Natesa Aiyar And Ors. vs Appavu Padayachi on 21 September, 1908

Equivalent citations: (1910)20MLJ230

JUDGMENT

Wailis, J.

1. This was a suit by the purchaser against the vendor for specific performance of a contract for the sale of immovable property and in the alternative for the return of the deposit of Rs. 4,000 paid by the purchaser. The purchaser failed to complete within the stipulated time, and the lower Court, finding that time was of the essence of the contract and that the defendant exercised his option of avoiding the contract under Section 55 of the Indian Contract Act on the plaintiffs failure to complete, refused to give the plaintiff specific performance but ordered the defendant to return the deposit of Rs. 4,000 paid by the plaintiff at the time of executing the contract of sale, Exhibit A, although in such contract it is expressly stipulated that the amount was to be forfeited by the plaintiff in the event of his delaying to complete the contract by the 24th May 1903, and he admittedly so delayed. This express provision is overridden, in the opinion of the lower Court, by the provisions of Section 64 of the Indian Contract Act that when a person at whose option a contract is voidable rescinds it, he must restore, so far as may be, any benefit he has received under the contract to the other party.

2. The question was argued before us at considerable length. In expressing my own opinion I propose to deal in the first place with the provisions of the Indian Contract Act. Several cases as to the right to recover deposits have been decided in India since the passing of that Act, but in none of them has it been suggested that this question was affected by the provisions of Section 64 or any other section of the Act. As pointed out by the House of Lords in Soper v. Arnold (1889) 14 App. Cas. 429 the deposit is primarily a security or guarantee for the performance of the contract, and, as observed by Fry, Lord Justice, in Howe v. Smith (1884) 27 Ch. D. 89 at p. 101" creates by fear of its forfeiture a motive in the parties to perform the rest of the contract." If, however, the law will not allow the deposit to be forfeited, this motive ceases to operate and the deposit ceases to be a guarantee or security for the performance of the contract. The learned Lord Justice goes on to observe that "the practice of giving something to signify the conclusion of the contract, sometimes a sum of money, or sometimes a ring or other object, to be re-paid or re-delivered on the completion of the contract, appears to be one of great antiquity and of very general prevalence," and it would further appear from Colebrook's Digest, Vol. 2, page 77 that India may be added to the list of countries in which it prevailed. It was certainly, therefore, not to be anticipated that Section 64 should have the effect of enforcing the return of the deposit to the defaulting party, when, owing to his default, the other party puts an end to the contract, the very case the deposit was intended to meet. Section 64 provides that, where a person at whose option a contract is voidable rescinds it, the

rescinding party shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be to the person from whom it was received. Now a deposit regarded as a security or guarantee for the performance of a contract must be regarded as outside of and collateral to the main contract, although consisting of money. If the contract be performed it will go in part performance thereof, but it might equally be a ring or some other object which could not go in part performance and would have to be given back on completion of the contract. Where we have a contract and a guarantee for its performance, although they are included in the same instrument it does not seem to me necessary to hold that the provisions of Section 64 requiring the party avoiding the contract to restore any benefit he has received thereunder as far as may be, extend to a deposit regarded as a guaraniee. Even if a section of this kind applied in terms, it would, I think, be open to the parties on the principle quilibet protest renunciare juri pro se introducto to provide, as they have in this case provided, that the deposit should not be returned on the avoidance of the contract; but I prefer to base my judgment on the view that the section does not apply. The opposite construction contended for would involve a serious, not to say uncalled for, alteration in the law, and if the legislature had intended to make any such alteration, it would, I think, have made its intention clear by the use of express terms. I feel further strengthened in the view by the number of Indian cases as to deposit which have since been decided without reference to this section.

3. We have also been referred to Sections 73 and 74, but in my opinion, these sections deal with the right to recover compensation for breach of contract, and do not deal with the right of the defaulting party to recover back a deposit he has paid or with the right of the other party to retain it.

