2. Sale of Goods

2.5. Rights of an unpaid seller

Who is an Unpaid seller?

The definition given in Section 38 (1) is as follows;

“(1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Ordinance-

(a) when the whole of the price has not been paid or tendered;
(b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.”

The seller is therefore ‘unpaid’ within the meaning of the ordinance even though he has sold on credit, and he remains unpaid until the whole price has been paid or tendered.

The meaning of a ‘seller’ for present purposes, is explained by Section 38 (2);

“(2) In this Part of this Ordinance the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.”

If for example, the seller sells the goods through an agent and the agent has himself paid the price to the seller, or made himself liable to pay it, then the agent is entitled to exercise any of the rights of the unpaid seller.

Where the buyer defaults in his principal obligation, that is, in payment of the price, the seller has, of course, his personal action on the contract itself. Section 39 however, confers the 3 real rights of the unpaid seller.

“(1) Subject to the provisions of this Ordinance and of any enactment in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law-

(a) a lien on the goods or right to retain them for the price while he is in possession of them;
(b) in case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;
(c) a right of re-sale as limited by this Ordinance.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.”

I. Unpaid Seller’s Lien
The seller’s lien is a right to retain the goods until the whole of the price has been paid or tendered. It does not strictly speaking give to the seller any property in the goods subject to it. The seller’s right of lien is a qualification upon the duty to deliver the goods laid down by Section 27 and it only arises if three conditions are satisfied.

i. The seller must be an unpaid seller as defined by Section 38. i.e. the whole of the price must be paid or tendered before the buyer can claim to have discharged the lien.

ii. The seller is not entitled to a lien if the goods have been sold on credit. If a seller agrees to allow the buyer credit this does not necessarily mean that he is prepared to deliver the goods before the price has been paid. Section 40 (1) (a)

Exceptions:

Section 40 (1) (b) and (c)

(b) where the goods have been sold on credit, but the term of credit has expired;
(c) where the buyer becomes insolvent. [Refer Section 59(3) for meaning of ‘insolvency’]

iii. The seller must be in possession of the goods. It is not a right which enables the seller to regain possession which has been given up.

Loss of lien
The seller loses his lien in one of four ways.

i. If the price is paid or tendered, the seller ceases to be an unpaid seller and therefore loses his lien.

ii. when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

iii. when the buyer or his agent lawfully obtains possession of the goods;

iv. by waiver thereof.

[Section 42]
We have already seen that for some purposes delivery to a carrier is deemed to be delivery to the buyer, but this section clearly differentiated between these two different possibilities. Although the seller loses his lien on delivery to the carrier, he may still have the right of stoppage in transit, but it is all the same important to decide when the goods pass into the possession of the carrier, because the extent of the right of lien differs from that of stoppage in transit. In particular, the seller can only stop the goods if the buyer is insolvent, whereas his right of lien only depends on the absence of a stipulation as to credit.

II. Unpaid seller’s right of stoppage in transit

The seller’s right of stoppage in transit is set out in Section 43

“Subject to the provisions of this Ordinance, when the buyer of goods becomes insolvent the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu; that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.”

It makes no difference whether or not the property has passed to the buyer. Where the property has not passed the seller has, in virtue of his ownership, the power to stop the goods, and the Ordinance makes the exercise of this power rightful as against the buyer; where the property has passed, the Ordinance confers both the power and the right to stop.

Before the seller can exercise his right of stoppage in transit, three conditions must be satisfied.

i. The seller must be an unpaid seller within the meaning of the ordinance

ii. The buyer must be insolvent

iii. The goods must be in the course of transit.

The first two of these have already been considered and it remains not to examine the meaning of the expression ‘course of transit’. Section 44 (1) states;

“Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee, for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee.”

Accordingly, the goods are in transit when they have passed out of the possession of a carrier, but have not yet reached the possession of the buyer.
III. Unpaid seller’s right of resale

The seller has the power to resell the goods

i. If he still has the property in the goods, or

ii. If, even though the property has passed, he is in possession of the goods within Section 25 of the Sale of Goods Ordinance or under the Factors Act, or

iii. If, even though the property has passed, the seller has exercised his right of lien or stoppage in transit.

