Natesa Aiyar And Anr. vs Appavu Padayachi And Anr. on 24 February, 1913

Equivalent citations: (1915)ILR 38MAD178, AIR 1915 MADRAS 896

JUDGMENT

Charles Arnold White, C.J.

1. The contract; we have to consider no doubt differs in some respects from the ordinary vendor and purchaser contract which was before the Courts in most of the cases which were discussed in the course of the argument in this appeal. The consideration for the contract in question was a sum of Rs. 41,000, of which Rs. 4,000 is stated to have been received by the vendor on the date of the agreement, Rs. 20,000 was to remain on mortgage, and the balance was to be paid on a specified date. If the purchaser failed to carry out the contract, he was to forfeit the Rs. 4,000 advance. If the vendor failed to carry out the contract he was to refund the advance and pay Rs. 4,000. There was a further provision that the vendor should execute the sale-deed before the agreed date either in favour of the purchaser or in favour of the purchaser's nominees. In pursuance of this, the vendor, before the agreed date, sold some of the lands to a nominee of the purchaser.

2. I do not think the fact that there was a reciprocal agreement by which Rs. 4,000 was to be forfeited to the vendor if the purchaser was in default, and Rs. 4,000 was to be paid by the vendor (besides refunding the advance) if the vendor was in default, or the fact that there was part performance of the contract before the agreed date, makes any difference for the purpose of the question we have to decide, viz., whether, in the events which have happened, the vendor is entitled to retain the Rs. 4,000.

3. As a matter of fact, the vendor has been able to sell the unsold portion of the land, or part of it, for more than the amount provided for in the agreement. This, again, in my opinion, does not affect the question we have to decide.

4. I agree that the question must be determined with reference to the provisions of the Indian Contract Act and that if they are in conflict with the English law as laid down in the English authorities, we must follow the statute.

5. I think, however, it may safely be premised that in a question such as this it was not the intention of the Legislature to depart from what was understood to be the English law at the time the Indian Contract Act was passed. It is also to be observed, as Wallis, J., points out, that though several cases as to the right to recover deposits have been decided in India since the Contract Act was passed, in none of these has it been suggested that under the provisions of that enactment the law of India differed from that of England with reference to this question.

6. In the contract before us we have an express agreement that, in default by the purchaser, the Rs. 4,000 was to be forfeited. Unless, therefore, the defaulting party can obtain relief on grounds of equity, or under some statutory enactment, he is bound by his bargain. In Howe v. Smith (1884) L.R., 27 Ch. D., 89 at p. 101 Fry, L.J., said: "Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part-payment, but is then 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 learned Lord Justice was dealing with a case where there was no express agreement. Here we have an express agreement, and the observations, as it seems to me, apply a fortiori. If time was of the essence of the contract into which the parties entered (and, in the opinion of Wallis, J., and of the Subordinate Judge, it was) it seems to me clear that (unless the plaintiff can establish that the provisions of the Contract Act give him a right to recover, and I will deal with this later) effect should be given to the intention of the parties as expressed in the agreement.

7. There is, so far as I know, Do reported ease, English or Indian, since In re Dagenham (Thames) Dock Company, Ex parte Hulse (1878) 8 Ch. App., 1022 (where the deposit was half the purchase price) of a vendor and purchaser contract; in which it has been held that, notwithstanding an express agreement, the deposit is to be forfeited on default by the purchaser; it has been held that the deposit can he recovered back. In Betts v. Burch (1859) 4 H. & N., 506, there was no deposit.

8. But, so far as the English law is concerned, as is pointed out in the judgments in Howe, v. Smith (1884) L.R., 27 Oh. D., 89 at p. 97, since the Judicature Acts where the question whether time is of the essence of the contract arises all contracts must be governed by the rules of Equity. I deal with this case, therefore, on the footing that the purchaser would have been entitled to fulfil his contract within a reasonable time after the agreed date.