4. The distinctions drawn by Courts of Equity between stipulations for liquidated damages and stipulations for penalties have not, in my opinion, any bearing in this case. Ordinarily a deposit of this kind is not agreed on as liquidated damages but goes in reduction of damages. Of course the parties may agree that the deposit shall be treated as liquidated damages. In the next place Courts of Equity do not regard a stipulation for the forfeiture of a deposit as a stipulation for penalty from which Equity will relieve. In the case of Maniam Patter v. The Madras Railway Company (1905) I.L.R. 29 M. 118 to which my learned brother was a party, this Court accepted, and acted on this rule and dissented from the case of Srinivasa v. RatAnasabapathi (l892) I.L.R. M. 474 in which it had beep lost sight of, proceeding upon the authority of Wallis v. Smith (1882) 21 Ch. D 243 in which Sir George Jessel states the rule clearly as follows, at page 258 :--"There is a class of cases relating to the deposits. Where a deposit is to be forfeited for the breach of a number of stipulations some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases the Judges have held that this rule" (of treating the stipulation as a penalty) "does not apply, and that the bargain of the parties is to be carried out." The italics are mine. In the earliest case of In re Dagenham (Thames) Dock Co; Exparte Hulse (1873) 8 Ch Appeals 1022 which has been cited, a stipulation that half the purchase-money should be paid in advance and forfeited for any breach of the conditions was treated as a penalty, but the amount was so large as to take it out of the ordinary class of deposits, and it does not appear to have been treated as such and that is probably why Sir George Jessel did not think it necessary to refer to it as qualifying the rule laid down by him.

5. In the present case the price was Rs. 41,000 of which Rs. 4,000 was paid in advance and Rs. 20,000 was to be paid by means of a mortgage and the balance of Rs. 17,000 before the 24th May

next when the conveyance was to be executed, and if there was any delay on the part of the vendee the Rs. 4,000 was to be forfeited. The contract also contained a stipulation that the vendor was to execute the conveyance either in favour of the purchaser or of those pointed out by him. This last provision cannot mean that the purchaser had a right to make the vendor part with his land in parcels to third parties for an apportioned amount of the purchase money; its only effect was to oblige the vendor on payment of the purchase money to execute separate conveyances of different parcels of the land if the vendor so desired. Subsequently to the execution of the contract the purchaser introduced one Muniya Pillai to the vendor as willing to purchase a part of the land and on the 28th of March the vendor executed an agreement to sell the land to Muniya Pillai for Rs. 12,500, Exhibit D, and subsequently executed the sale deed, Exhibit E, in his favour. It is admitted it was agreed between the original vendor and the purchaser that this was to be treated as a part performance of the contract and a part payment of Rs. 12,500 under it, but I cannot see how this transaction can have the effect of converting the stipulation for the forfeiture of the deposit into a penalty or of relieving the purchaser from the terms of his contract. It is next contended that the plaintiff is entitled to recover on the authority of Howe v. Smith (1884) 27 Ch. D. 89 at p. 110. I am unable to accept that contention. It is found and is clear that in this case time was of the essence of the contract, and just before the day of payment the defendant gave notice to the plaintiff that if payment was not made within the stipulated time the contract would be avoided. After that it seems to me quite clear that the purchaser was not entitled either to a decree for specific performance or to recover damages against the defendant for breach of contract. If so, according to the test laid down by Fry L.J. in Howe v. Smith (1884) 27 Ch. D. 89 at p. 110 he also lost the right to the return of the deposit. Lord Justice Bowen treats the question as one to be determined by the intention of the parties expressed in the contract, and Cotton L.J. does not, in my opinion, lay down any different rule. That was a case in which, before the Judicature Act, according to the view of the Courts of Equity, time was not the essence of the contract. There was, I may observe, no express provision for forfeiture or non-payment of the purchase-money on the due date, and it was even provided that if not paid on the due date it should bear interest. On the Common Law side, however, time was regarded as of the essence of such contracts and the effect of the Judicature Act was to substitute the Equitable for the Common Law rule. As there time was not of the essence of the contract, in that case, the vendor was not entitled to rescind for mere non-payment on the appointed day; and even delay which might disentitle the purchaser to specific performance might not, in Lord Justice Cotton's opinion, in some circumstances be sufficient to entitle the vendor to retain the deposit; in such a case there must be something more which would amount to a repudiation by the purchaser, and entitle the vendor to treat the contract as rescinded and retain the deposit. This, however, is no authority, in my opinion, for the proposition that where time is of the essence of the contract and the vendor owing to non-payment is entitled to treat the contract as rescinded and does so, he is bound to return the deposit.

6. In re Scott and Alvareyy's Contract (1895) 2 Ch. 603 at p. 612, Lindley L.J. held that the Judicature Act made no difference as to the right of a purchaser to maintain a suit for the recovery of his deposit, which must still be governed by the terms of the contract. "It appears to me the purchaser would fail if he brought an action at law to recover his deposit; and I must say I think the case, Mr. Far-well has referred to, of Corral v. Cattell (1839) 4 M and W. 734 is decisive on that point. The legal answer is this: 'There is no breach of contract at all; you have taken your chance

with respect to your deposit; and unless you show a breach by the vendor of his bargain, you are not entitled to have that deposit back.' "It all comes back to this, that, as laid down by Sir George Jessel, stipulations for the forfeiture of deposits are not penalties and must be enforced according to the terms of the contract. As regards the case Jackson v. De Kade (1904) W.N. 168, which is not fully reported, it is sufficient to distinguish it from the present case, that in that case there was no condition for forfeiture of the deposit, and it is unnecessary to consider how it is to be reconciled with the case of Howe v. Smith (1884) 27 Ch. D. 89 at p. 101 especially as it was the case of a vendor who, after obtaining a decree for specific performance, came to the Court and asked for rescission.