Accordingly, the seller has the right of resale in any of the following circumstances;

i. If the seller’s obligation to deliver has not yet crystallized into an obligation to deliver any specific goods. Here is it clear that the seller incurs no liability if he resells the goods for the simple reason that it cannot be said which are ‘the goods’ which he must deliver.

ii. If the buyer repudiates the contract, it is again clear that the seller can accept the repudiation and may resell the goods if he chooses. It is, of course immaterial whether or not the property has passed to the first buyer. Refusal to accept the goods by the buyer is prima facie a repudiation of the contract, and if the seller accepts that repudiation, the contract is thereby rescinded, any title which has passed to the buyer will revest in the seller, and the seller may resell the goods and sue for damages for non-acceptance. If however, the seller refuses to accept the repudiation, then prima facie he is not entitled to resell the goods.

iii. The seller has a right of re-sale if he has expressly reserved this right in the original contract, on default by the buyer. In this event Section 47 (4) comes into play;

"Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages."

As we have seen, Section 47 (1) states that;

"Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transit."

iv. The unpaid seller is given a right of resale if the buyer fails to pay the price, and the goods are perishable or, in other cases, if he gives notice to the buyer that he intends to resell, and the buyer still does not pay the price due. Section 47 (3) states that;

"Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-
sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.”

2.6. Sales by Auction

The first two subsections of Section 57 are as follows;

“(1) Where goods are put up for sale by auction in lots, each lot is prima facie deemed to be the subject of a separate contract of sale.

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made any bidder may retract his bid.”

Under these rules it is quite clear that the bidder is the offeror, that the auctioneer is entitled to accept or to refuse the bid, and the contract is made on the fall of the hammer.

The effect of the other subsections of Section 57 can be discussed under three heads;

Auction Sale expressly subject to reserve price of right to bid
Where the auction is expressly advertised subject to a reserve price or to the right of the seller to bid, subsection (6) preserves the seller’s right not to sell below the reserve price, or to bid himself or to employ one person to bid on his behalf, as the case may be.

Auction sale with no express statement as to reserve price or right to bid
Where nothing is said about any reserve price or right of the owner to bid, a distinction must be drawn between the two cases. In the former case, the effect of Section 57(2) is that the auctioneer is still entitled to decline to accept any bid. In the latter case, however, subsection (4) applies and the buyer may set the contract aside, or presumably may sue for damages.

Auction sale expressly advertised without reserve
The effect of an express notification that the sale will be without reserve is left obscure by the Ordinance. It is clear that Section 57 (2) prevents any contract of sale coming into existence if the auctioneer refuses to accept the bid.

2.7. Legal implications of Hire Purchase and Leasing

Law relating to Hire Purchase
A Hire Purchase contract is a contract between two parties namely the Hirer and the Owner (Financier). The hirer takes on hire a particular item, from the owner with the option to repurchase the item at the conclusion of the rental payments agreed between the parties. Legally,
on conclusion of the Hire-purchase contract, the item hired automatically vests in the Hirer on the payment of a nominal payment which is referred to in law as “a pepper-corn rent”.

In Sri Lanka the legislation that governs hire purchase transactions is the “Consumer Credit Act No. 29 of 1982 (as amended by Act No. 07 of 1990).

Guarantors of the Hirer
Payment and performance of the obligation undertaken by the Hirer are often guaranteed by a third party guarantor or surety. This is done by a separate agreement or more often by a term of guarantee endorsed on the hire purchase agreement itself. In such cases, the owner has recourse to the guarantor as well if the hirer defaults.

Rights of owner to repossess the item hired
Every hire-purchase agreement gives the owner a right to repossess the item hired on the occurrence of certain events and this right to re-possess is the most important right the owner has. However, this right has been curtailed by statutory provisions to overcome abuses by finance companies.

Main provisions of the Consumer Credit Act
The Consumer Credit Act regulated the duties of the Parties – both the owner and the hirer – in relation to hire purchase contracts. The main provisions are listed below;

