

SUPREME COURT OF NIGERIA

17TH JUNE, 2011. SC. 271/2003

CORAM:- A. M. MUKHTAR, W. S. N. ONNOGHEN, I. T. MUHAMMAD, J. A. FABIYI, B. RHODES-VIVOUR, JJSC

ALHAJI JIMOH AJAGBE APPELLANT
AND

LAYIWOLA IDOWU RESPONDENT

EVIDENCE - Facts not in dispute - Relevance of - Evidence of fact that is not in dispute - But is relevant to the matter in controversy - Is credible evidence that can be relied upon - For the determination of the matter (H1)

CONTRACTS - Credit sale transaction - Breach - Remedies - Aggrieved party is to sue for recovery of balance of purchase price of the item - And neither to seize nor sell the item (H2)

PLEADINGS - Damages - Special damages - It must be specifically pleaded and strictly proved - With sufficient and credible evidence in support (H3)

EVIDENCE - Evaluation - Scope - Court is to weigh the preponderance of evidence - And the balance of probability in determination of civil suits (H4)

APPEALS - Damages - Quantum - Interference by appellate court - It will review an award of damages downwards - Where it finds the amount excessive or not in accordance with principle of law (H5)

APPEALS - Findings of lower court - Interference by appellate court - It will interfere where the findings are not supported by credible evidence - Or are perverse and may have occasioned miscarriage of justice (H6)

FACTS

Plaintiff/respondent instituted this action at the High Court of Osun State, wherein he claimed against defendant/appellant the following relief inter alia: The return of a Toyota Liteace Bus with regis-

tration number OS 68 GA, Chassis No. 00194483 which respondent bought on credit sale from appellant, but which appellant unlawfully seized from him. The case for respondent is that he bought the vehicle from appellant under a credit sale transaction at the price of N250,000.00 (Two Hundred and Fifty Thousand Naira) for which he made an initial payment of N20,000.00 (Twenty Thousand Naira) and N2,000.00 (Two Thousand Naira) as deposit in respect of the vehicle. He is expected to make monthly payments until the whole sum was liquidated. After making a total payment of N39,000.00 (Thirty Nine Thousand Naira), he could not meet up with the monthly payments.

Consequently, appellant forcibly recovered the keys of the vehicle. When respondent took the sum of N12,000.00 (Twelve Thousand Naira) to appellant, he was told that the vehicle had already been sold to another person. This gave rise to the institution of this action. Appellant on his own contends that the transaction is based on a hire purchase agreement, exhibit A in this case. At the end of the hearing, the Court entered judgment in favour of respondent. It awarded the sum of N300,000.00 (Three Hundred Thousand Naira) in lieu of the return of the vehicle, N30,000.00 (Thirty Thousand Naira) as general damages and another N293,000.00 (Two Hundred and Ninety Three thousand Naira) as special damages to respondent. Dissatisfied, appellant appealed to Court of Appeal, Ibadan division. The Court allowed the appeal in part. Dissatisfied again, appellant has brought a further appeal to Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the learned Justices of the Court of Appeal were right in law to have held that there appears to be no consensus in the minds of the parties at the time of the transaction.

2. Whether the learned Justices of the Court of Appeal were right in law when they held Exhibit 'A' was not a valid Hire Purchase Agreement but that of a credit sale having regard to the evidence.

3. Whether the learned Justices of the Court of Appeal were right in their award of the sum of N250,000 to the Respondent as the sale value of the vehicle.

4. Whether the learned Justices of the Court of Appeal were right to award special damages in favour of the respondent which was not predicated on any evidence as required by law.

HELD (Unanimously allowing the appeal in part per **MUKHTAR JSC**)

EVIDENCE - Facts not in dispute - Relevance of

1. The above pieces of evidence, particularly the aspect of the instalment of N6,000.00 were neither challenged nor debunked in the course of cross examination.

It is trite law that evidence of a fact that is not in dispute and that is relevant to a matter in controversy is good and credible evidence that can be relied upon for the determination of the issue in controversy. (p. 1652 C)

CONTRACTS - Credit sale transaction - Breach - Remedies

2. I think the above, coming from the appellant closes and seals the fact that the liteace bus was actually seized by the appellant, which he had no right to do under the seemingly credit sale transaction which existed between them. That the respondent breached the instalment payment agreement is neither in doubt nor in dispute, but the remedy opened to the appellant would have been to sue for the recovery of the balance of the purchase price, and not to go to the extent of seizing and ultimately selling the vehicle. (p. 1656 E)

Special damages to be specifically pleaded and strictly proved

3. It may well be that the court below re-evaluated the evidence before the trial court. It is however imperative that I perform the same exercise, to meet the submission of the appellant, as I am convinced that the exercise may be necessary to satisfy the cause of justice. I will start with the consideration of the pleadings. In his statement of claim, the plaintiff pleaded the current market value of the vehicle (which he is claiming as an alternative to the return of the liteace bus) as N300,000.00. It is obvious that the claim was for special damages, which requires to be specifically pleaded and strictly proved with sufficient and credible evidence.