7. As regards Indian cases, I have already referred to the case of Srinivasa v. Rathnasabapathy (1892) I.L.R. 16 M. 474 and the case of Maniam Patter v. The Madras Railway & Co. (1905) I.L.R. 29 M. 118 The case of Luchman Das v. Chaler (1887) I.L.R. 10 A. 29 was not a case of deposit. Bishan Chand v. Rada Kishan Das (1897) I.L.R. 19 A 89 and the case of Balvanta Appaji v. Bhatuar Bira (1897) I.L.R. 23 B. 56 are in accordance with the view taken in this judgment. I would, therefore, allow the appeal and dismiss the suit with costs throughout.

Sankaran Nair, J.

8. The question is whether the plaintiff is entitled to recover the deposit. The plaintiff agreed on the 24th of February 1903 (see Exhibit A) to purchase certain lands from the defendant for Rs. 41,000, "out of which" a sum of Rs. 4,000 was paid "as advance" on that date to the defendant. Rs. 17,000 was to be paid before the 24th of May. The defendant agreed on such payment to execute the sale-deed; and for the balance of Rs. 20,000 the plaintiff undertook to execute a bond hypothecating these properties to the defendant. The plaintiff was to forfeit the above said amount of advance if he failed to pay before that date and obtain the sale-deed. If there was a delay on the part of the defendant to execute the sale-deed "be fore the due date," he was to return the deposit with an additional sum of Rs. 4,000. The plaintiff now claims specific performance or the return of the deposit. The claim for specific performance is disallowed by the Subordinate Judge as he held that time was of the essence of the contract and the defendant was, therefore, entitled to rescind the contract on the expiry of the stipulated time and that he rescinded it. The claim for the return of the deposit has been allowed. The defendant appeals.

9. It is admitted that the plaintiff entered into the contract not for purchasing the properties for himself but for selling the lands piece-meal at a profit to third parties. He was to introduce intending purchasers to the defendant and the agreement of the 24th February 1903, provided that the defendant was to execute the conveyances in their favour. On the 28th March 1903, the defendant agreed to sell (Exhibit D) to one Muruga Pillai, some of the lauds in Exh. A for Rs. 12,500 of which Rs. 3,000 was then paid. Rs. 4,000 was to be paid on the 31st May 1903, when the defendant was to execute the conveyance, and the rest was to be paid in two years. On the 30th May the sale-deed was executed. On 15th May the defendant warned the plaintiff that there was only one week more for the expiry of the time under (A) and that the transaction must be concluded before that date. The sale not having been effected on the 24th, or the 25th, the defendant rescinded the contract and informed the plaintiff that he had forfeited the deposit. On the 22nd July the defendant sold some lands Rs. 20,600 (H) to one Aghorappier and on the 5th August some other lands for Rs. 12,500 (F)

to one Muthukumara Pillai and there was also a subsequent sale for Rs. 200 to another person. In addition to the deposit the defendant has, therefore, realised Rs. 45,200.

10. It is admitted that the sale to Muruga Pillai under D and E was in pursuance of the contract. It is found by the Subordinate Judge, and we agree with him in that finding, that the subsequent sales were not in performance of the original agreement (A). He also finds that though the subsequent sales were not brought about by the plaintiff on account of the defendants' rescission of the contract "he did something in the way of recommending the purchases by those vendees;" and he further found "it cannot be said in these circumstances that plaintiff has wholly and absolutely failed to carry out his part of the agreement."

11. It is not in fact contended that the defendant has actually sustained any damage by reason of the breach of contract by the plaintiff or by its rescission by the defendant. He does not claim any damages. The only question, therefore, for consideration is whether the defendant is not entitled to retain the deposit under the terms of the contract.

12. It appears to me that the English cases lay down the rule that to forfeit the deposit it must appear that not only has the contract not been performed within the time specified, but the defaulting party has no intention of performing the contract or that he repudiates it; and that where the vendor rescinds it before the purchaser abandons or repudiates the contract, he is not entitled to retain the deposit--see Howe v. Smith (1884) 27 Ch. D. 89 at p. 101 Cotton L.J. says: "There must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance but which would make this amount to a repudiation on his part of the contract." Bowen L.J. says: "It is obvious that the party may lose his right to insist on specific performance before an equitable tribunal without at the same time having necessarily so acted as to justify the other side in saying that the contract is altogether at an end. We have to look to the conduct of the parties and to the contract itself, and, putting the two things together, to see whether the purchaser has acted not merely so as to break his contract but to entitle the other side to say he has repudiated and no longer stands by it."