9. In Howe v. Smith (1884) L.R., 27 Oh. D., 89 at p. 97), it was held that the purchaser was not entitled to a return of the deposit. There, there was no express agreement that the deposit should be forfeited, and the question was considered on the footing that time was not of the essence of the contract. Here we have an express agreement as to the forfeiture. In his judgment in Howe v. Smith (1884) L.R., 27 Oh. D., 89 at p. 97, Bowen, L.J., said: "The question as to the right of the purchaser to the return of the deposit money must, in each case, be a question of the conditions of the contract. In principle it ought to be so, because of course persons may make exactly what bargain they please as to what is to be done with the money deposited. We have to look to the documents to see what bargain was made". If any authority were wanted to prove that in each case it is a question of construction (I do not think it is wanted) it would be found in Palmer v. Temple (1839) 9 Ad. & E., 508 the case to which Cotton, L.J., has referred, and which-whatever may be the value of the case as an authority on the construction of the contract in that case, as to which I agree with everything that has fallen from Cotton, L.J.-adopts the principle that in each case we must consider what was the bargain. At page 520 there is this observation: "The ground on which we rest this opinion is, that in

the absence of any specific provision, the question, whether the deposit is forfeited, depends on the instant of the parties to be collected from the whole instrument." Again on page 99, "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." The question of the return of a deposit came before Eve, J., in Hall v. Burnell (1911) 2 Ch., 551 at p. 555 on a motion by the plaintiff (the vendor) that the agreement of sale should be rescinded and the deposit forfeited to the vendor. Here, again, there was no agreement for the forfeiture of the deposit. The learned Judge observes that the decision in Howe v. Smith (1884) 27 Ch.D., 89 at p. 99 negatives the purchaser's right to recover the deposit in a case where he has repudiated the contrast and establishes the right of the vendor in such circumstances to retain it. He also observes (page 556) that Howe v. Smith (1884) 27 Ch.D., 89 at p. 99 establishes that there is nothing inconsistent in a vendor being given relief by way of rescission and at the same time, in the absence of express stipulation to the contrary, being allowed to retain the deposit.

10. The learned Judge points out that in Jackson v. Dekadich (1904) W.N., 168 Farwell, J., had declined to make an order for a return of the deposit on the ground that a claim for rescission was inconsistent with a claim for damages under the contract and that in Howe v. Smith (1884) 27 Ch.D., 89 at p. 99 there was no rescission. Eve, J., then proceeds to point out that there had in fact been rescission in Howe v. Smith (1884) 27 Ch.D., 89 at p. 99 since the vendor had resold the property under his absolute title and not under a clause in the contract authorising him to sell on the purchaser's default, and that he had justifiably elected to treat the contract as rescinded. It may, I think, be put thus: If the purchaser repudiates the contract, the vendor may retain the deposit. If where time is not of the essence of the contract the vendor rescinds after the agreed date, it is for the purchaser to show that he was ready and willing to perform the contract within a reasonable time after the agreed date. If time is not of the essence of the contract, failure to perform on the agreed date does not in itself amount to repudiation, but express intimation by the purchaser that he repudiates his contract is surely not necessary, And if the party in default fails to fulfil his contract on the agreed date, I think the onus is on him to show he does not intend to repudiate. In the present case, some days before the agreed date, the vendor gave the purchaser express notice that he was not prepared to give him an extension of time (Exhibit V) and on the day of the agreed date or the day after the vendor gave the purchaser express notice that the purchaser had forfeited the deposit and that the vendor was going to sell the land to third parties. The purchaser made no offer, did not ask for an extension of time and did not answer the letter. The letter to Ratnaswami Ayyar (Exhibit VI) to which the Subordinate Judge refers cannot be treated as a notice to the vendor. Sankaran Naik, T. observes in his judgment that the Subordinate Judge finds that the purchaser's conduct shows his willingness to carry out the contract after May 24. I do not find any such finding though I may have overlooked it. But assuming it to be the case, this seems to me to be immaterial since it is not suggested that his readiness and willingness was intimated to the vendor. I think, on the facts of this case, the vendor was entitled on May 25 to elect to rescind. He did so elect and he gave the purchaser express notice he had so elected. Afterwards he re-sold the lands under his absolute title. The Subordinate Judge held and Wallis and Sankaran Nair, JJ., agreed with him that the subsequent sales were not under the original agreement.