The record of proceedings before us does not manifest such evidence. The only evidence in respect of the value of the vehicle is that which the plaintiff said was the total cost of the vehicle under cross examination, and which the defendant said represented the hire purchase price, in the course of cross examination. As a matter of fact, the plaintiff did not testify in respect of this claim of

N300,000.00 on special damages, this amount of N250,000.00 only emerged in the course of cross examination, and this was qualified with the word ‘total’, as can be seen on page 10 of the printed record of proceedings from line 14. When the word total is used in respect of any amount, it signifies that many figures are taken into account before arriving at an amount which is then described as ‘total’. The pertinent question is, were there other costs added to the actual cost of the vehicle that made the total cost N250,000.00? The answer is left blowing in the wind, so to speak. Definitely, the plaintiff did not prove the special damages as an alternative to the return of the Toyota liteace bus. Perhaps, if the plaintiff had sought the aid of a car dealer to give his testimony on the value of such a vehicle, it would have added value to his claim. However, the relief for the return of the vehicle still stands. As the grant of the relief is not feasible, (in the light of the evidence before the court that the vehicle had already been sold by the defendant), what was opened to the learned trial court was to have evaluated the other pieces of evidence in relation to the age and condition of the vehicle in respect of the issue under discussion. There was the evidence that the respondent was in possession of the vehicle from June 1992 till December 1992, and the evidence that the appellant expended money on the repair of the vehicle, a piece of evidence that was buttressed by the plaintiff’s evidence on the problems the vehicle had before it was seized. I am of the view that the court below should have considered those evidence closely before arriving at the value of the vehicle and the damages to award. In my own appraisal and calculation, the award of N250,000.00 was wrong, as other factors should have been taken into consideration. It was not as though the vehicle had not been used by the plaintiff. Evidence abounded that he used it for six months during which the vehicle broke down.

The court below therefore erred when it held thus:-

“The sum pleaded as the value of the vehicle on which evidence is given is N250,000.00 which sum I award in lieu of the return to the respondent on the said vehicle.”

In the circumstance of this case and the evidence, I assess the damages to be awarded at N150,000.00. This award will meet the justice of the case. (p. 1657 E)

EVIDENCE - Evaluation - Scope

4. It is manifestly clear from the latter piece of evidence that even repairs of the vehicle and other related matters came from the net income. This aspect of the claim and evidence should have been considered by the courts below. Another important factor the courts should have taken into account is the impossibility of the use of the vehicle every blessed day without ceasing for over 18 months. Is it possible that if the respondent was in possession of the vehicle he would have been plying Suleja/Abuja Road every single day through the week and months, without rest? It is not feasible.

There must be days for rest, days for repairs and service of the vehicle, and days for some family and social engagements which will require the attention of the respondent. To do the calculation of the loss of use without adverting to these human vagaries that may occur from time to time, and which may prevent the respondent from earning the said N500.00 net income daily is a grave omission. Then there is this aspect of the amount the respondent was paying the appellant by instalment for the few months he made the payments. There was the payment of N4,670.00, N6,000.00 and N3,000.00 per month. What I find worrisome is, if the respondent was earning N15,000.00 net income per month, why should a monthly payment of over the above amount be impossible for him, and why should he be able to pay only a meager N3,000.00 in a whole month? I think it is inconceivable that the net income of the respondent was N500.00 daily. If the lower courts took all the above factors into account they would not have accepted the evidence of the respondent, and based their award on it. A court in evaluating evidence must take into consideration every little aspect of it, and the surrounding factors. It is not for the judge to accept evidence hook, line and sinker without weighing its preponderance and probability.

The law is settled that civil suits are determined on preponderance of evidence and balance of probability.

As courts of justice they should have given careful consideration to the overall evidence before them and the claim as a whole. (p. 1659 G)

Damages - Quantum - Interference by appellate court

5. I find it difficult to agree with the above finding, and so have rea-

son to defer from it. I therefore dismiss the claim as it has not been proved. It is a well grounded principle of law that an appellate court will review an award of damages downwards where it finds it excessive or not in accordance with the principle of law. (p. 1661 A)

B Findings of lower court - Interference on appeal

6. It is also a cardinal principle of law that even though an appellate court will not ordinarily interfere with findings of a lower court, it behoves an appellate court to interfere with the findings where they are not supported by credible evidence, are perverse and may have occasioned miscarriage of justice. (p. 1661 C)

NOTABLE POINT OF INTEREST
MUKHTAR JSC

D 1. Contract of sale and Contract of hire purchase - Difference

The principle of hire purchase contract as contained in Halbury's Laws of England 1st Edition Volume 1 page 554 states thus:-

"The contract of hire-purchase, or even more accurately the contract of hire with an option to purchase is one under which the owner of a chattel lets it out on hire and undertakes to sell it to or that it shall become the property of the hirer conditionally on his making a certain number of payments. Until the making however of the last payment, no property in the chattel passes. Where the contract between the parties amounts to an absolute agreement to sell and buy, whether the instrument be called a hire purchase agreement or not, the property in the chattel passes upon delivery, provided that such was the intention of the parties..."

The difference between a contract of sale at a price payable by instalment and a contract of hire purchase is that in the former, the purchaser has no option of terminating the contract and returning the chattel, whereas in the latter there is none. In each case, the substance of the transaction or the agreement must be looked at and not the mere words."

H A careful consideration of the above principle, the provisions of the Hire purchase act, together with the requirements expected to be complied with, vis-a-vis the contents of exhibit 'A', one will find that it negates a valid hire purchase agreement. The learned trial judge found exhibit 'A' not to contain an option to purchase, and

that the plaintiff was not given cash price for which the vehicle may be purchased. (p. 1652 F)

REPRESENTATION

A.U. Mustapha with A.F. Attah, O.M. Soyoye. for Appellant
A. Adeniyi with O. Otitolaju, O. Atanda, R. Abdulrahman for Re- B
spondent

