

1967/4

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O N A P P E A L  
FROM THE BRITISH CARIBBEAN COURT OF APPEAL

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B E T W E E N:

1. R.P. DOOBAY
  2. N.P. DOOBAY, AND
  3. JAISRI RAM, jointly and severally.
- (Defendants) Appellants
- and -
- MOHABEER (Plaintiff) Respondent

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RECORD OF PROCEEDINGS

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GARBER, VOWLES & CO.,  
37, Bedford Square,  
London, W.C.1.

Solicitors for the Appellants.

SIMMONS & SIMMONS,  
14, Dominion Street,  
London, E.C.2.

Solicitors for the Respondents.

CLASS MARK

ACCESSION NUMBER

91379

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
15 MAR 1968  
25 RUSSELL SQUARE  
LONDON, W.C.1.

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O N      A P P E A L

FROM THE BRITISH CARIBBEAN COURT OF APPEAL

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B E T W E E N:-

1. R.P. DOOBAY
2. N.P. DOOBAY and
3. JAISRI RAM, jointly and severally  
(Defendants)                      Appellants.

- and -

MOHABEER (Plaintiff)                      Respondent

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RECORD OF PROCEEDINGS

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UNIVERSITY OF LONDON  
**INSTITUTE OF ADVANCED**  
 LEGAL STUDIES  
 15 MAR 1968  
 25 RUSSELL SQUARE  
 LONDON, W.C.1.



In the  
Supreme  
Court of  
British Guiana

No. 1

Specially  
Indorsed Writ  
with Statement  
of Claim  
7th December  
1962  
(Contd.)

WE COMMAND YOU that at 9.00 o'clock in the forenoon on Monday the 14th day of January, 1963 you do appear before the Supreme Court of British Guiana, at the Victoria Law Courts, Georgetown, Demerara, in an action at the suit of MOHABEER.

AND TAKE NOTICE that in default of your doing so the plaintiff may proceed therein and judgment may be given against you in your absence.

10

WITNESS the Honourable JOSEPH ALEXANDER LUCKHOO, Chief Justice of British Guiana this 7th day of December in the year of Our Lord One thousand nine hundred and sixty two.

N.B. If the Defendants desire to defend this action they shall not later than eleven o'clock in the forenoon of the day (not being a Sunday or a Public Holiday) immediately preceding that fixed for their appearance file an affidavit at the Registry at Georgetown setting forth their defence and serve a copy of such affidavit forthwith after filing the same on the plaintiff.

20

STATEMENT OF CLAIM

1. The plaintiff claims against the defendants jointly and severally for the sum of \$9,500.00 (nine thousand five hundred dollars) being the amount owing and payable by the defendants jointly and severally under an agreement dated the 27th day of September, 1961 made and entered into by and between the plaintiff and the defendants at Melville, Wakenaam, in the county of Essequibo and colony of British Guiana whereby the plaintiff sold, supplied and delivered to the defendants jointly and severally and who purchased from the plaintiff one ton Multi-Stage Mill valued at \$14,500.00 of which the sum of \$3,000.00 was paid on the execution of the said Agreement, leaving a balance of \$11,500.00 to be paid in instalments as follows:

30

40

The sum of \$2,000.00 on the 28th November, 1961.

The sum of \$2,000.00 on the 16th April, 1962.

50

The sum of \$7,500.00 on the 28th November, 1962.

2. The defendants have only paid one instalment of \$2,000.00 and have failed to pay the other instalments leaving a balance of \$9,500.00 due owing and payable by the defendants jointly and severally to the plaintiff as more fully appears from the bill of particulars hereunder.

10 3. A demand has been made for payment of the said amount but without effect.

PARTICULARS

To value of one ton Multi- Stage Mill .....	.....	.....	\$14,500.00
To paid on account .....	.....	.....	5,000.00
To balance due .....	.....	.....	<u>9,500.00</u>

Demerary,  
5th December, 1962.

20 A.G. King  
SOLICITOR FOR PLAINTIFF.

And the sum of \$94.30 (or such sum as may be allowed on taxation) for costs. If the amount claimed is paid to the plaintiff or his solicitor or agent within four days from the service hereof, further proceedings will be stayed.

30 This Writ was issued by ARTHUR GEORGE KING, of lot 295 Murray Street, Georgetown, Demerara, whose address for service and place of business is at his office lot 217, South Road, Lacytown, Georgetown, Demerara, solicitor of the said plaintiff who resides at Melville, Leguan, Essequibo.

A.G. King  
SOLICITOR TO PLAINTIFF

Demerary,  
5th December, 1962.

Authority to Solicitor filed with the Registrar.

In the  
Supreme  
Court of  
British Guiana

                      
No. 1

Specially  
Indorsed Writ  
with Statement  
of Claim  
7th December  
1962  
(Contd.)

In the  
Supreme  
Court of  
British Guiana

NO. 2

AFFIDAVIT VERIFYING CLAIM

No. 2  
Affidavit  
Verifying  
Claim  
10th January  
1963

I, MOHABEER, of Melville, Leguan in the county of Essequibo, British Guiana being duly sworn make oath and say as follows:

1. That I am the plaintiff herein.

2. That the defendants herein was at the date of the issue of the Writ of Summons herein and still are justly and truly indebted to me the plaintiff herein in the sum of \$9,500.00 (nine thousand five hundred dollars) being the amount due owing and payable by the defendants jointly and severally to me under an Agreement made on the 27th day of September, 1961 at Melville, Wakenaam in the county of Essequibo and colony of British Guiana whereby I sold, supplied and delivered to the defendants jointly and severally and who purchased from me one ton Multi-Stage Mill valued at \$14,500.00 of which the sum of \$3,000.00 was paid to me by the defendants on the execution of the said Agreement leaving a balance of \$11,500.00 to be paid in 3 (three) instalments.

10

20

3. The defendants have only paid one instalment of \$2,000.00 and have failed to pay the other instalments leaving a balance of \$9,500.00 due owing and payable by the defendants jointly and severally to me as more fully set forth in the Statement of Claim herein.

30

4. A demand has been made for the payment of the said amount but without effect.

5. In my belief there is no defence to this action.

MOHABEER

Sworn to at Georgetown, Demerara, this 10th day of January, 1963.

40

BEFORE ME

50 cents  
stamps  
cancelled.

A Vanier

A COMMISSIONER FOR OATHS  
TO AFFIDAVITS.



NO. 3  
 COUNTERCLAIM AND AFFIDAVIT  
 OF DEFENCE - 11TH JANUARY  
 1963.

---

In the  
 Supreme  
 Court of  
 British Guiana

No. 3

Counterclaim  
 and Affidavit  
 of Defence  
 11th January  
 1963

We, the Defendants herein, all of Doorn Haag, Leguan, Essequibo, being duly sworn make oath and say as follows :-

1. That we are the defendants herein.
- 10 2. That we admit entering into a hire-purchase agreement with Mohabeer, on the 27th September, 1961.
3. That the plaintiff covenanted that the Mill was in order and can produce (one hundred) bags of rice per day.
4. That we spent \$9,800.00 (nine thousand eight hundred dollars) for the installation and acquiring the engine of the said mill.
- 20 5. That the mill never operated to our satisfaction in that the plaintiff was to supply further parts for the said mill with the implied warranty and was informed by the defendants on several occasions to supply the said parts.
6. That the plaintiff was and has always been in breach of the said Hire-purchase Agreement and the plaintiff undertook to get his experts to rectify the said Rice Mill.
- 30 7. This defence goes to the whole of the plaintiff's Statement of Claim.

COUNTERCLAIM

And by way of set off and counterclaim the defendants repeat the averments contained in paragraphs 3 (three) 4 (four) 5 (five) and 6 (six) and claims as follows from the plaintiff:

- 40 (1) \$9,800.00 (nine thousand eight hundred dollars) as damages for the breach of the said agreement, in the alternative,
- (2) Special Damages
  - (a) \$5,000 (five thousand dollars) paid as advance for the said rice mill.

In the  
Supreme  
Court of  
British Guiana

No. 3

Counterclaim  
and Affidavit  
of Defence  
11th January  
1963  
(Contd.)

(b) \$1,500.00 (One thousand five hundred dollars) for installation of same.

(c) \$3,300 (three thousand three hundred dollars) for a 62 H.P. Lister Engine to propel the said machine.

7. The defendants claim costs.

8. That we do hereby authorise Mr. Abraham Vanier, Solicitor, of lot 216 South Street, Lacytown, Georgetown to act as our solicitor in this matter, and to do all acts and things necessary for and on our behalf to receive all moneys payable to us herein and give valid receipts therefor; our address for service and place of business is at the office of our said Solicitor at lot 216 South Street, Lacytown, Georgetown.

10

9. This affidavit was drawn by Mr. Abraham Vanier, Solicitor.

20

Sworn to at Georgetown,  
Demerara, this 11th day of  
January, 1963.

Before me,

J.E. Too-Chung  
A COMMISSIONER OF OATHS  
TO AFFIDAVITS

R.P. DOOBAY  
N.P. DOOBAY  
JAISRI RAM

50 cents  
stamps  
cancelled.