11. In Howe v. Smith (1884) 27 Ch.D., 89 at p. 103 Fry, L.J., observes that the effect of Section 25 of the Judicature Act is "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." But he goes on to observe: "and the inquiry therefore arises whether the purchaser in the present case could aver and prove such readiness and willingness within a reasonable time." So far as I can sea, the purchaser neither averred nor proved his readiness and willingness within a reasonable time, and I do not think he is relieved from this obligation because he bad received express notice from the vendor that the latter intended to hold him to his bargain.

12. Then as to the Contract Act I do not think Section 64 helps the purchaser. If the question had been res integra, I should have been inclined to hold that this section only applies where the contract is voidable under the law (e.g., as falling within Section 19 or 19(a), Indian Contract Act) or where the contract itself in terms gives an option to avoid, to one of the parties. However, the decisions would seem to be the other way.

13. I do not think the section applies to the case of a deposit made to secure the performance of a contract. It has been suggested that illustration (c) to Section 65, Indian Contract Act, ought to have found a place as an illustration to Section 64. Assume this to be so, it is clear the "benefit;" in the illustration was a benefit under the contract. Herd the benefit of having some security that the purchaser would fulfil his contract was ancillary to the contract for the sale of the land. I do not think it was "thereunder" within the meaning of the section', and I do not think the rescission of what; may be called the main contract by the vendor involves the rescission of the ancillary contract that, in default by the purchaser, the vendor should be entitled to retain the deposit.

14. I also think that Section 74, Indian Contract Act, does not apply. The sum of Rs. 4,000 is named in the contract as an advance," not as the amount to be paid in case of breach. Why should it be assumed that it was paid with a different intention from that stated in the contract? Further, if, as seems to me to be the right view, it is paid partly by way of part-payment of the purchase money and partly by way of security or guarantee for the performance of the contract, it cannot be regarded as a sum named in the contract as the amount to be paid in case of breach. Again, if we are to deal with this case according to the letter of the section, this, as was pointed out by Miller, J., in the course of the argument, is not a question of the amount of compensation which the vendor is entitled to receive by reason of the breach, but a question whether the vendee is entitled, under the contract, to recover an amount which has been already paid.

15. If we examine the illustrations to Section 74, Indian Contract Act, it seems to me the present case comes nearer to illustrations (c) and (d) where the contract can be enforced according to its terms than to the other illustrations where the stipulation is by way of penalty.

16. There are two or three Indian decisions I should like to refer to. In Bishan Chand v. Radha Kishan Das (1897) I.L.R., 19 All., 489 and Balvanta v. Bira (1899) I.L R., 23 Bom., 56, both case a in which there was no express agreement for the forfeiture of the deposit, the Courts in this country held, following the English Rule, that the deposit could not be recovered. Srinivasa v.

Rathnasabapathi (1893) I.L.R., 16 Mad., 474 was not a case of vendor and purchaser but a case where a contract provided that a deposit made by a contractor who had agreed to do certain work should be forfeited if he failed to do the work. There the stipulation as to the deposit was treated as a stipulation by way of penalty and it was held that the plaintiff's assignee was entitled to recover the difference between the amount of the deposit and the damages sustained by the defendants.