CASES REFERRED TO

State v. Ajie (2000) 11 NWLR part 678 page 434 C
Shittu v. Fashawe (2005) 14 NWLR part 946 page 671
Amadi v. Orisakwe (2005) 7 NWLR part 924 page 385
Adebanjo v. Brown (1990) 3 NWLR part 141 page 661
Gonzee (Nig.) Ltd v. NERDC (2005) 13 NWLR part 943 page 634
Pascutto v. Adcentro (Nig.) Ltd. (1997) 11 NWLR part 529 page 467 D
Chugbo Chemists Ltd v. Chugbo (1996) 5NWLR part 447 page 246
Ijebu Ode Local Govt. v. Balogun (1991) NWLR pt. 166 p. 136
K. Fagbenro v. Gani Arobadi (2006) 7NWLR pt.978 p. 172
S. O. Awoyoolu v. Sufianu Yusuf Aro (2006) 4NWLR pt. 971 p. 481
Chief Onisaodu v. Chief Elewaju (2006) 13 NWLR pt. 998 p. 517 E
Zenon Petro. & Gas Ltd. v. Idrisiyya Nig. Ltd. (2006) 8 NWLR pt 982
Chris Nwonji v. Coastel Serv. Nig Ltd (2004) 11 NWLR pt 885 p. 552
Neka B.B.B. Manufacturing Co. Ltd v. African Continental Bank Ltd
(2004) 2 NWLR part 858 page 521 F

STATUTE REFERRED TO

Hire Purchase Act Cap. 169 LFN 1990, s. 2(1)

BOOKS REFERRED TO

Chitty on Contracts General Principles, volume 1, page 6, para. 1004 G
Halbury's Laws of England 1st Edition volume 1 at p. 554

LEAD JUDGMENT BY MUKHTAR JSC

The plaintiff's claims against the defendant in the High Court H
of Justice, Osun State, as per the writ of summons are:-

*"1. The return of the Toyota Liteace Bus with registration
number OS 68 GA Chassis No. 00194483 which the plaintiff bought
on credit from the defendant, but which the defendant unlawfully*

seized from the plaintiff at Ifon-Osun on 4th December, 1992.

2. *The sum of five hundred Naira (500.00) per day for loss of use of the vehicle from 4th December, 1992 till the vehicle is returned to the plaintiff.*

3. *The sum of fifty thousand Naira (50,000.00) being general damages for the unlawful seizure of the vehicle."*

"IN THE ALTERNATIVE TO CLAIM 1 ABOVE,

The plaintiff claims the sum of Three hundred thousand Naira (300,000.00) being the current market value of the Toyota Liteace bus with registration No. OS 68 GA Chassis No. 0019483 which the plaintiff bought on credit from the defendant, but which the defendant unlawfully seized from the plaintiff at Ifon-Osun on the 4th December, 1992."

Briefly Put, the case of the plaintiff is that he bought a Toyota Liteace bus from the defendant on a credit - sale basis at N250,000.00, for which he made an initial payment of N20,000.00 as deposit in April 1992, and N2,000.00 in June, 1992. The plaintiff was to make monthly payments until the whole sum was liquidated and after making a total payment of N39,000.00 he could not meet up with the monthly payments.

Consequently, the defendant forcibly recovered the keys of the vehicle.

When the plaintiff took the sum of N12,000.00 to the defendant, he was told that the vehicle had already been sold to another person. According to the plaintiff, the sale was irregular, illegal and unlawful.

The case of the defendant is that the plaintiff took on hire a Toyota Liteace bus vehicle under a hire purchase agreement executed in June 1992.

The plaintiff made the initial payment of N22,000.00, and he was to make a regular monthly payment of N6,000.00 which he failed to meet. On the basis of the agreement there was an outstanding balance of N12,330.00 as at 8th November, 1992 when the plaintiff informed the defendant that the engine of the vehicle had broken down. The defendant proposed repairing the vehicle and thus increasing the monthly payment, but the plaintiff refused. On 10th December, 1992, the plaintiff's friend one Lasisi Liasu returned the vehicle to the defendant on the instruction of the plaintiff, and as at

that date there was an outstanding balance of N18,330.00 on the payments, for which demand was made vide a solicitor's letter. The defendant effected repairs on the vehicle at a cost of N10,300.00.

The plaintiff and defendant testified in court. The learned trial judge found the plaintiff's case proved and made the following orders in favour of the plaintiff:-

"(1) The defendant is hereby ordered to pay the plaintiff the sum of N300,000.00 (Three hundred thousand naira) being the current market value of the Toyota Liteace bus with registration No. OS 68 GA Chassis No. 0019483 which the plaintiff bought on credit from the defendant, but which the defendant unlawfully seized from the plaintiff at Ifon-Osun on the 4th day of December, 1992.

(2) The defendant is hereby ordered to pay the plaintiff the sum of N293, 000.00 (Two hundred and ninety three thousand naira being for loss of use of the vehicle from 4-12-92 at N500.00 per day until today 12-7-94.

(3) The sum of N30,000.00 (Thirty thousand naira general damages) is awarded in favour of the plaintiff against the defendant."

The defendant was dissatisfied with the decision, so he appealed to the Court of Appeal, Ibadan Division, which allowed the appeal in part. The defendant has again appealed to this court on four grounds of appeal. As is the practice in this court learned counsel exchanged briefs of argument which were adopted at the hearing of the appeal. The following issues for determination were distilled from the grounds of appeal, and they are contained in the appellant's brief of argument. They are:-

"1. Whether the learned Justices of the Court of Appeal were right in law to have held that there appears to be no consensus in the minds of the parties at the time of the transaction.

2. Whether the learned Justices of the Court of Appeal were right in law when they held Exhibit 'A' was not a valid Hire Purchase Agreement but that of a credit sale having regard to the evidence.

3. Whether the learned Justice's of the Court of Appeal were right in their award of the sum of N250,000 to the Respondent as the sale value of the vehicle.

4. Whether the learned Justices of the Court of Appeal were right to award special damages in favour of the respondent which was not predicated on any evidence as required by law.

I will treat issues (1) and (2) together.