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>Requirements relating to hire-purchase agreements</td>
</tr>
<tr>
<td>4</td>
<td>Warranties and conditions</td>
</tr>
<tr>
<td>5</td>
<td>Limitation on hire-charges</td>
</tr>
<tr>
<td>6</td>
<td>Passing of property</td>
</tr>
<tr>
<td>7</td>
<td>Right of hirer to purchase hired item at any time with rebate</td>
</tr>
<tr>
<td>8</td>
<td>Right of hirer to terminate agreement at any time</td>
</tr>
<tr>
<td>9</td>
<td>Right of hirer to appropriate payments in respect of two or more agreements</td>
</tr>
<tr>
<td>10</td>
<td>Assignment and transmission of hirer’s right or interest under hire-purchase agreement</td>
</tr>
<tr>
<td>11</td>
<td>Assignment and transmission of owner’s right or interest under hire-purchase agreement</td>
</tr>
<tr>
<td>12</td>
<td>Obligation of hirer to comply with agreement</td>
</tr>
<tr>
<td>13</td>
<td>Obligation of hirer in respect of care taken of goods</td>
</tr>
<tr>
<td>15</td>
<td>Obligation of hirer to give information as to whereabouts of goods</td>
</tr>
<tr>
<td>16</td>
<td>Rights of hirer in case of repossession of goods by owner</td>
</tr>
<tr>
<td>17</td>
<td>Fraudulent sale or disposal of goods by hirer</td>
</tr>
<tr>
<td>18</td>
<td>Rights of owner to terminate hire-purchase agreement for defaults in payment of hire or unauthorised act or breach of express conditions</td>
</tr>
<tr>
<td>19</td>
<td>Rights of owner on termination of Contract</td>
</tr>
<tr>
<td>20</td>
<td>Restriction on owner’s right to recover possession of goods otherwise than through court</td>
</tr>
<tr>
<td>21</td>
<td>Powers of Court in actions to recover goods</td>
</tr>
</tbody>
</table>
In the case of *Raymond Fernando v Bank of Ceylon* (2000) 1 SLR 12, THE Supreme Court emphasized the importance of finance companies complying with the provisions of the Consumer Credit Act. In that case the plaintiff-appellant had entered into a hire purchase agreement on 27.2.1986 with the defendant-respondent which was the Bank of Ceylon, in respect of a vehicle. The Bank informed the appellant in terms of the agreement that unless the appellant paid a sum of Rs. 33,000/- being in arrears of rent within seven days, the Bank will take steps to recover the arrears of rent. The plaintiff failed to pay the said sum. Thereafter the Bank seized the vehicle and arranged to sell it. The appellant instituted an action in the District Court against the Bank for a declaration that the seizure of the vehicle was illegal. The Supreme Court held that the hire-purchase agreement had not been duly terminated in terms of Section 18 of the Consumer Credit Act which required two weeks notice of termination of agreement to be given and that section 18 of the Act prevailed over clause 11 of the agreement which stipulated seven days notice. Hence, the seizure was unlawful.

In *Mercantile Credit v Thilakaratne* [2002] 3 SLR 206, the plaintiff, a finance company which had given a vehicle on hire-purchase, sued the hirer and the guarantor of the contract to recover money dues on the contract of hire. The guarantor while admitting that he signed the guarantee bond argued that he had not renounced the rights entitled to guarantors which prevented him from being sued until it was proved that the principal debtor (the hirer) was unable to pay. The finance company replied that a clause in the guarantee bond he had signed excluded that privilege. To this argument the guarantor replied that such a renunciation had not been explained to him. The trial judge held with the guarantor. The Court of Appeal however disagreed and gave the judgement for the finance company. The Court said:

a) The burden of proving that the clause relating to the renouncing of all benefits and privileges to which sureties are entitled to by law were not understood by him is a special fact within the knowledge of the person alleging it and by virtue of section 101 of our evidence ordinance, the burden of proving that fact is with the person who asserts it.

b) Here the evidence clearly showed that the guarantor was a businessman and also an income tax payer. He had earlier also signed as a guarantor for other loans. Therefore, it was difficult to believe that he did not understand or did not care to read what he had signed.
c) Negligence in not reading or understanding a document you sign is not an excuse to deny liability under it. Where a person who is neither illiterate nor blind signs a deed without examining the contents he would not as a general rule be permitted under the Roman Dutch law to set up the plea that the document is not his.

**Law relating to Leasing**

The basic concept of leasing is that *profits are earned through use and not ownership* of an asset. Leasing frees funds of a business being tied by in property, enabling such funds to be used for productive expenditure.

A lease agreement in which the owner of an item, for example a business asset or a parcel of real estate, allows someone else to use it for a specified time, in return for a rental. The owner of the leased asset is the *Lessor* and the user of the asset is the *Lessee*.