30

No. 4

Defence and  
Counterclaim  
8th April  
1963.

NO. 4

DEFENCE AND COUNTERCLAIM

Save as is hereinafter expressly admitted the defendants denies each and every allegation contained in the plaintiff's Statement of Claim as if the same were set out verbatim and traversed seriatim.

1. The defendants admit entering into an agreement of hire purchase with the plaintiff on the 27th day of September 1961.

40

2. That the plaintiff covenanted that the mill was in order and can produce 100

(one hundred) bags of rice per day.

3. The defendants spent \$9,800 (nine thousand eight hundred dollars) for the installation and acquiring the engine of the said mill.

10 4. That the mill never operated to the defendants satisfaction in that the plaintiff was to supply further parts for the said mill with the implied warranty and was informed by the defendants on several occasions to supply the said parts.

5. That the plaintiff was and has always been in breach of the said hire-purchase agreement and the plaintiff undertook to get his expert to rectify the said Rice Mill.

6. That the plaintiff is guilty of breach of warranty.

20 COUNTERCLAIM

And by way of set off and counter-claim the defendants repeat the averments contained in paragraph 3 (three) 4 (four) 5 (five) 6 (six) and claim as follows from the plaintiff:

- (1) \$9,800.00 (nine thousand eight hundred dollars) as damages for the breach of the said agreement, in the alternative.
- 30 (2) Special Damages
- (a) \$5,000.00 (five thousand dollars) paid as advance for the said Rice Mill.
- (b) \$1,500.00 (one thousand five hundred dollars) for installation of same.
- 40 (c) \$3,300.00 (three thousand three hundred dollars) for a 62 H.P. Lister Engine to propel the said machine.

A. Vanier  
SOLICITOR FOR DEFENDANTS

S. Misir OF COUNSEL.

Georgetown, Demerara,

Dated this 8th day of April, 1963.

In the  
Supreme  
Court of  
British Guiana

No. 4

Defence and  
Counterclaim  
8th April  
1963.  
(Contd.)

In the  
Supreme  
Court of  
British Guiana

NO. 5  
REPLY AND DEFENCE TO  
COUNTERCLAIM

No. 5  
Reply and  
Defence to  
Counterclaim  
15th August  
1963

1. The plaintiff joins issue with the defendants on their defence.

2. With regard to the defence and counterclaim the plaintiff denies each and every allegation in paragraphs 2 to 6 inclusive as if set out verbatim and denied seriatim. 10

3. The plaintiff denies that there was any covenant or warranty, express or implied in respect of the said mill or that the plaintiff undertook to supply any parts for the said mill.

A.G. King

SOLICITOR TO PLAINTIFF

G.M. Farnum  
OF COUNSEL

Dated this 15th August, 1963. 20

No. 6  
Order  
Granting  
Leave to  
Amend State-  
ment of Claim  
4th  
February  
1964.

NO. 6  
ORDER GRANTING LEAVE TO AMEND  
STATEMENT OF CLAIM BEFORE THE  
HONOURABLE MR. JUSTICE BOLLERS  
(IN CHAMBERS)

UPON the application by summons on the part of the plaintiff filed herein on the 30th day of January, 1964, AND UPON READING the said application and the affidavit filed in support thereof AND UPON HEARING counsel for the plaintiff and for the defendants IT IS ORDERED that the plaintiff be at liberty to file an Amended Statement of Claim in accordance with the summons filed herein before the 7th day of February, 1964 AND IT IS FURTHER ORDERED that the costs of this application fixed in the sum of \$25,00 (twenty five dollars) shall be paid by the plaintiff to the defendants on or before the filing of the said Amended Statement of Claim. 30 40

BY THE COURT  
Kenneth W. Barnwell  
DEPUTY REGISTRAR (Ag.)

NO. 7

AMENDED STATEMENT OF CLAIM  
 IN ACCORDANCE WITH ORDER OF  
 MR. JUSTICE BOLLERS MADE ON  
 THE 4TH DAY OF FEBRUARY, 1964

In the  
 Supreme  
 Court of  
 British Guiana

No. 7

10 ELIZABETH THE SECOND, by the Grace of God,  
 of the United Kingdom of Great Britain,  
 Northern Ireland and of her other Realms  
 and Territories, Queen, Head of the  
 Commonwealth, Defender of the Faith.

Amended State-  
 ment of Claim  
 (as amended by  
 order of 4th  
 February 1964).

To: 1. R.P. DOOBAY,  
 2. N.P. DOOBAY, and  
 3. JAISRI RAM, all of Doorn  
 Haag, Leguan, Essequibo.

20 WE COMMAND YOU that at 9.00 o'clock  
 in the forenoon on Monday the 14th day of  
 January, 1963, you do appear before the  
 Supreme Court of British Guiana at the  
 Victoria Law Courts, Georgetown, Demerara,  
 in an action at the suit of MOHABEER;

AND TAKE NOTICE that in default of  
 your so doing the plaintiff may proceed  
 therein and judgment may be given against  
 you in your absence.

WITNESS THE HONOURABLE JOSEPH  
 ALEXANDER LUCKHOO, Chief Justice of British  
 Guiana this 7th day of December in the year  
 of Our Lord One thousand nine hundred and  
 sixty two.

30 N.B. If the defendants desire to defend  
 this action they shall not later than eleven  
 o'clock in the forenoon of the day (not  
 being a Sunday or a Public Holiday)  
 immediately preceding that fixed for their  
 appearance file an affidavit at the Registry  
 at Georgetown setting forth their defence  
 and serve a copy of such affidavit forthwith  
 after filing the same on the plaintiff.

STATEMENT OF CLAIM

40 1. The plaintiff claims against the  
 defendants jointly and severally for the  
 sum of \$9,500.00 (nine thousand five hundred  
 dollars) being the amount due owing and  
 payable by the defendants jointly and  
 severally under an agreement dated the 27th  
 day of September, 1961 made and entered  
 into by and between the plaintiff and the

In the  
Supreme  
Court of  
British Guiana

No. 7

Amended State-  
ment of Claim  
(as amended by  
order of 4th  
February 1964.)  
(Contd.)

defendants at Melville, Wakenaam, in the county of Essequibo and colony of British Guiana whereby the plaintiff sold, supplied and delivered to the defendants, jointly and severally and who purchased from the plaintiff one ton Multi-Stage Mill valued at \$14,500.00 of which the sum of \$3,000.00 was paid on the execution of the said agreement, leaving a balance of \$11,500.00 to be paid in instalments as follows :

The sum of \$3,000.00 on the 28th November, 1961.

The sum of \$2,000.00 on the 16th April, 1962.

The sum of \$7,500.00 on the 28th November, 1962.

2. The defendants have only paid one instalment of \$2,000.00 and have failed to pay the other instalments leaving a balance of \$9,500.00 due owing and payable by the defendants jointly and severally to the plaintiff, as more fully appears from the Bill of Particulars hereunder.

3. A demand has been made for the payment of the said amount but without effect.

P A R T I C U L A R S

To value of one ton Multi- Stage Mill .....	\$14,500.00
To paid on account .....	5,000.00
	<hr/>
To Balance due .....	\$ 9,500.00
	<hr/>

4. In the alternative, the plaintiff claims the sum of \$9,500.00 being the balance of an amount due owing and payable to the plaintiff by the defendants jointly and severally under an agreement of hire purchase for the hire of one Ton Kyoma Rice Mill entered into by the plaintiff and the defendants on the 27th day of September 1961 at Melville, Wakenaam, in the county of Essequibo, in the colony of British Guiana.

P A R T I C U L A R S

Amount due on 16th April,  
1962                                 \$2,000.00

Amount due on 30th  
November, 1962                         7,500.00

A.G. King  
SOLICITOR FOR PLAINTIFF

Demerary,

5th December, 1962.

In the  
Supreme  
Court of  
British Guiana

          
No. 7

Amended State-  
ment of Claim  
(as amended by  
order of 4th  
February 1964)  
(Contd.)

10                 And the sum of \$94.30 (or such sum  
as may be allowed on taxation) for costs.  
If the amount claimed is paid to the  
plaintiff or his solicitor or agent within  
four days from the service hereof, further  
proceedings will be stayed.

20                 This Writ was issued by ARTHUR GEORGE  
KING, of lot 295, Murray Street, Georgetown,  
Demerara, whose address for service and  
place of business is at his office lot 217  
South Road, Lacytown, Georgetown, Demerara,  
Solicitor of the said plaintiff who resides  
at Melville, Leguan, Essequibo.

A.G. King  
SOLICITOR TO PLAINTIFF

Demerary,

5th December, 1962.

Authority to Solicitor is filed  
with the Registrar.

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In the  
Supreme  
Court of  
British Guiana

NO. 8  
NOTES OF TRIAL JUDGE

No. 8

Parties present.

Notes of  
Trial Judge  
2nd April 1964

G.M. Farnum (instructed by A.G. King)  
for plaintiff. S. Misir (Instructed by  
A. Vanier) for defendants.

FARNUM:

On pleadings it is for the defendant to begin. Statement of Claim alleged first sale, then on agreement under which sum of \$9,500.00 is due for the hire of a rice mill.