The learned counsel for the respondent adopted the appellant's issues for determination in the respondent's brief of argument.

The argument of the learned counsel for the appellant under issue (1) is that exhibit 'A' which is the basis of the agreement between the parties was clear in all the terms, and that where the agreement is clear and unambiguous, it is the duty of the court to give effect to the agreement and not to attempt to write agreement for the parties. He referred to the case of *Alhaji Onibudo v. Alhaji Akibu* 1972 7 SC 60. The excerpt of the judgment of the lower court attacked by the appellant in this argument is as follows:-

"In this instant appeal, it appears that there is no consensus of the minds of the parties at the time of the transaction."

It is also the argument of the learned counsel for the appellant that nowhere in the pleading or evidence or oral argument of both counsels was consensus of the parties mentioned. The learned counsel further argued that the duty of the court is to confine itself to the evidence before it and not to embark on voyage of discovery. In the circumstance it was wrong for the court to raise the issue suo moto. He placed reliance to the cases of *Pascutto v. Adcentro (Nig.) Ltd.* 1997 11 NWLR part 529 page 467, *Adebanjo v. Brown* 1990 3 NWLR part 141 page 661, and *Chugbo Chemists Ltd v. Chugbo* 1996 5 NWLR part 447 page 246. It is also argued that where agreement between parties is clear and unambiguous, the duty of the court is to enforce the agreement. See the case of *Oviasu v. Oviasu* 1973 8 N.S.C.C. 502.

In his reply, the learned counsel for the respondent has submitted that the minds of the parties before the trial court did not meet on the fundamental basis of the contract they entered. The meeting of the minds is called 'consensus ad idem'. He cited the cases of *Nigerian Bank for Commerce and Industries v. Integrated Gas (Nig.) Ltd* 1998 8 NWLR part 613 page 119, and *Norwich Union Fire Insurance Society v. Price* 1943 AC 455. He submitted that where the meeting of the minds is lacking, the contract becomes unenforceable, for while the respondent had a mindset that he bought the Toyota bus on credit, the appellant thought he gave out the bus on hire purchase. It was further submitted that no case was made for the parties other than those presented, so the cases of *Ochonma v.*

Unosi 1965 N.M.L.R. 321 and Chugbo v. Chugbo supra are inapplicable, and the admission of exhibit A does not confer the existence of consensus ad idem on the contract of the parties.

On issue (2) the argument of the learned counsel for the appellant is hinged on the content and the validity of Exhibit 'A', a document which he says is clear and unambiguous; and so it was the duty of the court to enforce. B

In the argument, the learned counsel attacked an excerpt of the judgment of the lower court, which reads thus:-

"In the instant appeal, exhibit A between the parties shows the defendant did not advert his mind to the necessary clause of transfer of title to the purchaser upon completion of payment of instalment in a hire purchase agreement and the plaintiff believed that he bought the vehicle on a credit sale with instalment payment of the balance of sale price. This happened when the Plaintiff/Respondent paid N22,000 to the Defendant/Appellant out of the sale price of N250,000 for the liteace vehicle. The respondent carried out repairs on the said vehicle because he believed the vehicle is his own." C D

The learned counsel for the appellant submitted that the court below was wrong to have held that the defendant did not advert his mind to the necessary clause of transfer of title to the purchaser upon completion of instalment, and by so doing re-wrote the agreement of the parties by raising issues that were not raised by the parties. Reliance was placed on the cases of Pascutto v. Adecentro (Nig.) Ltd supra, Adunukwe v. Adebajo 1999 4 NWLR part 593 page 317 and Samson Ochonma v. Unosi supra. The conditions required for an agreement to qualify as a hire purchase agreement are stated in the appellant's brief of argument as:- E F

"(a) The person giving out the goods must be the owner and the transaction must be in writing. G

(b) Owner's right to hire rentals due under the hire purchase agreement.

(c) The right of repossession of the goods, upon breach of the term of hire purchase agreement." H

Finally, it was submitted that from the facts of this case and the testimonies of the respondent it is clear that the agreement is that of hire purchase and not credit sale as erroneously held by the court below.

In reply to the above submissions, the respondent's counsel submitted that an agreement does not simpliciter become a hire purchase agreement just because it is so headed or called. The test of whether the agreement is a hire purchase agreement or not is whether the so called hirer has an option of determining the contract or of purchasing the chattel after completion of the instalment payments. Halsbury's laws of England was referred to, and so was Section 2(1) of the Hire Purchase Act (Cap 169) Laws of the Federation of Nigeria 1990 which provides as follows:-

"Before any hire purchase agreement is entered into in respect of any goods, the owner shall state in writing to the prospective hirer otherwise than in the note or memorandum of the agreement, a price at which the goods may be purchased by him for cash (in this section referred to as the "cash price")"

It was argued that the lower court neither made a case for the party nor rewrote the parties' agreement, and that exhibit A ran foul of the provisions of the hire purchase Act supra. What the court did was to consider both parties evidence vis-a-vis the contents of exhibit A in reaching its decision.

The learned counsel referred to the three requirements of a valid hire purchase agreement stated by the learned counsel for the appellant and submitted that those requirements apply only where the transaction forms the parties' intention and agreement.

Now, what did the plaintiff plead in respect of this agreement and the claim? I will reproduce the relevant averments in the pleadings and the evidence in their proof.

"3. Sometimes in April, 1992 or thereabout, the plaintiff paid the sum of twenty thousand Naira (N20,000.00) to the defendant as deposit for the supply of a Toyota Liteace bus to the plaintiff by the defendant.

4. The plaintiff made a further payment of the sum of two thousand Naira (N2,000.00) to the defendant on or about the 3rd day of June, 1992 and the defendant delivered possession of a Toyota Liteace bus with registration No. OS 68 GA and chassis No. 0019483 (hereinafter called "The Vehicle" to the plaintiff.