16. In Martian Patter v. The Madras Railway Company (1906) I.L.R., 29 Mad., 118, the Court held that, where the instrument referred to a sum deposited as security for performance, the bargain of the parties should be carried out except where the forfeiture is relieved against on terms which the Court imposes to meet the justice of the case where the circumstances warrant the grant of such equitable relief. These two decisions might perhaps be reconciled on the ground that, in the former case, the "deposit" having regard to the value of the contract was proportionately larger than in the latter case. But I doubt if this distinction on the facts can be drawn as regards the latter case. The proposition as to the reasonableness of the sum deposited as security is in accordance with the passage in Sedgwick on Damages which the learned Judges cite. If the question of reasonableness is a matter which can be taken into account, I am certainly prepared to hold that a 10 per cet. deposit, as in this case, on the purchase price (I do not overlook the fact that Rs. 20,000 was to remain on mortgage), is reasonable. In In re Dagenham (Thames) Dock Company Ex parte Rules (1878) L.R., 8 Ch. App., 1022 where it was held the vendor could not retain the deposit the deposit was half the purchase money. There, as Wallis, J. points out, the amount was so large as to take it out of the ordinary case of deposits. There is certainly nothing extraordinary in a 10 par cent, deposit under an agreement for the sale of land.

17. I agree with Wallis, J., and I think this appeal should be allowed.

Miller, J.

18. I am of the same opinion. On the facts, I agree with Wallis, J., that the sum of Rs. 4,000 for which the plaintiff is suing can be regarded as a deposit by way of guarantee or security of the performance of the contract; of sale, and (agreeing with Wallis, J., and the Subordinate Judge) that of that contract time was of the essence.

19. On those facts I do not sea how to avoid the conclusion that the plaintiff on his failure to be ready with the purchase money at the essential time, must be held to have abandoned the contract, having put it out of his power to perform it. That brings the case within the English authorities among which Howe v. Smith (1884) L.R., 27 Ch. D., 89 is conspicuous, and if we follow those cases the present suit must fail.

20. The weight of authority both in this country and in England is against the contention that the plaintiff is entitled to claim the return of the deposit as having been paid in pursuance of a penal stipulation: that is clear from the judgments of both the learned Judges who heard the appeal and it is needless for me to discuss the authorities.

21. There may be cases where the Courts must find that the amount of the deposit or payment in advance is so great in comparison with the amount payable under the contract, that the parties cannot have intended it as mere security for performance, but rather as a punishment for non-performance of the contract, and in those cases the Court may doubtless refuse to allow the retention of the whole of the deposit; but where there is no such disproportion and nothing unreasonable in regarding the deposit as a security, then the defaulter will not be allowed to recover back what he has paid on an express stipulation that it shall be forfeited in the event of default. This is the rule which was accepted in Manian Patter v. The Madras Railway Company (1906} I.L.R., 29 Mad., 118 as being in accordance with the English cases, and it is a rule which I am prepared to accept, as being obviously calculated to do justice. Here I do not think it was seriously contended that the sum of Us. 4,000 was excessive or unreasonable as a security for performance of the contract, and the fact that the vendor was able after breach of the contract by the vendee to effect a sale on terms even batter than those contained in the broken contract is not evidence sufficient to support an inference that the deposit was unreasonable in amount Unless then we are prevented by something in the Indian Contract Act from following these authorities I am of opinion that the appeal must be allowed. For the reason given by Wallis, J., I do not think Section 74 is applicable to this suit, and the only other section which need be considered is Section 64-the second sentence of that section. I agree with Wallis, J., that section does not apply to the circumstances of this case.

22. It is as a forfeited security for the performance of the contract and not as part-payment of the price that the defendant seeks to retain the deposit, and it will not be denied that a benefit which he has obtained by reason of a breach of the contract is not a benefit under the contract.

Sankaran Nair, J.

23. takes the view that there is only one contract and the stipulation with regard to the deposit is a part of the consideration, and consequently, as I understand the learned Judge, the defendant, when be rescinded the contract rescinded with it the stipulation; the benefit which ha has received under the stipulation is therefore a benefit received under the rescinded contract. Wallis, J., on the other hand holds that the stipulation may be regarded as collateral to the contract of sale, and thus, as I understand him, it is not rescinded with the rescission of the contrast of sale and therefore Section 64 cannot apply. This view seems to me to be the better.