10

The defence is a general denial. In paragraph 1 defendants admit agreement. A general denial is not sufficient to put plaintiff to proof of anything. I refer to Order 19 rules 1 and 3 of the Rules of Court. This claim is under Order 4 rule 6. The defendants do not specifically deny that they owe the amount. It is my submission in the circumstances that the defence must begin.

20

S. MISIR:

There is no merit in my friend's submission. We have pleaded the breach of a warranty of fitness of the machinery.

Section 16A Chapter 333 (reads), Sale of Goods Ordinance - Chitty on Contract, 21st Edn. Volume 2, paragraph 1163.

COURT: (Ruling)

30

Court is in agreement with counsel for plaintiff that right to begin is on the pleadings placed on the defendants as all the material issues have been admitted by defendants.

If defendants allege breach of warranty of contract they must prove it. See Order 33 rule 5.

RESAUL PERSAUD DOOBAY (m):

I live at Kingston, Leguan, Essequibo. I am the first-named defendant. I am a rice farmer and rice miller. I am co-owner of a rice mill

40



situate at Dornhaag, Leguan. I know the plaintiff Mohabeer. In 1961 I and one Angus went to Wakenaam to the rice mill of the plaintiff. We went there to see how his rice mill was working but when we went there the mill was not working. Mohabeer told us to buy his mill, that two experts would be coming from Japan to examine it and put it in good working order. Mohabeer offered his mill to us for \$14,500 and we agreed to buy. We bought because Mohabeer told us that two experts would be coming to put it in order. This was in September 1961 and the same time we paid him \$3,000.00. The agreement between Mohabeer and I was that the \$3,000 would be paid as down payment and the balance by instalment. The plaintiff wrote out one copy of the agreement and kept it. I have no copy of this agreement. The first instalment on the mill was to be paid in April, 1962. It was to be \$2,000. I took delivery two weeks later in October 1961. My two partners H.P. Doobay and Jaisri Ram helped to take delivery. The plaintiff sent Angus Whyte to instal the rice mill. Another man called Neville was sent too.

The mill was installed on concrete foundations at our factory at Doornhaag. The cost of the installation was \$1,500 including workmanship. We had to buy a Lister Engine from Sproston's Limited to propel the mill. The Lister Engine costs \$3,519.95. This is a certified bill (put in by consent of parties - Exhibit A). A few months later after September 1961 I paid the plaintiff \$2,000. Before this in the Leguan-Parika ferry boat I spoke with the plaintiff in presence of one Secomar Jagroop. The plaintiff then told me it was time to pay \$2,000 on the mill. I told him we could not get the mill to work. The plaintiff then said: "Don't be afraid boy the experts are coming to repair the mill." The plaintiff did not tell me when the experts would be coming but he showed me some paper he had with him to show that the experts were coming. I did not read them, but I believed him that the

In the  
Supreme  
Court of  
British Guiana

No. 8

Notes of  
Trial Judge  
2nd April 1964  
(Contd.)

In the  
Supreme  
Court of  
British Guiana

                      
No. 8

Notes of  
Trial Judge  
2nd April 1964  
(Contd.)

experts were coming. It was about one month after that conversation on the ferry boat that he told me experts were coming. The experts never came. I ordered a pulley from the Demerara Foundry for \$137 to get the mill to work but it would not. I have not paid plaintiff any more money. I have tried to get the mill to work but cannot. Neville came to try to get it to work but he could not. In subsequent conversation the plaintiff told me not to be afraid that the Japanese would not make something and sent it to British Guiana and not cause it to work.

10

I contacted the Sataki Japanese agents who were in British Guiana about the mill I bought from plaintiff. The mill Mohabeer sold us was a Sikoko rice mill. I admit that I entered into a contract with the plaintiff to buy this rice mill and paid him \$5,000. I even offered to return his rice mill and for him to keep the \$5,000 but he refused. I told plaintiff this before I got this writ in this case but plaintiff said he did not want back his mill.

20

I claim plaintiff is in breach of contract of warranty of contract. I claim \$9,800 including \$1,500 for installing mill; \$3,300 for the Lister Engine to propel the mill and the return of my advances. The rice mill never worked. I now say the rice mill worked but broke up the rice. I put in 50 bags padi to be milled into rice for Secoomar Jagroop but all broke up. 30 bags for Birjanie and all broke up. I had to pay those men for their padi - \$8 per bag.

30

40

Cross examined by Farnum:

I have been milling rice up to January 1962 and have been delivering rice to the Rice Marketing Board. I had a single stage rice mill before I saw Mohabeer's mill. I had to get a multi-stage mill to comply with Government Regulations. Mohabeer's mill was the first multi-stage mill I had ever seen. I admit I did not know to operate the multi-stage mill.

50

I say plaintiff sent one Angus Whyte to operate the mill. I say the mill is bad because Angus Whyte failed to operate. I admit I signed an agreement when I bought the mill. The two co-defendants signed too. This is agreement we signed (tendered, admitted and marked "B"). Apart from Exhibit "B" I signed another paper. I was not satisfied with the mill of Mohabeer after I signed. I can read a little. I did not read Exhibit "B" nor did my co-partners. We all signed without reading. Exhibit "B" is dated 27.9.61. I admit it was about two weeks afterwards that I signed Exhibit "B" i.e. after I bought the mill. Exhibit "B" was signed in Georgetown when the mill was at my place at Doornhaag. I see this document which I signed (reads document). (Tendered, admitted and marked "C"). I signed Exhibit "C" the same day when I saw Mohabeer's mill. I went to Mohabeer to see the mill to decide whether I would buy it. I wanted to see how the mill worked before I bought it. I signed Exhibit "C" at Mohabeer's place. I took plaintiff's word that the experts were coming. Mohabeer told me he knew nothing about the mill but experts would be coming to repair the mill and I believed him. I took him at his words that experts would be coming to British Guiana. I signed this paper with my two partners (tendered, admitted and marked "D"). (No objection).

I can't remember where Exhibit "D" was signed but I signed it. I did not read Exhibit "D".

In exhibit "D" I did not know there was a trial run. When I signed Exhibit "D" it had writing on it. I knew I was signing to the writing on Exhibit "D". I knew I was signing to the terms of the agreement for the rice mill. It was Mohabeer who wrote Exhibit "D".

I cannot remember getting a letter of demand from Mr. King, Solicitor, for the balance of the purchase price but may be I got one.

It is not true that I was satisfied with the way the mill worked and that is why I bought it. I bought the mill because he told me that experts were coming.

In the  
Supreme  
Court of  
British Guinana

No. 8

Notes of  
Trial Judge  
2nd April 1964  
(Contd.)

In the  
Supreme  
Court of  
British Guiana

            
No. 8

Notes of  
Trial Judge  
2nd April 1964  
(Contd.)

The plaintiff said he would supply parts. I took his word.

When I paid the \$2,000 plaintiff did not give me a receipt though he said he would do so.

Re-examined:

I have known plaintiff for over 20 years. I call him uncle. Exhibit "D" is dated 27.9.61 and so is Exhibit "B". I signed Exhibit "D" first at Wakenaam and Exhibit "B" a few days later in Georgetown.

10

11.15 a.m. - Adjournment.

1.15 p.m. - Resumption.

MISIR:

May I recall first defendant please?

RESAUL PERSAUD DOOBAY sworn: (Recalled).

I claim \$9,500 on behalf of myself and two co-defendants.

20

THROUGH COURT:

(By Mr. Farnum):

Mr. Angus Whyte and I went to plaintiff together to inspect the mill. Whyte's wife was not with him. We spent about two hours at Mohabeer's place. Whyte went on a motor cycle.

ANGUS WILLIAM WHYTE (m) sworn:

I live at Canefield, Leguan. I am a rice miller and landed proprietor. I am also a Justice of the Peace. I know Plaintiff, Mohabeer and the three defendants.

30

In September, 1961, I accompanied Resaul Persaud Doobay to plaintiff's factory at Melville, Wakenaam to inspect a multi-stage rice mill. Mr. Mohabeer gave us a demonstration of the mill but part of the mill was not working. The padi separator was not working. The demonstration was not satisfactory.

40

Resaul agreed to buy the mill and plaintiff agreed to put the mill in working order. I was present. I did not hear the price the parties bargained for because I had to leave.

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No. 8

Notes of  
Trial Judge  
2nd April 1964  
(Contd.)

10 The plaintiff said he would put the mill in working order for the defendant. I promised to instal the mill on the defendant's premises at Leguan and I did so with the assistance of my nephew and Resaul Persaud Doobay who is called Willie Doobay. One Neville also gave assistance in installing the mill.

20 I have been in the rice milling business for over twenty years. When we assembled the rice mill at the defendant's factory we could not get it (the mill) to work. One day shortly after the installation of the mill I spoke to plaintiff in presence of second defendant. This was aboard the ferry boat. Mohabeer told me that he expected to get two experts from Japan to look after the mill.

30 I have a rice mill of my own which I bought from Mohabeer. It is a "Sikoko" rice mill. Mohabeer is the agent for these types of mill. I have been a rice miller for these types of mill. I have been a rice miller actually all my life. I know the "Kyowa" mill. It is a Japanese Mill. I say the mill never worked when we installed it at the defendant's factory. It never worked. We could not get the separation system to work at all. I could not say where Mohabeer got the mill from.