5. The arrangement between the plaintiff and the defendant was that of credit - sale wherein the vehicle is sold to the plaintiff at two hundred and fifty thousand Naira (N250, 000.00) and the plaintiff

is required to make monthly payments to the defendant on or before the 8th of every month until the whole debt is liquidated.

6. The plaintiff made payments totalling thirty-nine thousand Naira (N39,000.00) to the defendant leaving a balance of two hundred and eleven thousand Naira (N211,000.00) to be paid to the defendant under the credit sale agreement.” B

In his statement of defence the defendant averred thus:-

“5. Under a Hire Purchase agreement executed at Ifon-Osun on or about 3rd June , 1992, by the defendant as owner of the first part and the plaintiff as Hirer on the second part, the plaintiff took on hire with an option to purchase the defendant Toyota Liteace bus Motor vehicle with Diesel engine, chassis No. 0019483 and registration No. OS 68 GA for a hire purchase price of N250,000.00. C

6. Under the terms of the said hire purchase agreement the plaintiff was requested to make an initial deposit of N22,000.00 D (twenty-two thousand Naira before collecting the said motor vehicle and thereafter to make thirty-eight (38) regular and consecutive monthly instalment payments of N6,000.00 (six thousand Naira) from 8th July, 1992 in order to complete payment of the total purchase price on 8th August 1995, or thereabout (the hire purchase agreement is hereby pleaded).” E

The plaintiff’s evidence in chief reads:-

“I bought a vehicle from the defendant sometimes in June 1992 and paid part of the money and it was agreed that the balance F would be paid by instalment. The defendant thereafter seized the vehicle from me and deflated my tyres. I begged him but he insisted that I should first and foremost pay the instalment for November and December 1992.”

Under cross examination the plaintiff said:- G

“Myself and the defendant entered into an agreement in respect of a vehicle. The total cost of the vehicle is N250,000.00. What we agreed upon was that I would pay the balance on the vehicle by instalments but not on a particular amount. I have a guarantor. It was not part of my agreement with the defendant to pay N6,000.00 H monthly until the balance on the vehicle is liquidated. The vehicle was given to me in June 1992. In July, I paid N4,670.00 to the defendant. On 8th day of August 1992, I also took N6,000.00 to the defendant but he told me that he deducted N2,000.00 from the

money leaving N4,000.00.

On 8-9 -92, I paid N3,000.00 to the defendant.

On 8-10-92 I paid N6,000.00 to the defendant (sic) I said earlier on that my net income was N500.00 therefore my income per month will be N15,000.00".

B The defendant's testimony in chief reads as follows:-

"...bought the vehicle on hire purchase terms. He paid N22,000.00 deposit. The plaintiff promised to be paying me N6,000.00 monthly. There is an agreement to that effect that the plaintiff will be paying on the 8th day of every month..."

C In October, 1992 the plaintiff paid only N6,000.00. The Plaintiff did not pay the November 1992 instalment. The plaintiff came on 8/12/92 and informed me that he had no money and I told him to bring the vehicle."

D **The above pieces of evidence, particularly the aspect of the instalment of N6,000.00 were neither challenged nor debunked in the course of cross examination.**

E **It is trite law that evidence of a fact that is not in dispute and that is relevant to a matter in controversy is good and credible evidence that can be relied upon for the determination of the issue in controversy.** (See

Omoregbe v. Lawani 1980 3 - 4 SC. 108, Okupe v. Ifemembi 1974 3 SC. 97, and Durosaro v. Ayorinde 2005 8 NWLR part 927 page 407.)

F The principle of hire purchase contract as contained in Halbury's laws of England 1st Edition Volume 1 page 554 states thus:-

G "The contract of hire-purchase, or even more accurately the contract of hire with an option to purchase is one under which the owner of a chattel lets it out on hire and undertakes to sell it to or that it shall become the property of the hirer conditionally on his making a certain number of payments. Until the making however of the last payment, no property in the chattel passes where the contract between the parties amounts to an absolute agreement to sell and buy, H whether the instrument be called a hire purchase agreement or not, the property in the chattel passes upon delivery, provided that such was the intention of the parties..."

The difference between a contract of sale at a price payable by instalment and a contract of hire purchase is that in the former, the

purchaser has no option of terminating the contract and returning the chattel, whereas in the latter there is none. In each case, the substance of the transaction or the agreement must be looked at and not the mere words."

A careful consideration of the above principle, the provisions of the Hire purchase act, together with the requirements expected to be complied with, vis-a-vis the contents of exhibit 'A', one will find that it negates a valid hire purchase agreement. The learned trial judge found exhibit 'A' not to contain an option to purchase, and that the plaintiff was not given cash price for which the vehicle may be purchased. In the end he found exhibit 'A' not to be a valid hire purchase agreement thus:-

"In the circumstance, it is my view that Exhibit 'A' is not valid hire purchase agreement enforcement (sic) against the plaintiff. The relationship between the plaintiff and the defendant therefore is, that, whereby the plaintiff is expected to pay for the vehicle by instalments i.e. credit also (sic). And in that case the ownership and possession have passed to the plaintiff."

The court below agreed with the trial court, for in its judgment it posited inter alia thus : -

"I have held above, that the transaction between the defendant/appellant and the plaintiff/respondent is one of a credit sale of the vehicle to the respondent where the title in the vehicle passed to the respondent upon the payment of N22,000.00 out of N250,000.00 which sum the appellant received."