13. So, Fry, L.J., referring to the 25th section of the Judicature Act of 1873, says: "The effect of this clause is, in my opinion, that the purchaser seeking damages is no longer obliged to prove his willingness and readiness to complete on the day named, but may still recover if he can prove such readiness and willingness within a reasonable time after the stipulated day. If before the lapse of such reasonable time or repudiation by the purchaser the vendor rescinds the contract he cannot retain the deposit."

14. Thus in Sugden's Vendors and Purchasers, 14th Edition, page 22, "a stipulation in a contract that in case the vendor cannot deduce a good title or if the purchaser cannnot pay the money on the appointed day, the agreement shall be void, does not enable either party to avoid the agreement by refusing to perform his part of it; the seller may avoid the contract if the purchaser do not pay the money. And if he, the vendor, insist that he has the right to rescind the contract, he cannot at the same time retain the deposit"--Morley v. Cook (1812) Hare 110. 111. So in Fry on Specific Performance, 3rd Edition, Section 1487, it is stated that the vendor is entitled to retain the deposit

"where the purchaser unjustifiably repudiates the contract or it in any other way goes off through his default." Neither under the Indian Contract Act nor in English Law, as pointed out by Fry L.J., in the extract from his judgment already quoted, does the contract go off merely by non-payment before the stipulated time. So the two conditions are: (1) the contract must go off, and (2) going off must be due to the purchaser's default, which must be something else than nonpayment. Farwell J., in Jackson v. Dekadie (1904) W.N. 168 also was of opinion that the vendor cannot have rescission and at the same time damages for the breach of the contract. In Howe v. Smith (1881) 27 Ch. P. 89 and the other cases, there was either abandonment or repudiation of the contract by the purchaser before the vendor sold the lands.

15. It is clear, therefore, the defendant is not entitled to retain the deposit, because the plaintiff never abandoned the contract or repudiated it, and the defendant rescinded it on the 25th May though the plaintiff was entitled to perform the contract within a reasonable time after the 24th. Moreover, the plaintiff's conduct, it is found by the Subordinate Judge, shows his willingness to carry out his promise after that date. In all the cases cited where a party has been allowed to retain the deposit, the other party has failed to perform the contract within a reasonable time after the stipulated time or has by his conduct shown that he has refused to perform the contract and repudiated it.

16. The breach of the contract, the failure to perform on or before the specified date, clearly entitles the defendant to compensation under Sections 73 and 74 but the contract still subsists and the question whether the deposit is forfeited cannot arise till the determination of the contract.

17. The appeal, in my opinion, fails on this ground.

18. Again, if we have to decide this case with reference to the ordinary rules which distinguish in English Law a penalty from liquidated damages, then it appears to be clear that this provision must be treated as a penalty. Thus, supposing in this case the agreement was carried out before the 24th May, except as to the item last sold for Rs. 200, or supposing there was a piece of land worth only Rs. 5 to be sold, then the stipulation that the plaintiff is to lose his deposit of Rs. 4,000 must be treated as a penalty according to the rule in Kemble v. Farten (1829) 6 Bing 141 in which it was held "that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered to be a penalty appears to be a contradiction in terms, the case being precisely that in which the Courts of Equity have always relieved."

19. The same rule is thus stated by Cotton L.J. in Walk's v. Smith (1882) 21 Ch. D. 243; "That comes within the same principle as where the Courts have interfered, where one of the covenants has been for payment of a sum of money when the damage is capable of being assessed accurately and is very much below the sum named." The case of Betts v. Burch (1859) 4 H. and N. 506 is in point. In Betts v Burch (1859) 4 H. and N. 506 the plaintiff agreed to sell and the defendant to purchase some property of which possession was to be given on or before the 13th October and in the event of either party not complying with every particular set forth in the agreement the defaulter should forfeit and pay the other £50. The plaintiff sued to recover the amount as he alleged the defendant broke the

agreement and did not take possession. It was held that the plaintiff was not entitled to recover. Baron Martin said: "The plaintiff's counsel have established that the same construction must be put on the agreement for both parties. Now, as that is so, it would follow, if the contention contended for on the part of the plaintiff were to prevail, that if a very small part of the price were unpaid the defaulter would be liable to the penalty of £50. The cases are too strong, and I am bound to say that this is a penalty, i.e., as pointed out by Lord Lindley in Wallis v. Smith (1882) 21 Ch. D. 243 the £50 would be payable even though £1 only might be unpaid."