Cross-examined by Farnum:

We started up the mill at Mohabeer's place. It worked, but not satisfactorily.

40 I have installed mills like the one the defendants bought before. I had some trouble with the mill I had bought. I paid for my mill even though it was not working properly. I bought the same make of mill as the defendants bought.

The mill's engine turned over at Mohabeer's yard. It also turned over at defendants' factory.

The first defendant had asked me to accompany him to Mohabeer's place to inspect

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the mill. It was only once that I went to Mohabeer's place and that was to see and inspect the rice mill which defendants bought.

The first defendant did not tell me before he left to go to Mohabeer that he was going to buy the mill. He told me he was going to examine it and if he was satisfied he would buy it. Before we left Mohabeer's yard defendant did not say he was going to buy the mill. I did not go with the defendant as his adviser.

10

It is true that Mohabeer had promised to sue me for payment of the rice mill I bought from him.

It is not true that I am on bad terms with him. Up to last week I dealt with Mohabeer in business.

I agree that if one agree to buy a rice mill "as is" this means commercially "in its present condition".

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Re-examined:

Further than that plaintiff undertook verbally to see that the mill was put in working order, I do not know anything more.

BIRJUNE ALGOO (m) sworn:

I live at Richmond Hill, Lequan. I am a rice farmer. I mill my rice at first defendant's factory.

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In 1961/1962 I milled my padi there. I took 60 bags padi there to be milled into rice but the padi broke up. The first defendant had to pay me for 30 bags at \$8 per bag. Thirty bags of padi were damaged. I got no white rice. This was broken.

Cross-examined by Farnum:

I do not know anything about rice mills.

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MISIR:

I close my case.

FARNUM:

I do not propose to lead further evidence and close my case. The defendants have failed to prove any of the allegations as set out in the defence. Re: paragraph 2 of Defence - no evidence whatever was led. I rely chiefly on Exhibit "D" signed by all three defendants.

10 The mill is sold "as is" and we have evidence of what this expression means. Exhibit "D" speaks of the trial run as having taken place before Exhibit "D" was signed.

I ask for judgment on the claim and counterclaim for there is no proof whatever of any warranty.

MISIR:

20 We have adduced evidence to show we have bought a mill from plaintiff and he knew the purpose for which the mill was bought. He undertook to see that the mill was in working condition.

(2) Plaintiff has broken H.P. Agreement and also has committed breach of warranty that mill was in good working order.

(3) Exhibit "C" shows inspection was carried out on 14/9/61 and not on 27/9/61.

30 (4) It would appear from Exhibit "D" that one person signed the document with the consent of the others. The signature on Exhibit "B" is not the same as on Exhibit "D".

(5) Judgment must be entered in the defendant's favour. Why did not the plaintiff give evidence? Why did he not go into the box to rebut the obligations?

C.A.V.

V.E. CRANE  
Puisne Judge  
2nd April, 1964.

In the  
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No. 8

Notes of  
Trial Judge  
2nd April 1964  
(Contd.)

In the  
Supreme  
Court of  
British Guiana

NO. 9  
JUDGMENT

No. 9  
Judgment  
5th May 1964

BEFORE: CRANE, J.  
1964: April, 2.  
May, 5.

Mr. G.M. Farnum for Plaintiff.

Mr. S. Misir for Defendants.

JUDGMENT:

As a preliminary point in this case I ruled that the right to begin lay with the defendants, it being clear from the pleadings that the burden of proof of the material issues fell to be discharged by them. 10

In the statement of claim as originally filed and delivered, this suit was preferred as a claim for a balance of \$9,500 due for the price of goods sold and delivered by the plaintiff to the defendants. Later, leave to amend having been granted, there was included an alternative claim for a similar sum being the balance of an amount due to the plaintiff by the defendants jointly and severally under an agreement of hire purchase of a one-ton Kyoma Rice Mill, dated September 27, 1961, at Melville, Wakenaam, Essequibo. 20

On the true construction of this agreement of hire purchase, I am of the opinion that it clearly falls within the principle, of Helby V. Mathews (1895) A.C. 471, that is, it is one in which the defendants are under no legal obligation to purchase, and so the provisions of the Sale of Goods Ordinance, Cap. 333, sec: 16 to which counsel for the defendants has referred me do not apply. I have no doubt that it was this fact which the plaintiff subsequently realised that motivated the amendment of his original form of writ. In my judgment, the agreement (Exhibit B), does not amount to a binding obligation on the part of the hirers to buy Mohabeer's rice mill, even though the agreement details the manner in which the down payment and instalments are to be 30 40



paid, for from its terms no contract of sale is disclosed, only an agreement to hire with an option to purchase. The agreement is one under which the purchasers are not obligated to purchase, though they may do so if they choose.

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Judgment  
5th May 1964  
(Contd.)

10 Clause 1 of the Owners covenants (page 3,) reserves to the hirer power to return the goods during the hiring, thus terminating the agreement; while clause 2 provides, (that the hirer may, at anytime during the hire, become the purchaser of the ITEM by payment in cash of the hereon written value plus any interest which may have accrued".

20 The provisions of the Sale of Goods Ordinance, Cap. 333, being by law thereby excluded from this transaction, enquiry must be directed to the correct legal category into which the transaction can be relegated, but I have observed the parties have already settled this for themselves, for by clause 11, they have agreed, "that the ITEM shall not be pledged, pawned, or otherwise dealt with, but shall be, and continue to be the sole property of the owners and that the hirer shall remain and be considered a bailee only for all purposes both civil and  
30 criminal".

Bailment therefore is the nature of their transaction, and it will therefore be necessary at a later stage to consider the rights and obligations of the parties under such an agreement. This I shall do after stating the facts.

40 The hire purchase agreement (Exhibit B), is dated September 27, 1961; it is expressed to acknowledge a down payment of \$3,000 on the signing thereof, and a discharge of the balance as follows :-  
\$2,000 on November 25, 1961; \$2000 on April 16, 1962; and \$7,500 in November 1962; in fact only the down payment and the first instalment were duly paid. No other payment was made. Exhibit "B" was not executed on the date of sale for on September 14, 1961 the first named defendant, Resaul Persaud Doobay, went to  
50 the plaintiff's ricemill at Wakenaam in company with one Angus Whyte for the purpose of examination and inspection

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5th May 1964  
(Contd.)

with a view to purchasing the plaintiff Mohabeer's mill.

Whyte is himself a ricemiller and owner of a mill like the one he went to inspect; in fact, he has over twenty years experience in the ricemilling business. Whyte's evidence is that the mill's padi separator was not working properly, and despite the fact that the demonstration revealed a flaw, the first defendant agreed to buy Mohabeer's mill, the latter agreeing to put it in working order and condition.

10

The defendants took delivery of the mill two weeks later, and with the assistance of Angus Whyte, installed it at their factory at Leguan; but on assembling it they could not get it to work properly.

It is in these circumstances that plaintiff has sued out his writ for \$9,500, balance due on the sale of the rice mill; or alternatively, for balance due on their hire purchase agreement.

20

The statement of defence alleges breach of warranty, that is to say, that at the time of purchase of the mill, it was a condition of purchase that the plaintiff would supply the damaged part which inspection revealed, and obtain an expert to fit it on. In support of their plea the defendants say that they took the plaintiff at his word when purchasing the mill - that he would obtain an expert to remedy the defect, and that it was for this reason and on this representation that they purchased the mill.

30

I have no doubt that plaintiff did represent to the defendants at the time of inspection that he would procure an expert from Japan to repair the mill. That the mill was defective there is no doubt, for both the defendant Doobay and Whyte, whom I regard as an honourable and truthful witness, have said so. It is obvious that the defendant was inexperienced and knew nothing about ricemills; he had in fact admitted this. But the same cannot be said about Whyte who is an experienced miller owning and

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operating a similar type of rice-mill to the one in dispute. Whyte is very clear that there was a promise by the plaintiff at the time of examination to put the mill in working order after the defect was discovered.

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10 True, Whyte does not testify that at the time of the bargain there was a representation that a Japanese mill expert would be forthcoming, though he did say that the plaintiff told him subsequently aboard a ferry-boat when the matter of the mill was discussed, that he expected the arrival of two experts from Japan to examine the mill. It is important to note that in his evidence the defendant Doobay has persistently reiterated that he bought the mill because plaintiff 20 told him that experts were coming to rectify it; and to a situation of this nature I think the following statement of the law to be found in Vol:34 Halsbury Laws of England 3rd Edn. para. 65, becomes pertinent:

65: "STIPULATIONS AND MERE REPRESENTATIONS DISTINGUISHED.

30 It depends upon the intention of the parties to the contract whether any statement made with reference to the goods is a stipulation in the contract and so a condition or a warranty; or whether the statement is an expression of opinion or other mere representation and does not form part of the contract. 40 To form part of the contract the statement need not be made simultaneously with the conclusion of the bargain, and the fact that the bargain is subsequently committed to writing does not necessarily prevent a previous oral statement, not expressed in the written document, from amounting to a stipulation. Subject to the rules of evidence, the fundamental test is whether the parties contracted upon the basis that the statement should form part of the contract or not." 50

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(Contd.)