**Leasing in Sri Lanka**

Initially leasing activities were governed under the common law. However, the Leasing Act styled the Finance Leasing Act no. 56 of 2000 was introduced and certified by parliament. According to this Act, all companies and other institutions should be registered with the Central Bank to carry out the business of finance leasing. These registered organisations are referred to as “Registered Finance Leasing Establishments” Two legislative amendments have been made to the Leasing Act firstly by Act No 24 of 2005 and secondly by Act No. 33 of 2007.

**Salient features of Leasing**

Finance leasing can be defined as a contractual arrangement that allows one party (the lessee) to use the asset owned by the Leasing Company (the lessor) for specified periodic payments. Under a lease contract;

i. The lessor holds the legal ownership knows as “absolute ownership” of the asset and the lessee has the right to possess and use the asset for the specified period (initial period) on agreed upon rental payments. Statutorily, this is called the “Registered ownership”

ii. After the acceptance of the asset, the contract is not cancellable by the lessee during the initial (primary) period.

At the end of the initial period, the contract may or may not be renewed for a secondary period or the asset could be returned to the lessor or the lessee may purchase it from the lessor.

Lessees are required to pay a periodic rental to the lessor and these rentals are generally structured on a monthly basis, although quarterly, semi annual and annual repayment schedules are also possible. Rental payments are commonly made in advance at the beginning of each period. They can also be structured to be paid at the end of each period.
**Benefits of Leasing**

Leasing offers benefits to both the lessor and the lessee.

**Benefits to the lessor – Banks and other financial institutions**

1. Leasing is an important component in packaging of financial services which are needed by many customers. Providing lease facility efficiently will lead to customer retention.
2. Absolute ownership of the asset reduces the financing risk.
3. Upfront (advance) lease rentals reduce the risk and also interest free funds to the Lessor.
4. Interest income
5. Convenient repossession procedures if the terms and conditions of the lease are breached by the lessee.
6. Tax benefits such as Capital allowance on the asset could be claimed by the lessor.
7. Transfer fee at the end is an additional income to the lessor.

**Benefits to the Lessee**

1. Complete (100%) finance against the price of the asset could be obtained.
2. Therefore, lessee’s equity can be used for other business purposes.
3. Less security or collateral requirements as the absolute ownership of the asset is with the lessor.
4. Asset is an off the balance sheet item of the lessee. Hence, comparatively high ROA and low debt equity ratio. Companies can pose a better financial picture.
5. Facility can be obtained conveniently and speedily than loans.
6. Rentals are qualified expenses to charge against revenue, In case of loans only interest can be charged. Hence, reduced tax payments.
7. Fixed rentals will provide hedge against inflation.

Main provisions of the Finance Leasing Act No. 56 of 2000

<table>
<thead>
<tr>
<th>Sections 2 – 10</th>
<th>Registration of finance leasing business</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 11 – 26</td>
<td>Duties of Lessors, Lessees and Suppliers.</td>
</tr>
<tr>
<td>Section 27 – 31</td>
<td>Recovery of possession etc.</td>
</tr>
<tr>
<td>Sections 32 – 37</td>
<td>Powers of the Regulator, namely, the Central Bank</td>
</tr>
<tr>
<td>Section 38 – 43</td>
<td>Miscellaneous provisions</td>
</tr>
</tbody>
</table>

Interpretation of terms in the Leasing Act of 2000

- Finance Lease
- Finance leasing business
- Lessor
- Lessee
- Supplier
- Equipment
An interesting Supreme Court decision affecting the leasing of a bus by a Bank is the case of Hatton National Bank Ltd v Hithanaarachchi (2001) 1 SLR 252. There the lease agreement required the Bank (as the lessor) to insure the bus at the expense of the lessee during the term of the lease agreement as long as the lessee paid the monthly rentals. The Bank was entitled to recover the leased property (the bus) in case of default by the lessee.

Subsequently, the lessee defaulted paying the rentals and also failed to give possession of the bus to the Bank. While the bus was in the custody of the lessee, it met with an accident and was badly damaged. The insurance of the bus had lapsed because the lessee had stopped payment of the premium cheque. Thus, there could be no claim from insurance. The Bank (as it was entitled) took steps to sell the bus at an auction but the lessee prevented the sale by an injunction from teh Provincial high Court.

On an appeal by the Bank, the Supreme Court held that the High Court should not have given an injunction against the Bank as the lessor. No blame could be attached to the Bank for the non-renewal of the insurance (which would have compensated for the damage to the bus) as the non-renewal was due to the wrongful act of the lessee in stopping payment of the insurance premium cheque.