The pertinent question I would like to ask at this juncture is, if exhibit 'A' was found to be invalid, and consequently not enforceable, then what did the court base its decision on, on the nature of the agreement between the parties? It is important that this question be asked and answered because no any other written agreement exists in the record of proceedings. No such document was tendered and admitted in evidence. Chitty on contracts general principles, volume 1, page 6, paragraph 1004 captured a situation as the one existing in this case and the general concept of agreement in the following words:-

"Moreover, even though it is true that the existence of an agreement is in the vast majority of cases, a condition for the existence of a contract not contained in a deed, this statement ought to be treated

with some caution. First, the existence of an agreement is not an issue merely of fact, to be found by a psychological investigation of the parties at the time of its alleged origin. English law takes an “objective” rather than a “subjective” view of the existence of agreement and so its starting point is the manifestation of mutual assent by two or more persons to one another. Agreement is not a mental state but an act, and as an act, is a matter of inference from conduct. The parties are to be judged, not by what is in their minds, but by what they have said or written or done.”

C Underlining is mine.

It is as though Ojage JCA had the underlined above in mind when he found as he did in the excerpts of the judgment reproduced above. If that was the position and that was the course the lower court adopted in determining the nature of the agreement, there should have been proper evaluation of the evidence to arrive at a just conclusion of the case, after it had decided that it was a credit sale agreement, which I will deal with before coming back to the evidence. In the case of *Yakassai v. Incar Motors (Nig.) Ltd* 1975 N.S.C.C. 284 which facts are virtually on all fours with the instant case, (in that the vehicle in controversy was seized by the owner on default of instalment payments after an outright sale), the Supreme Court after a thorough consideration of the facts of the case, the addresses of learned counsel, and the principles enunciated in the case of *Kofi v. Mensah* 1 W.A.C.A. 76 pronounced as follows:-

“We are in no doubt whatsoever that the facts of this case show clearly that the vehicle was sold outright by the defendants to the plaintiff ever before the defendants effected the seizure which is the subject matter of this action. That being so, we think that the respondents in the present case acted wrongly when they seized the vehicle as they did. The difference between an outright sale and a Hire Purchase Agreement is that in the former, the property in the vehicle passes to the purchaser as soon as the contract is entered into, whereas in Hire Purchase Agreement, the property in the vehicle still remains vested in the owner until payment is fully made. In other words, under a Hire Purchase Agreement it is always open to the owner of a vehicle to take possession of it on failure of the hirer to pay the instalments. In an outright sale, the seller’s remedy lies in an action to recover the balance of payment owed by the purchaser.”

I am guided by the above principle.

Now, back to the evidence before the learned trial court which forms the basis of its findings on the nature of the transaction between the parties, and the legality of the sale of the vehicle. As I have said earlier on, having disqualified exhibit 'A', as a hire purchase agreement, and without an alternative agreement, what was left was the evidence before the court. In the face of the evidence of the payment of deposit and instalment payments which were not in issue, and the reproduced principles of law enunciated in the authorities above, I am satisfied with the observation of the court below which reads thus-

"In determining the status of exhibit A, therefore in issue one of both parties, and issue 2 of both parties and to determine whether the seizure of the said vehicle is lawful as questioned in the brief of the respondent, it is necessary to see whether the evaluation of evidence made by the court below is right. It is not the function of the court to re-write the contract for the parties. See Union Bank of Nigeria vs. SAX NIG. LTD (1994) 9 SCNJ at 13, but where the intention as expressed in the transaction, a legal interpretation of the nature of the agreement between the parties under the law, will be pronounced by the court."

The above observation confirms that the court had recourse to the evidence before the lower court and at the end found and confirmed the nature of the transaction, as it did in its judgment. There was a proper evaluation of that aspect of the evidence, as it does actually conform with the transaction of credit sale i.e. there was an undisputed payment of deposit, and instalment payments, (which even though the exact amounts were not ascertained) was still by instalment.

In its judgment the court below reiterated its finding thus:-

"I have held above, that the transaction between the defendant/appellant and the plaintiff/respondent is one of a credit sale of the vehicle to the respondent where the title in the vehicle passed to the respondent upon the payment by the respondent of part payment of N22,000.00 out of N250,000.00 which sum the appellant received."

It was the case of the plaintiff/respondent that the litem was seized by the defendant/appellant, whereas, the defendant asserted

that it was the respondent who brought the vehicle to him. In paragraph (7) and (8) of his statement of claim, the respondent averred the seizure of the vehicle by the appellant, and the appellant made his own assertion in paragraph (14) of his statement of defence, to wit the plaintiff averred in paragraph (3) of the reply to the statement of defence as follows:-

“3. The plaintiff denies that he voluntarily released the vehicle to the defendant either by himself or through any one and shall at the hearing contend that by the defendant’s solicitors letter dated 12-12-92, the defendant is estopped from denying the fact that he seized the vehicle from the plaintiff.”

Are the averments supported by credible evidence? It is on record that the plaintiff by his evidence already reproduced supra proved his averments that the vehicle was seized by the appellant, as is corroborated by the content of the appellant’s solicitor’s letter addressed to the respondent dated 10th December 1992, a pertinent excerpt of which reads:-

“We are further informed that you have damaged the said motor vehicle and yet you refused to pay as a result of which the vehicle was seized from you on 10/12/92.”

I think the above, coming from the appellant closes and seals the fact that the liteace bus was actually seized by the appellant, which he had no right to do under the seemingly credit sale transaction which existed between them. That the respondent breached the instalment payment agreement is neither in doubt nor in dispute, but the remedy opened to the appellant would have been to sue for the recovery of the balance of the purchase price, and not to go to the extent of seizing and ultimately selling the vehicle. (See Yakassai v. Incar, and Kofi v. Mensah supra.)