20. In this case there was no deposit. But there is no reason why the case of deposits should be treated as an exception to the general rule. See In re Dagenham (Thames) Dock Company; Exparte Hulse (1873) 8 Ch. 1022 which is an instance of a successful attempt to recover back the deposit money. In that case a Company agreed to purchase land for £4,000 and deposited £2,000: the remaining £2,000 was to be paid on a day named in the agreement with a provision that if the whole of £2,000 was not paid on that day, the vendors were to repossess themselves of the land without any obligation to repay the deposit. The time was extended by an agreement which provided that the £2,000 with all interest should be entirely paid and discharged before a certain date. This was held to be a penalty. The reason is thus stated: "When you look at the last agreement it provides that if the whole £2,000 with interest or any part of it, however small, remains unpaid after a certain day, then the Company shall forfeit the land and the portion of the purchase-money they have paid." This case also treats a deposit as damages payable by the defaulting party and applies to it the rule that the stipulation which provides for payment of a sum of money larger than the amount payable by the defaulting party is a penalty.

21. With reference to this case Mr. Krishnaswamy Iyer contended that if it in any way supports the respondent's contention, it is opposed to the more recent cases in which it has been held that a deposit is not only a part payment but a security for the performance of the contract and, therefore, is liable to be forfeited on failure to carry out the contract.

22. I shall refer to some of those cases though it has to be remembered that they cannot throw light on the Indian Contract Act passed long before.

23. It is, no doubt, often said on the authority of, the decisions referred to by Mr. Krishnaswami Aiyar that the cases distinguishing between a penalty and liquidated damages do not apply to a pecuniary deposit. But this is so on the ground that if there be only one event upon which the money is to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of the contract, the parties may fix a given amount to avoid the difficulty. The rule, therefore, does not apply to cases where the damages may be accurately estimated. It does not get rid of the rule that where the provisions of the contract show the stipulation to be only a penalty, it must be treated as such and should not be enforced. The deposit will not then be forfeited. I shall refer to a few cases that lay down that rule, drawing attention in particular to the law as it was understood before the Indian Contract Act (1872).

24. The case of Palmer v. Temple (1839) 9 A. and E. 508 decides that where there is no forfeiture clause the fact that it is a deposit does not necessarily show that the amount is forfeited and not to

be returned and when the party who holds the deposit is entitled to claim damages, he must hold it to the use of the other party reducing the damages to that extent, if he is entitled to recover more than the deposit. This seems reasonable, because if it is absolutely forfeited, it cannot go in reduction of damages. The deposit, according to this case, therefore, is really the damages payable by one to the other, as settled by the parties themselves by their agreement.

25. The case that will be next referred to, Hinton v. Sparks (1868) L.R. 3 C.P. 161 where there was forfeiture clause, makes this quite clear. The agreement in that case contained the stipulation that as earnest of an agreement for the purchase of a public house " the purchaser has paid into the hands of the vendor £50 which is to be allowed in part-payment at the completion of the agreement and if the purchaser shall fail to perform his part of the agreement then the deposit money shall become forfeited, in part of the following damages; and if either of the parties neglect or refuse to comply with any part of the agreement he shall pay to the other £50, hereby mutually agreed upon to be the damages actually ascertained and fixed on breach thereof." As a fact the sum of £50 was not paid but the purchaser gave only an I.O.U. for the amount, but the Judges held that this made no difference. The purchaser made default and the vendor claimed the amount. The Chief Justice was of opinion that so far as the stipulation that £50 shall be the damages, ascertained and fixed was concerned that was not in the nature of a penalty.

26. Palmer v. Temple (1839) 9 Ad. & E. 508 was distinguished on the ground that there was no condition of forfeiture; and it was held that as there was a stipulation that the money was to be forfeited, the vendor was entitled to the amount of the deposit represented by the pro-note. In that case on behalf of the vendor the contention was that the £50 was recoverable as liquidated damages and the purchaser pleaded that it was a penalty and apart from the claim on the ground that there was an I.O.U. the only question was whether the £50 was a penalty or liquidated damages and in the course of the argument, Bovill C.J. remarked : "Is there any case where money deposited, as in this case, has been treated as a penalty and not as a liquidated sum," and he was of opinion that the cases cited showing the distinction between penalty and liquidated damages have no application to a case where the agreement contains a stipulation of forfeiture. From the observation made in the course of the argument and the arguments in the case it is clear that the case of a deposit with a condition of forfeiture was not treated as has been erroneously assumed, as not falling within the class of cases which turn upon the distinction between penalty and liquidated damages. Wikes, J. pointed out: "In the event of the purchaser's default the deposit is to be forfeited, and there is abundant reason for supposing that the parties meant that the damages as against the purchaser should be the sum they have set down."