Can it be said from the evidence in this case that plaintiff and defendants have contracted on the basis that the representation that experts were coming to repair the mill should form part of their contract or not? This point must be determined. In Exhibit D which is a receipt issued by the plaintiff, dated September 27, 1961, for the sum of \$3,000, the defendant agreed to accept the mill "as is", which expression commercially means, it has been proved, "in its present condition". In the circumstances, I believe this fact is some evidence showing the probability that the evidence of the defendant and Whyte as to the condition of the mill is indeed true; that is to say, there was a defect in the mill. I believe there was indeed a verbal representation made by the plaintiff that the defect would be set right on the arrival of experts and that this was no mere representation, but a sub-stantive part of the contract and induced the making of it. In my view, the whole of the circumstances of the case point to this conclusion including the unlikelihood that defendants would have been content with the mill in that condition. The following classification of representations is instructive:

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".....representations fall into three classes:

(1) Representations which form no part of the contract.

(2) Representations which are of the essence of the contract and entitle the party to whom they are made to be discharged from his liabilities under the contract.

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(3) Representations which constitute subsidiary promises, the breach of which confers the right to recover such damages as the promisee has sustained by the failure of the promisor to fulfil his promise ..... second class of representations are usually called conditions, while the third class are usually termed warranties. If a representation amounting to a condition is broken

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and the injured party does not avail himself of his right to be discharged, or if the contract has been executed the injured party can recover damages as on a breach of warranty ex post facto". (per Luxmore, J., in Sullivan V. Constable (1932), 48 T.L.R., 267, 271, affirmed 48 T.L.R. 369).

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Supreme  
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(Contd.)

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Whether a representation contained in a contract is a condition or a warranty is a matter of the intention of the parties as revealed by all the circumstances of the case.

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But quite apart from any express obligation to repair the mill which the plaintiff imposed upon himself, the obligation of bailor to bailee in a transaction of this nature is stated as follows in Vol: 19, 3rd Edn. Halsbury's Laws of England page 532, para: 858:

858 "IMPLIED CONDITION OR WARRANTY OF FITNESS FOR PURPOSE.

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In hire purchase agreements outside the statutory control there is an implied term that the goods are as reasonably fit and suitable for the purpose for which they are expressly hired, or for which from their character the owner must be aware they are intended to be used, as reasonable care and skill can make them.

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Accordingly, if damage or loss is caused to the hirer by reason of some defect in the chattel of which the owner was, or ought to have been, aware, the owner is liable not only for the immediate results of his

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failure to provide a fit and proper article, but also for any other consequences which may reasonably be supposed to be within the contemplation of the parties. The mere fact that the hirer made a preliminary inspection of the hired chattel will not relieve the owner of the implied term

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5th May 1964  
(Contd.)

that it is reasonably fit for the  
purpose for which it is hired".

Clause 4 of the agreement requires the hirer at his own expense during the existence of the agreement to keep the mill in good working order and repair, and for such repairs to be effected by the owners servants or agents at the hirers' expense, but the hiring being for more or less a definite period i.e. until November 1962, at the latest, a reasonable inference is that the owner had undertaken to supply a chattel that would last for that period in a good state of repair, and if through no lack of proper care on the part of the hirer, it gets into a state of disrepair, the owner is bound to repair it. But the clear evidence in the present case is that the mill was delivered in a state of disrepair with a promise that it would be rectified later by an expert.

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As has been stated in Exhibit D, the defendants agreed to accept the mill "as is" i.e., in its present condition, which I have interpreted to mean in its present defective condition because this is the evidence of the defendant Doobay and the witness Whyte which I accept. But it is submitted from the very nature of a bailment for hire which I have above explained, the plaintiff is prohibited by law by an implied warranty of fitness from delivering on hire an article in a defective state of repair. The delivery of an article in an unfit state of repair is repugnant to a bailment of hire. I have already explained the obligation of the bailor in this regard and the implied warranty of fitness even though the bailee has inspected the bailment. As a matter of fact the view has been expressed that this implied warranty of fitness can properly be regarded as a condition rather than a warranty.

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(See note (1) to para: 858, Vol: 19  
Halsbury's Laws, above mentioned).

On this implied warranty, Lord Abinger observed in Sutton V. Temple (1843)  
12 M & W 53, 60:

"If a carriage be let for hire, and  
it break down on the journey, the

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letter is liable and not the party who hires it. So if a party hire anything else of the nature of goods and chattels, the party furnishing the goods is bound to furnish that which is fit to be used for the purpose intended. In every point of view the nature of the contract is such that an obligation is imposed upon the party letting for hire to furnish that which is proper for the hirer's accommodation".

In the  
Supreme  
Court of  
British Guiana

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No. 9

Judgment  
5th May 1964  
(Contd.)

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No question arises that the defendants did not keep the mill in good working order and repair; the fact remains it was never delivered to them as it ought to have been, in a fit state for the purpose for which they hired it.

The matter now arises whether in view of the plaintiff's breach of the implied warranty (or condition) of fitness the defendants can recover damages thereby; and if so, what is the appropriate measure. It is to be noted that the defendants have never exercised their right of determining the bailment as they could have done after the lapse of a reasonable time on the failure of plaintiff to have the mill repaired by experts. I venture to suggest this should have been their proper course for which a cause of action for an essential breach clearly lay, but in fact they did nothing about rescinding or repudiating the agreement and claiming damages. By their inertia, they have clearly elected to affirm the contract. By passively standing by and not paying the balance of the instalments, the last of which fell due in November, 1962, they have clearly rendered themselves (by clause 6) liable in this action by the owner to which there is no answer.

But though the defendants are deemed by their conduct to have elected to affirm the contract in that they have waived their right to repudiate the agreement, they are

In the  
Supreme  
Court of  
British Guiana

No. 9

Judgment  
5th May 1964  
(Contd.)

nevertheless entitled to sue for damages. See Bentsen v. Taylor & Co. (1893) 2. Q.B. 274. The problem is the appropriate measure to award them in these circumstances, and in ascertaining this sum, I will begin by eliminating from consideration their claim for \$5,000 advanced by them on the purchase price since by clause 8, it is provided, "that when the hiring is terminated the hirer shall not on any ground whatsoever be entitled to any allowance, credit, return, or set-off for payments previously made". This will of course exclude the \$5,000 already paid by the defendants.

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There is however the claim for the sum of \$1,500 as installation expenses, and for \$3,500 being the purchase price of a Lister 62 H.P. engine to operate the mill. In my view, only one of these sums is recoverable as special damages. Both have been pleaded and are supported by evidence, but though there has been a denial of them by the plaintiff in his reply to the defence and counterclaim, these amounts have not been effectively challenged. The plaintiff has in fact not given evidence on oath. I shall allow the claim for \$3,500 only on the rule in Hadley v. Baxendale (1852) 9 Exch 341, but not \$1,500 which I consider has not been properly established, though I can imagine defendants did entail some expense, in installing the mill. But the claim from the witness-box by the defendants for the sum of \$640 which they claim to have paid their customers whose rice was destroyed in the damaged mill, cannot be entertained for a twofold reason, for one thing, it was not pleaded, nor was an amendment sought, and for another, it is difficult to see how the defendants with knowledge of the mill's defect could recover such amount, for it is unreasonable to hold the owner liable for any damage which the hirers could have avoided by appropriate steps taken after the time they knew of the defect.

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I shall therefore allow only



£3,500 on the counterclaim. I direct that judgment be entered on the claim for £9,500 with costs, and £3,500 on the counterclaim with costs.

In the  
Supreme  
Court of  
British Guiana

Sgd. V.E. Crane  
Puisne Judge.

No.9

Judgment  
5th May 1964  
(Contd.)

Mr. A.G. King for Plaintiff.

Mr. A Vanier for defendants.

Dated this 5th day of May, 1964.

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NO. 10

No.10

ORDER ON JUDGMENT BEFORE THE  
HONOURABLE MR. JUSTICE CRANE  
SATURDAY THE 5TH DAY OF MAY,  
1964 - ENTERED THE 8TH DAY OF  
JUNE, 1964.

Order on  
Judgment  
5th May 1964

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This action having come on for hearing on the 2nd day of April, 1964, and on this day AND UPON HEARING Counsel for the plaintiff and for the defendants and the evidence adduced and the Court having ordered that judgment be entered for the plaintiff on the claim with costs and for the defendants on the counterclaim with costs THEREFORE IT IS THIS DAY ADJUDGED that the plaintiff do recover against the defendants the sum of £9,500 (nine thousand five hundred dollars) with costs to be taxed and that the defendants do recover from the plaintiff the sum of

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£3,500 (three thousand five hundred dollars) with costs to be taxed.

BY THE COURT

Kenneth W. Barnwell  
DEPUTY REGISTRAR (Ag.)