In the light of the above discussions, I resolve issues (1) and (2) in favour of the respondents, and dismiss the grounds of appeal which cover them.

I will now proceed to issue (3). It is the contention of the learned counsel for the appellant that the value of the vehicle had depreciated, and the failure of the lower court to have regard to the depreciating value of the seized vehicle was a poor evaluation of evidence. This court has been called upon to perform the function of evalua-

tion of evidence on the depreciating value of the vehicle, as according to learned counsel, the learned trial judge failed in his duty to do so. Reliance was placed on the cases of Chief S. O. Awoyoolu v. Sufianu Yusuf Aro 2006 4 NWLR part 971 page 481, Kamaldeem Fagbenro v. Gani Arobadi 2006 7 NWLR part 978 page 172, Chief Falade Onisaodu v. Chief Asunmo Elewuju 2006 13 NWLR part 998 page 517, and Zenon Petroleum & Gas Ltd. v. Idrisiyya Nig. Ltd. 2006 8 NWLR part 982 page 221. B

The learned counsel for the respondent submitted that the court below rightly granted the sum of N250,000.00 to the respondent which was a reduction from the sum of N300,000.00 granted by the trial court, and that was the product of re-evaluation of the evidence before the trial court. It was argued that the respondent was entitled to the award as special damages as awarded by the court below following its interference with the judgment of the trial court. On the purport of a claim for special damages, the cases of Ijebu Ode Local Government v. Balogun 1991 NWLR part 166 page 136, and Obasuyi v. Business Ventures Ltd 2000 FWLR part 101722 on the need to plead and strictly prove special damages, were cited. C

It may well be that the court below re-evaluated the evidence before the trial court. It is however imperative that I perform the same exercise, to meet the submission of the appellant, as I am convinced that the exercise may be necessary to satisfy the cause of justice. I will start with the consideration of the pleadings. In his statement of claim, the plaintiff pleaded the current market value of the vehicle (which he is claiming as an alternative to the return of the liteace bus) as N300,000.00. It is obvious that the claim was for special damages, which requires to be specifically pleaded and strictly proved with sufficient and credible evidence. (See Oshinjirin and ors. v. Alhaji Elias & ors 1970 1 All NLR 153, Dumez (Nig) Ltd v. Ogbeli 1972 1 all NLR 241, and Gonzee (Nig.) Ltd v. NERDC 2005 13 NWLR part 943 page 634.) E

The record of proceedings before us does not manifest such evidence. The only evidence in respect of the value of the vehicle is that which the plaintiff said was the total cost of the vehicle under cross examination, and which the defendant said represented the hire purchase price, in the course of cross F

examination. As a matter of fact, the plaintiff did not testify in respect of this claim of N300,000.00 on special damages, this amount of N250,000.00 only emerged in the course of cross examination, and this was qualified with the word 'total', as can be seen on page 10 of the printed record of proceedings
B *from line 14. When the word total is used in respect of any amount, it signifies that many figures are taken into account before arriving at an amount which is then described as 'total'. The pertinent question is, were there other costs added*
C *to the actual cost of the vehicle that made the total cost N250,000.00? The answer is left blowing in the wind, so to speak. Definitely, the plaintiff did not prove the special damages as an alternative to the return of the Toyota liteace bus. Perhaps, if the plaintiff had sought the aid of a car dealer vide*
D *his testimony on the value of such a vehicle, it would have added value to his claim. However, the relief for the return of the vehicle still stands. As the grant of the relief is not feasible, (in the light of the evidence before the court that the vehicle had already been sold by the defendant), what was opened*
E *to the learned trial court was to have evaluated the other pieces of evidence in relation to the age and condition of the vehicle in respect of the issue under discussion. There was the evidence that the respondent was in possession of the vehicle from June 1992 till December 1992, and the evidence that*
F *the appellant expended money on the repair of the vehicle, a piece of evidence that was buttressed by the plaintiff's evidence on the problems the vehicle had before it was seized. I am of the view that the court below should have considered*
G *those evidence closely before arriving at the value of the vehicle and the damages to award. In my own appraisal and calculation, the award of N250,000.00 was wrong, as other factors should have been taken into consideration. It was not as though the vehicle had not been used by the plaintiff. Evidence*
H *abound that he used it for six months during which the vehicle broke down.*

The court below therefore erred when it held thus:-

"The sum pleaded as the value of the vehicle on which evidence is given is N250,000.00 which sum I award in lieu of

the return to the respondent on the said vehicle.”

In the circumstance of this case and the evidence, I assess the damages to be awarded at N150,000.00. This award will meet the justice of the case.

I resolve issue (3) in favour of the appellant, and allow the appeal on the related ground of appeal. B

On the last issue for determination, it was argued that the award of N293,000.00 constituted special damages stemming from loss of use of the Toyota liteace vehicle, which was supposed to be set out and particularized in the claim, and to be supported by credible evidence. The learned counsel for the appellant has submitted that the N500 per day net income as alleged and awarded failed to take into cognizance Saturday/Sundays and other days when the vehicle may be taken for service etc. Reliance was placed on the cases of Brigadier General B. A. M. Adekunle (Rtd.) v. Rockview Hotel Ltd. 2004 1 D NWLR part 853 page 161 Christopher U. Nwonji v. Coastal Services (Nig.) Ltd. 2004 11 NWLR part 885 page 552., and Neka B.B.B. Manufacturing Co. Ltd v. African Continental Bank Ltd 2004 2 NWLR part 858 page 521. C

The learned counsel for the respondent has argued that the respondent pleaded the loss of use and strictly proved the claim. He placed reliance on the cases of Udinaka v. Moghalu 1992 4 NWLR part 233 page 1, and Nwanji v. Coastal Services (Nig.) Ltd. supra. It is a fact that the respondent pleaded that he made an income of N500.00 when he was using the vehicle. His evidence in support of that claim was:- E

“The vehicle was plying Abuja to Suleja. My daily income is N500.00 after deducting money for fuel and food.”