27. In my opinion there is a clear authority for the position that the reason why the purchaser is to forfeit the deposit is that it is to be taken as the damages payable by him. So too in Lea v. Whitaker (1872) L.R. 8 C.P. p. 71 all the three Judges concurred in laying down the same principle, that the intention of the parties must be pursued and where the language of the stipulation shows that the deposit was the agreed amount of damage, then the party committing the breach of the agreement is not entitled to recover his deposit.

28. The other party retained it as the liquidated or estimated damages to be retained by the other.

29. These decisions were before or about the time of the Indian Contract Act. In Wallis v. Smith (1882) 21 Ch. D. 243 the plaintiff agreed to deposit, £5,000 by payment to the Bankers to the joint account of the plaintiff and the defendant. Fry J., after referring to the authorities above cited, held "these authorities are very strong to show that where a deposit has been placed in the hands of a third person and that is primarily the fund for the payment of the sum in question, that sum is liquidated damages, and not a penalty. That applies strongly to the present case."

30. In appeal Jessel, M.R., classified the decisions and laid down four propositions to determine whether a stipulation is a penalty or forfeiture.

31. Referring to deposit as one of such cases Jessel M.R. says: "I now come to the last class of cases. There is a class of cases relating to deposit where a deposit is to be forfeited for a breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day; in all those cases the Judges have held that this rule does not apply and that the bargain of the parties is to be carried out."

32. The opinion of Cotton L.J. has been already cited. He evidently was of opinion that the rule that a covenant to pay a sum of money where the damage is capable of being assessed accurately and is very much below the sum mentioned must be treated as a penalty applied to the case of a deposit also. But he held that on the facts this principle was not applicable and that the sum of £5,000 must be treated as liquidated damages.

33. Lindley L.J. also held in that case which was one of deposit that "it has long been settled that where a person agrees to pay a larger sum if he does not pay a small one, he does not mean what he says, and the contract is not to have the effect one would suppose it was intended to have." In that case, in his opinion, the damage could not be ascertained. This case also supports the view that a deposit can be retained only as liquidated damages but "where the damage can be small or trivial" or ascertainable and is less than the deposit, then it has to be treated as a penalty.

34. In Howe v. Smith (1884) 27 Ch. D. 39 it was held that a deposit is not only a part payment but is also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract. The Judges also agree that the question is one of construction of the document to discover the intention of the parties. Palmer v. Temple (1839) 9 A. & E. 508 was for this purpose relied upon, and Fry, L.J., says that if the intention is not expressed they have to enquire what terms are implied.

35. The only other English case that need be referred to is the case Soper v. Arnold (1889) 14 App. Chs. 429 Lord Macnaughten stated therein: "The deposit serves two purposes. If the purchase is carried out it goes against the purchase-money, but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not." In this case there was a stipulation that the purchaser should forefeit the deposit.

36. It will be observed that there is a distinction between these cases and the case In re Dagenham (Thames) Dock Company; Ex parte Hulse (1873) 8 Ch. 1022. In the later case, the deposit was to be forfeited for 'non-payment of a smaller amount which did not appear to be so in the other cases.

37. As pointed out by Mr. Mayne with reference to Walk's v. Smith (1882) 21 Ch. D. 243 the forfeiture of the deposit for non-payment on a certain day is apparently due to the fact that the damages resulting therefrom cannot be accurately estimated or any lesser sum apportioned as payable in the event of a breach--Mayne on Damages 7th Edition, page 160. The rule laid down in In re Dagenham (Thames) Dock Company: Ex parte Hulse (1873) 8 Ch. 1022 is not, therefore affected by these later decisions.

38. Thus it appears to me that though the English Law in 1872, when our Act was passed, treated the question whether the payer is entitled to recover the deposit or not, as turning upon the intent of the parties to be collected from the whole instrument, that intent was often different from what the words in the natural sense conveyed. The cases decided that certain words in certain events bear a particular meaning: and it was assumed that when the parties entered into the contract knowing that the Courts would attach such special meaning to these words, the parties must have used those words in the sense in which the Courts understand them, though on the face of them, they may have a different meaning.

39. One of the artificial rules so laid down to discover the intent is that where there is a deposit made under a contract for a sale of land, and the contract is repudiated, then the deposit is to be treated as liquidated damages not recoverable by the repudiating party, because in such cases it is difficult to assess accurately the damage sustained. Even in the case of a deposit, if such an intention cannot be gathered from the document as a whole, it will be treated only as a penalty--Palmer v. Temple (1839) 9 A.D. and E. 508--or if the deposit is larger than the amount ascertained to be due. See In re Dagenham v. (Thames) Dock Company: Ex parte Hulse (1873) 8 Ch. 1022 and Wallis v. Smith (1882) 21 Ch. D. 243, then also it will be deemed a penalty.