In the British  
Caribbean Court  
of Appeal

NO. 11

NOTICE OF APPEAL

No.11

IN THE BRITISH CARIBBEAN COURT OF APPEAL

Notice of  
Appeal  
5th June 1964

BRITISH GUIANA:

CIVIL APPEAL No. 21 of 1964

B E T W E E N:

MOHABEER

(PLAINTIFF)  
Appellant

-and-

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1. R.P. DOOBAY
2. N.P. DOOBAY and
3. JAISRI RAM, jointly and severally

(DEFENDANTS)  
Respondents.

NOTICE OF APPEAL

TAKE NOTICE that the (plaintiff) appellant being dissatisfied with the decision more particularly stated in paragraph 2 hereof of the Supreme Court of British Guiana contained in the judgment of the Honourable Mr. Justice Crane, dated the 5th day of May, 1964, doth hereby appeal to the British Caribbean Court of Appeal upon grounds set out in paragraph 3 hereof and will at the hearing seek the relief set out in paragraph 4.

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And the (plaintiff) appellant further states that the names and addresses including his own of the persons directly affected by the appeal are those set out in paragraph 5.

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2. The decision on the counterclaim.

3. GROUNDS OF APPEAL

(1) The learned judge erred in

holding in the circumstances of the case, that the plaintiff was prohibited by law by an implied warranty of fitness from delivering on hire to the (defendants) respondents a rice mill, the subject matter of the action in a defective state of repair.

In the British  
Caribbean Court  
of Appeal

-----  
No. 11

Notice of  
Appeal  
5th June 1964  
(Contd.)

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(2) The learned judge erred in holding in the circumstances of the case that there was an implied term in the hire purchase agreement that the rice mill was reasonably fit for the purpose for which it was hired.

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(3) The learned judge erred in holding in the circumstances of the case that the rice mill ought to have been delivered by the (plaintiff) appellant to the (defendants) respondents in a fit state for the purpose for which they hired it.

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(4) The learned trial judge erred in holding that a verbal representation by the (plaintiff) appellant that the rice mill would be set right on the arrival of experts from Japan was a substantial part of the contract of hire.

(5) The decision was unreasonable, having regard to the evidence.

(6) In the alternative, the damages were excessive.

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4. The relief sought from the British Caribbean Court of Appeal is that the judgment of the Supreme Court on the counter-claim in favour of the (defendants) respondents be reversed and that the costs of this appeal and on the counterclaim in the Supreme Court be paid by the (defendants) respondents.

5. Persons directly affected by the appeal.

In the British  
Caribbean Court  
of Appeal

No. 11

Notice of  
Appeal  
5th June 1964  
(Contd.)

NAME	ADDRESS	
1. Mohabeer	Melville Village, Wakenaam, Essequebo River.	
2. R.P. DOOBAY	All of Doorn Haag, Leguan, Essequebo, and c/o Abraham Vanier, Solicitor, 216 South Street, Lacytown, Georgetown Demerara.	
3. N.P. DOOBAY		
4. JAISRI RAM		

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A.G. King

Solicitor for Appellant.

Dated this 5th day of June, 1964.

No. 12

NO. 12

Notice by  
Respondents  
of Intention  
to Contend  
that Decision  
of Court below  
be Varied.  
2nd October  
1964

NOTICE BY RESPONDENTS OF INTENTION  
TO CONTEND THAT DECISION OF COURT  
BELOW BE VARIED

TAKE NOTICE that the above named Respondents intend upon the hearing of the appeal under the APPELLANT'S NOTICE OF APPEAL, dated the 5th day of June, 1964, from the Judgment of the Honourable Mr. JUSTICE CRANE given on the trial of the above action on the 5th day of May, 1964, to contend that the said judgment or order in favour of the APPELLANT should be reversed and that judgment be entered for the RESPONDENTS on the claim with costs to be taxed and that the Judgment entered in favour of the Respondents on the Counter-claim be varied and that Judgment be entered in favour of the Respondents for the sum of \$10,019.95 (ten thousand and nineteen dollars and ninety five cents) as damages in lieu of the sum of \$3,500.00 (three thousand five hundred dollars).

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AND FOR AN ORDER that the costs of this Appeal be paid by the APPELLANT to the RESPONDENTS and for such further or other Order as the Court shall seem just.

AND TAKE FURTHER NOTICE that the grounds on which the Respondents intend to rely are:-

In the British Caribbean Court of Appeal

No. 12

Notice by Respondents of Intention to Contend that Decision of Court below be varied.  
2nd October 1964.  
(Contd.)

- (a) that the award of damages in favour of the Respondents was based on a wrong principle having regard to the evidence and the circumstances of the case.
- 10 (b) that the damages awarded to the Respondents are inadequate having regard to the evidence adduced at the Trial and accepted by the trial Judge.

Sgd. H.A. Bruton

Solicitor for Respondents.

Dated 2nd day of October 1964

To:- MOHABEER the above named Appellant  
(Plaintiff)

20 -and-

MR. ARTHUR GEORGE KING,  
Appellant's Solicitor,  
South Road, Georgetown.

NO. 13  
JUDGMENT

No. 13  
Judgment of  
British Caribbean Court of  
Appeal  
5th April 1965

BEFORE: SIR CLYDE ARCHER, President,  
SIR DONALD JACKSON, Justice of  
Appeal,

30 SIR JOSEPH LUCKHOO, Chief Justice  
of the Supreme Court of British  
Guiana.

1965: March 24; April 5

G.M. Farnum for Appellant

F.H.W. Ramsahoye for Respondents.

In the British  
Caribbean Court  
of Appeal

JUDGMENT

ARCHER, PRESIDENT

No. 13

Judgment of  
British Carib-  
bean Court of  
Appeal  
5th April 1965  
(Contd.)

The respondents entered into a written agreement with the appellant for the hire of a rice mill with the option of purchasing for \$14,500. They paid down \$3,000 and were to have made payment for hire by three instalments of \$2,000, \$2,000 and \$7,500 on three specific dates.

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The mill was not in working order at the date of hire but the respondents took delivery with full knowledge that it was not working satisfactorily. They installed the mill on their premises and purchased an engine for propelling it, but were unable to get it to work properly. They paid the first instalment of \$2,000 but made no further payments, and shortly after the date on which the last payment should have been made, the appellant sued them for \$9,500 due for goods sold and delivered.

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The respondents had earlier suggested to the appellant that he take back the mill, but he had refused to do so and they had not insisted. They pleaded the hire purchase agreement and counterclaimed for damages for breach of warranty to procure experts to put the mill in order. The amount claimed as general damages was \$9,800, but there was a claim in the alternative for the same amount as special damages made up of \$5,000 paid under the agreement, \$3,300 for purchase of the engine to propel the mill, and \$1,500, the expenses incurred in installing the mill.

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The appellant amended his statement of claim to include a claim in the alternative for \$9,500 as the balance for hire due under the agreement. The respondents did not amend their defence and counterclaim. The Judge found that the agreement had continued up to the date for payment of the last instalment for hire and awarded the appellant \$9,500 on the claim. He also found the breach of warranty

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proved and gave \$3,500 damages on the counterclaim to cover the purchase of the engine, the price of which was in fact \$3,519.95. He disallowed the expenses of installation.

In the British  
Caribbean Court  
of Appeal

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No.13

10 The appellant appealed against the award of damages and the respondent cross-appealed against the judgment on the claim and asked for an increase of damages on the counterclaim. They argued that the appellant's failure to procure experts to put the mill in order was a fundamental breach of the agreement resulting in forfeiture of the unpaid instalments and liability to refund the money already paid. They conceded that they could not recover the money expended in the purchase of the engine, but maintained that they were entitled to payment of the expenses of installation of the mill.

Judgment of  
British Carib-  
bean Court of  
Appeal  
5th April 1965  
(Contd.)

30 Counsel for the appellant submitted that the breach of warranty to provide experts had not been pleaded and that the evidence did not disclose any such undertaking; that judgment had been given on the basis of implied warranty, whereas the respondents could succeed only on an express warranty that the respondents had taken possession of what they had bargained for and had throughout the proceedings treated the mill as their own property; and that the mill was not entirely useless, and no question of fundamental breach could therefore arise.

40 The pleadings were carelessly drawn but they did raise the issue of the particular breach of warranty. Moreover, the trial proceeded on this issue and evidence concerning it was led by the respondents without objection by the appellant. That evidence was never contradicted by the appellant for he offered no evidence. Even if, therefore, the argument could have succeeded on a point of pleading, it is now too late for the appellant to take the objection. The respondents completely misapprehended their rights under the agreement and did not appreciate the legal consequence that

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In the British  
Caribbean Court  
of Appeal

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No.13

Judgment of  
British Carib-  
bean Court of  
appeal  
5th April 1965  
(Contd.)

flowed from their conduct. They did not repudiate the agreement, and at the trial they took the stand that they had purchased the mill and had elected to keep it.