Under cross examination, the respondent testified thus:- F

“Things like tyres repair of vehicle etc were taken care of from my income.” G

It is manifestly clear from the latter piece of evidence that even repairs of the vehicle and other related matters came from the net income. This aspect of the claim and evidence should have been considered by the courts below. Another important factor the courts should have taken into account is the impossibility of the use of the vehicle every blessed day without ceasing for over 18 months. Is it possible that if the H

respondent was in possession of the vehicle he would have been plying Suleja/Abuja every single day through the week and months, without rest? It is not feasible.

There must be days for rest, days for repairs and service of the vehicle, and days for some family and social engagements which will require the attention of the respondent. To do the calculation of the loss of use without adverting to these human vagaries that may occur from time to time, and which may prevent the respondent from earning the said N500.00 net income daily is a grave omission. Then there is this aspect of the amount the respondent was paying the appellant by instalment for the few months he made the payments. There was the payment of N4,670.00, N6,000.00 and N3,000.00 per month. What I find worrisome is, if the respondent was earning N15,000.00 net income per month, why should a monthly payment of over the above amounts be impossible for him, and why should he be able to pay only a meager N3,000.00 in a whole month? I think it is inconceivable that the net income of the respondent was N500.00 daily. If the lower courts took all the above factors into account they would not have accepted the evidence of the respondent, and based their award on it. A court in evaluating evidence must take into consideration every little aspect of it, and the surrounding factors. It is not for the judge to accept evidence hook, line, and sinker without weighing its preponderance and probability.

The law is settled that civil suits are determined on preponderance of evidence and balance of probability. (See *Shittu v. Fashawe* 2005 14 NWLR part 946 page 671, *Elias v. Omo-Bare* 1982 5 SC. 25, and *Odulaja v. Haddad* 1973 11 SC. 357.)

As courts of justice they should have given careful consideration to the overall evidence before them and the claim as a whole.

The learned justice in the lower court was therefore in error when he made the following finding in his lead judgment:-

“The sum of N293,000.00 claimed and awarded by the court in favour of the plaintiff/respondent (sic). The award of N293,000.00 to the respondent arose from the delict (sic) of the defendant/appellant who by the unlawful seizure of the liteace vehicle which had

become the property of the plaintiff/respondent denied the respondent of the use and income shown to accrue to the respondent per day. The award is legitimate and I find no reason to defer from it. I affirm the award."

I find it difficult to agree with the above finding, and so have reason to defer from it. I therefore dismiss the claim as it has not been proved. It is a well grounded principle of law that an appellate court will review an award of damages downwards where it finds it excessive or not in accordance with the principle of law. (See Stirling Civil Eng. (Nig.) Ltd. v. Yahaya 2005 11 NWLR part 935 page 181, Otaru and Sons Ltd. v. Audu Idris 1999 6 NWLR part 606 page 330, and Jarmakani Transport v. Abeke 1963 1 All N.L.R. 180.)

It is also a cardinal principle of law that even though an appellate court will not ordinarily interfere with findings of a lower court, it behoves an appellate court to interfere with the findings where they are not supported by credible evidence, are perverse and may have occasioned miscarriage of justice. (See Amadi v. Orisakwe 2005 7 NWLR part 924 page 385 Shittu v. Fashawe supra, and State v. Ajie 2000 11 NWLR part 678 page 434.)

In the light of the above discussion I resolve this issue in favour of the appellant, and allow its related ground of appeal.

In the final analysis, the appeal succeeds in part, and it is allowed in part. I make no order as to costs.

ONNOGHEN JSC

I have had the benefit of reading in draft the lead judgment of my learned brother MUKHTAR, JSC just delivered.

I agree with the reasoning and conclusion that the appeal be allowed in part and I order accordingly and abide by the consequential orders made in the said lead judgment including the order as to costs.

Appeal allowed in part.

FABIYI JSC

I have read before now the judgment just delivered by my learned brother, Mukhtar, JSC.

I agree with the reasons therein advanced to arrive at the conclusion that the appeal should be allowed in part. I order accordingly. I too, make no order on costs.

RHODES-VIVOUR JSC

C I have had the privilege of reading in draft the leading judgment delivered by my learned brother Mukhtar, JSC. I agree with the judgment and allow the appeal in part.

The fundamental issue for decision is the nature of the transaction between the parties. The plaintiff/respondent's case is that it was a credit sale agreement for the purchase of the vehicle, while the defendant/appellant says it was a hire purchase agreement.

In a credit sale agreement for the purchase of a vehicle, the buyer, i.e. the plaintiff/respondent pays a deposit, followed by instalment payments. Once the agreement is entered into by the parties, ownership of the vehicle is transferred to the buyer. If the buyer defaults or is unable to meet his financial obligations to the seller, the option open to the seller is an action to recover the balance of payment owed by the buyer/purchaser.

F On the other hand, in a hire purchase agreement ownership of the vehicle remains with the seller until payment is fully made.

Failure of the buyer/hirer to pay the instalments, the owner is at liberty to take possession of the vehicle. (See *Yakassai v. Incar* 1975 5 SC pg. 107)

G The facts of this case show that the vehicle was sold on a credit sale agreement as correctly found by the Court of Appeal. The seizure of the vehicle by the seller (i.e. the appellant) was wrong since ownership had passed to the buyer (the respondent) when the contract was entered into by them. That explains the liability of the appellant in this appeal.

H For this, and the much fuller reasoning in the leading judgment the appeal succeeds.