40. The real object of the Courts of Equity was to relieve parties from their oppressive contracts. It was felt that while a party to a contract is entitled only to the specific performance of his contract or for damages which he may have sustained on account of non-performance, it is inequitable to allow him to derive any undue benefit far in excess of any damage he may have sustained, though the parties may have expressly stipulated to that effect.

41. So these rules of construction were adopted. The question is whether the Indian Contract Act adopted this theory of a fictitious intention to be discovered by these extremely artificial rules of construction, which have perplexed English lawyers themselves, or laid down the simple rule that where a contract is broken, the damages alone shall be assessed and paid, and laid on the Courts the task in all cases of assessing the damages.

42. It is, no doubt, in appellant's favour that the Indian cases generally discuss the question only with reference to the rules laid down in the English cases and, with one exception, the Contract Act is not even referred to. I shall refer to a few of the cases cited. In Srinivasa v. Rathnasabapathy

(1892) I.L.R. 16 M. 474 the suit was brought by a purchaser of the interest of a contractor who had deposited a certain sum of money with a Municipal Council under a contract which provided that the deposit should be forfeited on any default made by him in performing his contract. The contractor failed to perform the contract and the deposit was declared forfeited. In a suit by the purchaser it was held that the stipulation of forfeiture was in the nature of a penalty as it made the deposit liable to be forfeited, irrespective of the importance of the breach and was not enforceable. The purchaser got a decree for the amount. The case of Luchman Das v. Chaler (1887) I.L.R. 10 A. 29 and apparently the case of Howe v. Smith (1884) 27 Ch. D. 89 [Soper v. Arnold (1889) 14 A.C. 429 seems to be a mistaken reference of the Reporter] were relied upon. It is important that in this case there was no claim for damages by the Municipality and that claim was not considered.

43. The next case is Manian Patter v. The Madras Railway Company (1905) I.L.R. 23 M. 118.

44. That also was the case of a contractor who deposited a certain sum of money with the Madras Railway Company, which was liable to be forfeited on the contractor's default. The rule laid down in that case by Subramania Aiyar J. and myself was that the forfeiture will not be interfered with, if the amount deposited was reasonable in amount, and as it did not appear unreasonable the forfeiture was upheld.

45. On further consideration I do not think that this view is inconsistent with the decision in Srinivasa v. Rathnasabapathy (1892) I.L.R. 16 M. 474. Both of them are clear authorities against the appellant's contention that on breach of the contract the deposit is unconditionally forfeited. They in effect decide that it can only be claimed as damages. In Manian Patter v. The Madras Railway Company (1905) I.L.R. 29 M. 118 it was further held that it may be presumed to be the reasonable amount of damages which a Court ought to award, a presumption which may be rebutted by evidence. Where damages are not claimed, or, they are less than the deposit, then it is unreasonable to enforce the deposit. This alone was necessary for the decision. The reasonableness or otherwise of the amount depends upon the nature of the loss sustained. In the present case no loss has been sustained and no damages claimed. There are also certain observations, to which, so far as they are inconsistent with this judgment, I do not now adhere.

46. In Lachman Das v. Chaler (1887) 10 A. 29 the case which was followed in Srinivasa v. Rathnasabapathy (1892) I.L.R. 16 M. 474 the entire amount in an administration bond became payable on breach of any of the conditions of the bond. The bond was executed and the stipulation was made to secure the due performance of the contract to exhibit in Court a true inventory of the estate and for the due collection and administration of the estate according to law. It was held that the stipulation though made as a guarantee for performance, was a penalty and that the plaintiff was only entitled to damages, and as he had not suffered any, the plaintiffs claim was disallowed.

47. However, in Bishan Chand v. Radha Kishan Das (1897) I.L.R. 19 A. 89 the learned judges following Ex parte Barrell; Parnell, In re (1875) L.R. 10 Ch. 512, and Howe v. Smith (1884) 27 Ch. D. 89 held that the plaintiff was not entitled to recover a deposit after he has repudiated the contract for a sale of land.

48. So far the decision is consistent with authorities. But they apparently proceed further. The defendant therein claimed only Rs. 2,000 as damages and the Judges held that he was entitled to recover the full deposit of Rs. 6,500 even though he admitted that his damages amounted to only Rs. 2,000. The observations of the learned Judges fully support the appellant.