The respondents continued under the agreement up to the time of the trial and are therefore liable for the unpaid instalments. They would have been entitled to a refund of the \$5,000 they paid if there had been a fundamental breach of the agreement, but there was not a total failure of consideration. The mill, although faulty, functioned as a mill and was not something different from the subject-matter of the agreement. The appellant is liable for damages for breach of warranty. The installation of the mill and the provision of an engine are, however, the responsibility of the respondents, and they cannot recover in respect of those items. They did not claim for the cost of putting the mill in good working order, the mill they now find themselves saddled with, and the only item of damage by way of loss of custom proved - and even this was not pleaded - was the refund of \$240 to a customer for broken paddi. The amount they can recover on the counterclaim is therefore, by reason of the uninspired pleading and conduct of their case, probably much less than the loss they have actually suffered, but the fault is entirely their own.

The appeal is allowed and judgment on the claim is affirmed with costs. There will be judgment on the counterclaim for \$240, but no order for costs of the appeal on the counterclaim.

C.V.H. Archer

President

British Caribbean Court of  
Appeal.

Donald Jackson  
Justice of Appeal

J.A. Luckhoo

Chief Justice, Supreme  
Court of British Guiana.

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NO. 14ORDER ON JUDGMENTIn the British  
Caribbean Court  
of AppealBEFORE THE HONOURABLE SIR CLYDE  
ARCHER, PRESIDENT, THE HONOURABLE  
SIR DONALD JACKSON  
THE HONOURABLE SIR JOSEPH LUCKHOO

No.14

Order on  
Judgment  
5th April 1965DATED THE 5TH DAY OF APRIL, 1965  
ENTERED THE 22ND DAY OF MAY, 1965

10 UPON READING the notice of appeal  
on behalf of the appellant filed herein  
on the 5th day of June, 1964, and the  
notice of intention to contend that the  
decision of the Court below be varied  
filed by the respondents on the 2nd  
day of October, 1964, and the judgment  
hereinafter mentioned and the Judge's  
notes herein:

20 AND UPON HEARING Mr. G.M. Farnum  
of Counsel for the Appellant and Mr.  
F.H.W. Ramsahoye of Counsel for the  
Respondents.

30 IT IS ORDERED that the appeal  
by the appellant be allowed and that  
the judgment of the Honourable Mr. Justice  
Crane dated the 5th day of May, 1964, in  
favour of the respondents on the counter-  
claim be varied by the substitution  
of the sum of \$240 for the sum of \$3,500  
recovered by the respondents and that  
judgment be entered for the respondents  
on the counterclaim in the sum of  
\$240.00 no order for costs of this appeal.

AND IT IS FURTHER ORDERED that the  
Respondents' cross-appeal be dismissed  
with costs and that the judgment of the  
claim be affirmed.

BY THE COURT

K.M. GEORGE

DEPUTY REGISTRAR (AG).

In the British  
Caribbean Court  
of Appeal

NO. 15

ORDER GRANTING CONDITIONAL  
LEAVE TO APPEAL TO HER  
MAJESTY IN COUNCIL

No. 15

Order granting  
Conditional  
Leave to Appeal  
to Her Majesty  
in Council.  
17th June 1965.

BEFORE THE HONOURABLE SIR DONALD JACKSON  
(IN CHAMBERS)

THURSDAY THE 17TH DAY OF JUNE, 1965  
ENTERED THE 30TH DAY OF JULY, 1965.

UPON the petition of the above  
named petitioners (respondents) dated the 15th day of April, 1965, for leave to appeal to Her Majesty in Council against the judgment of the Court comprising the Honourable the President, the Honourable Sir Donald Jackson and the Honourable Sir Joseph Luckhoo delivered herein on the 5th day of April, 1965, AND UPON READING the said petition and the affidavit in support thereof sworn to by their solicitor on the said 15th day of April, 1965, and filed herein: 10  
20

AND UPON HEARING Mr. F.H.W. Ramsahoye of Counsel for the petitioners (respondents) and Mr. G.M. Farnum of Counsel for the respondent (Appellant).

THE COURT DOTH ORDER that subject to the performance by the said petitioners (respondents) of the conditions herein-after mentioned and subject to the final order of this Honourable Court upon due compliance with such conditions leave to appeal to Her Majesty in Council against the said judgment of the British Caribbean Court of Appeal be and the same is hereby granted to the petitioners (respondents). 30

AND THIS COURT DOTH FURTHER ORDER that the petitioners (respondents) do within ninety days from the date hereof enter into good and sufficient security to the satisfaction of the Deputy Registrar of this Court in the sum of £400. with one or more sureties or deposit into Court the said sum of £400. for the due prosecution of the said appeal and for the payment or part payment of such costs as may become payable by the petitioners (respondents) in the 40

event of the petitioners (respondents) not obtaining an order granting them final leave to appeal or of the appeal being dismissed for non-prosecution or for the part of such costs as may be awarded by the Judicial Committee of the Privy Council to the respondent (Appellant) on such appeal as the case may be.

In the British  
Caribbean Court  
of Appeal

\_\_\_\_\_

No. 15

Order granting  
Conditional  
Leave to Appeal  
to Her Majesty  
in Council.  
17th June 1965.

10           AND THIS COURT DOTH FURTHER ORDER that all costs of and occasioned by the said appeal shall abide the event of the said appeal to Her Majesty in Council if the said appeal shall be allowed or dismissed or shall abide the result of the said appeal in case the said appeal shall stand dismissed for want of prosecution.

(Contd.)

20           AND THAT THE COURT DOTH FURTHER ORDER that the petitioners (respondents) do within four (4) months from the date of this order in due course take out all appointments that may be necessary for settling the record in such appeal to enable the Deputy Registrar of this Court to certify that the said record has been settled and that the provisions of this order on the part of the petitioners (respondents) have been complied with.

30           AND THIS COURT DOTH FURTHER ORDER that the petitioners (respondents) be at liberty to apply at any time within five (5) months from the date of this order for final leave to appeal as aforesaid on the production of a certificate under the hand of the Deputy Registrar of this Court of due compliance on their part with the conditions of this order.

40           AND THIS COURT DOTH FURTHER ORDER that judgment including costs of this Court and the Court below be stayed pending the hearing and determination of this appeal to Her Majesty in Council on condition that the petitioners do within three months from the date hereof provide security in the sum of \$9,000 with

In the British  
Caribbean Court  
of Appeal

one or more sureties in a like sum or  
deposit into Court the said sum of  
\$9,000.

No. 15

Order granting  
Conditional  
Leave to Appeal  
to Her Majesty  
in Council.  
17th June 1965.  
(Contd.)

AND THIS COURT DOTH FURTHER ORDER  
that the costs of and incidental to this  
application be the costs in the cause.

LIBERTY TO APPLY.

BY THE COURT

K.M. GEORGE  
DEPUTY REGISTRAR (AG.)

10

No. 16

Order granting  
Final Leave to  
Appeal to Her  
Majesty in  
Council.  
8th December  
1965.

NO. 16

ORDER GRANTING FINAL LEAVE TO  
APPEAL TO HER MAJESTY IN COUNCIL

BEFORE:

THE HONOURABLE SIR CLYDE ARCHER, PRESIDENT  
THE HONOURABLE SIR DONALD JACKSON; and  
THE HONOURABLE SIR JOSEPH LUCKHOO  
WEDNESDAY THE 8TH DAY OF DECEMBER, 1965  
ENTERED THE 9TH DAY OF DECEMBER, 1965

UPON the petition of the above named  
R.P. Doobay, N.P. Doobay, and Jaisri  
Ram dated the 10th day of November, 1965  
preferred unto this Court on the said 10th  
November, 1965 for final leave to appeal  
to Her Majesty in Her Majesty's Privy  
Council against the judgment of the British  
Caribbean Court of Appeal dated the 5th  
day of April, 1965 AND UPON READING the  
said petition and the order of the said  
Court dated the 17th day of June, 1965  
AND UPON HEARING Counsel for the petitioner  
and for the respondent and being  
satisfied that the terms and conditions  
imposed by the said Order dated the  
17th day of June, 1965 have been  
complied with THIS COURT DOTH ORDER  
that final leave be and is hereby granted  
to the said petitioners to appeal to Her  
Majesty in Her Majesty's Privy Council.

20

30

BY THE COURT

(Sgd) K.M. GEORGE  
DEPUTY REGISTRAR (AG)

40

E X H I B I T S

"A"

Defendants  
Exhibits

Charge Bill

"A"

Telephone 3290, 3291

Charge Bill  
2nd April 1964

Georgetown, Demerara

2 April, 1964.

STATEMENT OF ACCOUNT OF:-

R.P. Doobay, Kingston, Leguan

SPROSTONS, LIMITED

10 Lot 4 Lombard Street

TERMS:- STRICTLY MONTHLY

Oct. 1961 50401 One Lister Model JK 4

Stationary Diesel Engine with  
attachments \$3,519.95

Certified Correct

B.E. Thirsk

B.E. Thirsk, A.S.A.A.

Assistant Chief Accountant.

"B"

"B"

20 Agreement of Hire Purchase

Agreement of  
Hire Purchase  
27th September  
1961

A G R E E M E N T

30 AGREEMENT made the twenty seventh day of  
September 1961 between: Mohabeer  
of, Melville Wakenaam, herein  
called the "Owners" (which term shall  
include their Successors and Assigns) of  
the one part, and R.P. Doobay, N.P. Doobay  
and Jaisri Ram all of Doornhaag, Leguan  
herein called the "Hirers" of the  
other part.