49. In Ibrahimbhai v. Fletcher (1896) 21 B. 827 at p. 853 there was a defect of title and the question, therefore, really did not arise for decision. In Balvanta Appaji v. Bhatkar Bira (1897) I.L.R. 23 B. 56 following Howe v. Smith (1884) 27 Ch. D. 83 it was held that where the contract goes off on account of the purchaser's default he forfeits the deposit.

50. It will be noticed that all these decisions purporting to follow the English rulings arrive at conclusions not easily reconcilable with one another.

51. I shall now consider the provisions of the Indian Contract Act. Under that Act, if a party fails to perform his promise before the time specified, the contract does not become voidable if time is not of the essence of the contract, the only result of the failure being that he becomes liable to pay compensation: To enforce a stipulation of forfeiture of deposit seems obviously inequitable unless, of course, we adopt the rule that, however oppressive, the terms are to be strictly carried out in all cases of deposit. If time is of the essence of the contract then the contract only becomes voidable at the option of the other party, but till he exercise his option the contract subsists so far as specific performance is concerned as before (Section 55). Sections 73 and 74 are intended to get rid of the distinctions between penalties and liquidated damages and it appears to me that Section 74, as amended by Act VI of 1899, shows with sufficient clearness that a deposit, as such only, is not forfeited by any breach of contract. That section provides 'that if the contract contains any other stipulation by way of penalty, reasonable compensation must be awarded not exceeding the penalty stipulated for'. If the deposit is treated only as part payment, it is not contended--and the authorities are clear that it is not forfeited.

52. The decisions uphold the forfeiture on the ground of its being a guarantee for the due performance. The word 'penalty' in this section means any provision intended to compel the performance of a contract and hence includes a deposit. The argument that if a deposit is not forfeited, it ceases to be security for the performance of any contract would apply with equal force to every stipulation which is not enforced on the ground of its being a penalty. The provision that he will get something less than the deposit is inconsistent with the view that he is entitled to retain the whole deposit. Where a person at whose option, under Section 55, a contract is voidable rescinds it, while he gets compensation under Sections 73 and 74 for the breach, he has to restore any benefit so far as may be to the other party (Section 64), the object being to replace the parties in the position which they occupied before the contract was made. The deposit has prima facie, therefore, to be restored under this section. This is consistent with the rule of English law that where there is no abandonment or repudiation of the contract by the purchaser and the vendor puts an end to the contract; he cannot claim to retain the deposit. It was argued that Section 64 applies only to contract voidable under Sections 19 or 19 A. Section 55 shows that the contracts referred to therein are voidable, and I see no reason to limit the operation of the section as suggested.

53. It was then contended that this is not a benefit derived under the contract. I am unable to accept this contention either. If not a part of the contract there is no fresh consideration and a promise to fulfil a pre-existing obligation cannot be a consideration.

54. There is in fact only one contract. The deposit is also part of the consideration. If it be a different contract then the forfeiture must be absolute which, it is admitted, is not the case, as it will go in reduction of damages or will be treated as part payment if the sale is subsequently carried out. It stands on the same footing for this purpose as the stipulation by the defendant to pay Rs. 4,000 to the plaintiff on his default. That cannot be a different contract and is clearly only a penalty. Not only deposits but penalties also may be enforced on the same ground. If we uphold this contention of the appellant, we shall have to declare those deposits forfeited, which are only penalties according to English decisions and also in cases where there is no repudiation. The section also recognises no difference between deposits for sales of land and for other purposes; nor between contracts in which time is of the essence and others.

55. It was also argued that it is open to a party to waive the benefit of any provision of law in his favour and as the plaintiff has agreed to forfeit the deposit, the stipulation must be enforced. This argument would apply to every penalty. These sections are intended to prevent a party from enforcing the express provisions of his contract and, therefore, that there is such a stipulation is no reply. See Section 1 of the Contract Act. My conclusions are:--According to the English decisions where there is a deposit by a purchaser under a contract of sale of land, the deposit is not forfeited by him; where there is no repudiation or abandonment of the contract by him, and where the vendor rescinds it before the contract is put an end to by the purchaser, he cannot retain the deposit.

56. Where the damage sustained can be assessed and it is below the deposit amount it will not be forfeited. I think Srinivasa v. Rathnasabapathi (1892) I.L.R. 16 M. 474, is rightly decided. Under the Indian Contract Act the vendor can recover only the damages sustained by breach of contract and if he rescinds the contract he must restore the deposit.

57. As in this case no damage has been sustained and there is no plea to that effect, I would dismiss the appeal with costs.

Wallis, J.

58. As my learned brother is in favour of confirming the judgment, the appeal is dismissed with costs.

59. The memorandum of objections is dismissed with costs.