WHEREBY the Owners agree to let to the  
Hirer on the dates set out below the following  
item and accessories (hereinafter referred  
to as the "ITEMS")

M.  
R.P.D.  
J.R.

Defendants  
Exhibits

FULL DESCRIPTIONSELLING PRICE

"B"

one - one ton Kyowa \$14,500.00  
xx

Agreement of  
Hire Purchase  
27th September  
1961  
(Contd.)

Rice Huller Complete  
(Ce Co Co Japanese)  
Total Price: \$14,500.00

Down payment as hereinafter stated:

\$ 3,000.00  
xx

Interest and collection charges on Balance.

Balance to be paid as follows :

10

M.  
R.P.D.  
J.R.

\$2,000.00 on November 25th, 1961  
xx

\$2,000.00 on April 16th, 1962  
xx

\$7,500.00 on November, 1962  
xx

The Hirer Agrees:

1. To pay the "Owners" on entering into this agreement the sum of: Three thousand dollars (\$3,000.00) as per Receipt No. 23 and henceforth the sum of:

M.  
R.P.D.  
J.R.

Written Amount

.....19.

20

M.  
R.P.D.  
J.R.

24 cents stamp cancelled.

Payments and interest in arrear shall bear interest at the rate of 5/6 of 1 per cent; on all arrears at the end of each month. Such interest to become due and payable immediately. The payment of such interest shall not waive the Owners right as hereinafter stipulated to terminate this Agreement. Such interest to become part of this Agreement and in addition to any other interest charged.

30

2. To keep the ITEM (S) covered by this Agreement in good order and undefaced

(damage or loss by fire included) fair wear only excepted, and at all times to allow the Owners' agents and servants or any other person employed by them, to inspect the same.

Defendants  
Exhibits

-----  
"B"

Agreement of  
Hire Purchase  
27th September  
1961  
(Contd.)

3. To insure and keep insured, unless the Owners agree otherwise by endorsement hereto, at the Hirer's own cost and expense the said ITEM (S) against  
10 damage by fire or accident in some Insurance Company to be first approved of by the Owners, and will pay punctually and regularly as the same become due the premiums of insurance required to insure and keep insured the said ITEM (S), and will endorse to the order of the Owners or transfer to the Owners the Policy or Policies for such insurance as security  
20 for the payment of the instalments to become due and payable hereunder or for the restoration, reparation or replacement of the said ITEM (S) and will deliver to the Owners the policy or policies for such insurance and the receipt or receipts for the premium or premiums in respect thereof.

4. At his (the Hirer's) own cost and expense during the existence of this Agreement to keep in good working order  
30 and repair the said ITEM (S) fair wear only excepted, which repairs shall be effected by the Owners or their Agents or servants at the expense of the Hirer and not by any person or persons whomsoever, and will at all times allow the Owners or their agents or servants or others employed by them to inspect the same. The Hirer shall also pay the licence for the said ITEM (S) punctually and regularly and be solely responsible and  
40 liable for the payment of such licence.

5. To keep the ITEM (S) in the Hirer's own custody at the above mentioned address, and not to remove them or part with their possession either temporarily or permanently, without the Owners' previous consent in writing.

6. That if the Hirer shall not duly perform any of the clauses of this Agreement or shall commit any act of Bankruptcy or have  
50 a Receiving Order made against him/her or be adjudicated bankrupt, or make a composition

Defendants  
Exhibits

-----  
"B"

Agreement of  
Hire Purchase  
27th September  
1961  
(Contd.)

with his/her creditors or in case the said ITEM (S) shall be distrained upon or taken in execution, the Owners or their agents, and servants or anyone else employed by them may (without prejudice to their right to recover arrears of rent and damage for breach of this Agreement) summarily terminate the hiring and retake possession of the said goods as aforesaid.

10

6a. "The Hirer shall repay to the Owners on demand all costs and expenses incurred by the Owners in seizing and re-possessing the item(S) and bringing same down to the office of the Owners in Georgetown, in the county of Demerara and colony of British Guiana".

7. "The Hirer shall repay to the Owners on demand all costs and expenses incurred by the Owners in seizing and re-possessing the item(s) and bringing same down to the office of the Owners in Georgetown, in the county of Demerara and colony of British Guiana".

20

8. That when the hiring is terminated the Hirer shall not on any ground whatsoever be entitled to any allowance, credit return or set off for payments previously made.

9. The Hirer agrees that in the event of re-possession of the ITEM(S) by the Owners or the voluntary surrendering of the ITEM(S) to the Owners by the Hirer that the cost of any repairs or parts to put the ITEM(S) into a condition satisfactory to the Owners will be for the account of the Hirer.

30

10. That time, indulgence or concession granted by the Owners to the Hirer, shall not alter or invalid this Agreement, nor shall such time, indulgence or concession, be construed as a waiver of any right to the Owners or preclude them from exercising any power hereby conferred upon them.

40

11. That the ITEM(S) shall not be pledged, pawned, or otherwise dealt with but shall be, and continue to be the sole property of the Owners, and that the Hirer shall remain and be considered a Bailee only thereof for all purposes both civil

50



and criminal.

Defendants  
Exhibits

"B"  
Agreement of  
Hire Purchase  
27th September  
1961  
(Contd.)

10 12. To pay, should the Hirer return the ITEM(S) under the provisions of this Agreement or the Owners re-take the same under the provisions of this Agreement before the expiration hereof, such further sum (in addition to any sum payable under the terms of this Agreement), as with the total amount previously paid under Clause "I" hereof, and the amount of the then assessed value of the ITEM(S) will equal the sum of \$..... by way of compensation for depreciation of the said ITEM(S).

13. That the value of the rented ITEM(S) is \$14,500.00.  
XX

The Owners agree:

20 1. That the Hirer may terminate the hiring by delivering up to the Owners the ITEM(S) subject to the provisions of Clause II hereof.

2. That the Hirer may, at any time during the hire, become the Purchaser of the ITEM(S) by payment in cash of the hereon written value plus any interest which may have accrued.

3. That if such purchase be effected, credit will be given for all payments previously made under this Agreement.

30 WITNESSES

"HIRER"

Name.....

1. R.P. Doobay

Address.....

2. Jaisri Ram

Occupation.....

3. N.P. Doobay per  
R.P. Doobay

"OWNERS"

Name.....

Mohabeer

Address.....

Melville Wakenaam

- Occupation.....

Defendants  
Exhibits

NOTICE TO THE PERSON SIGNING THIS  
AGREEMENT:

"B"  
Agreement of  
Hire Purchase  
27th September  
1961  
(Contd.)

Read the terms of this agreement before  
signing it, as no statement, settlement,  
agreement or understanding, verbal or  
written not contained therein will be  
recognised.

"C"

R E C E I P T

Receipt  
14th September  
1961.

14th Sept. 1961.

To: Mohabeer, Melville Wakenaam

10

Sir

This tends to inform you that I agree  
to buy your rice mill Ce Co Co one ton size for  
\$14,500.00 (fourteen thousand five hundred  
dollars) delivery taken from his rice mill  
at my expense, the sum of seven thousand  
dollars to be paid before taking delivery  
and \$3,000 at the end of August 1962 and  
\$4,500 at the end of October, 1962.

R.P. Doobay

20

2 eight cents stamps and 2 four cents  
stamps cancelled.

"D"

"D"

Receipt  
27th September  
1961

R E C E I P T

\$3,000.00  
xx

Melville Village,  
Wakenaam,  
27.9.61.

Received from Messrs. R.P. Doobay,  
N.P. Doobay and Jaisrie Ram all of Back  
Part, Leguan the sum of three thousand  
dollars being part payment of fourteen  
thousand and five hundred dollars \$14,500.00  
xx

30

on account of the purchase price of one one-  
ton Ce Co Co Multistage Rice mill which  
is now in my rice mill as was inspected and  
trial run given today. Balance to be paid  
as follows: \$2000.00 to be paid on or before  
xx

28th November, 1961;  $\$2000.\overline{00}$  on or  
before 16th April, 1962 and  $\$7,500.\overline{00}$   
to be paid on or before 28th November,  
1962. The mill is sold and delivered  
as is and where is today and a proper  
hire purchase agreement to be made  
at a later date when this receipt will  
be null and void.

Defendants  
Exhibits

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"D"  
Receipt  
27th September  
1961  
(Contd.)

MOHABEER.

10 We the undersigned hereby agree  
to the above mentioned terms etc.

R.P. DOOBAY  
JAISRI RAM  
N.P. DOOBAY

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O N A P P E A L  
FROM THE BRITISH CARIBBEAN COURT OF APPEAL

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B E T W E E N:

- 1. R.P. DOOBAY
- 2. N.P. DOOBAY, AND
- 3. JAISRI RAM, jointly and severally.  
(Defendants) Appellants
  
- and -
- MOHABBEER (Plaintiff) Respondent

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RECORD OF PROCEEDINGS

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GARBER, VOWLES & CO.,  
37, Bedford Square,  
London, W.C.1.

Solicitors for the Appellants.

SIMMONS & SIMMONS,  
14, Dominion Street,  
London, E.C.2.

Solicitors for the Respondents.