24. Let us assume that the stipulation represents an agreement as to the damages payable under Section 75 of the Contract Act: in that case it seems to me it would be unreasonable to hold that with the rescission of the contract, that agreement is also rescinded; but if it is not rescinded Section 64 cannot apply to it. And if in that case it would be held, as I think it necessarily would be held, that the stipulation is not rescinded with what I may call the main contract, there is no reason why the same conclusion should not be reached when the stipulation relates to a security for the performance of the contract.

25. Both stand on the same footing: both are stipulations which depend for their operation not upon the fulfillment of the main contract but on its breach, and the provisions of Section 64 are it seems to me, inapplicable to them.

Sankaran Nair, J.

26. Is of opinion that the stipulation, if it is not an integral part of the contract of sale, must fail for want of consideration, but that difficulty, I venture to think, will arise only if the deposit is regarded solely as a part-payment: if it is a security placed in the hands of the vendor for the purpose of binding the bargain, there seems to be no want of consideration.

27. I agree also with Wallis, J., that we cannot regard the deposit as the amount of damages agreed upon by the parties. It is very difficult to my mind to believe that the vendor would have limited his demand for damages to the sum of Rs. 4,000, in the circumstances of the case, and there is nothing in the language of the contract to compel us to hold that he did so. On the contrary the contract rather shows that was not the intention.

28. I am for these reasons of opinion that the second part of Section 64 is not applicable to the case and that being so I find nothing in the Contract Act to prevent our following the authority of Howe v. Smith (1884) L.R., 27 Ch.D., 89 which as has been pointed out by Eve, J., in Hall v. Burnell (1911) 2 Ch., 551 permits a vendor to rescind the contract as well as at the same time to retain the deposit.

29. I would therefore allow the appeal and dismiss the suit.

Sadasiva Ayyar, J.

30. I have the misfortune to differ from the judgment of the majority of the Bench in the case.

31. The Indian Contract Act was the result of the labours of several years' deliberation. It was drafted in England by the Indian Law Commission, it was revised and elaborated by the Legislative Department in India (which even borrowed certain provisions from the New York draft code) and it was lastly considered and revised with great care by that eminent jurist, Sir James Fitzjames Stephen, who was the then Law member of the Governor-General's Council. It wa3 enacted "in order to define and amend certain parts of the law relating to contracts." Though there might be some portions of the law of contracts not covered by the Act, I do not think that, so far as the general principles are concerned, the learned Legislator would have failed to indicate them with sufficient clearness and fullness for the guidance of Indian Courts. (The Indian Evidence Act which also we owe to the same eminent jurist has been universally praised for its thorough grasp of the principles of the Law relating to Evidence and for the exhaustive and clear manner in which such principles have been applied in the enactment of the rules of evidence embodied in the Act.) Pollock mentions the case of Damdupat in the Bombay Presidency and in the town of Calcutta in connection with the case of loans contracted by Hindus. He also refers to the provisions as to the awarding of interest as damages under the Hindu Law in Bombay, Saunadanappa v. Shivbasawa (1907) I.L.R., 31 Bom., 354, and then remarks "Such cases are very few and the native Law of Contract may, for all practical purposes, be regarded as having been superseded by the Indian Contract Act, etc." Shephard, J., in his Contract Act refers to some special and subsidiary portions of the Law of Contracts such as that of the Law of Master and Servant, Consignor and Carrier, the law regulating promissory notes and bills of exchange, the Law of Contracts specially affecting land, the law as to specific performance

and some few similar technical matters as intentionally omitted from the direct scope of the Act, some of these matters being afterwards embodied in enactments like the Negotiable Instruments Act and the Transfer of Property Act. But as regards the enunciation of the general and universal principles of the Law of Contracts, I think that the Contract Act was intended to be as exhaustive as possible.

32. I am therefore naturally reluctant to hold that the Indian Contract Act contains no provisions applicable to the very common cases where a vendor and a purchaser agree that the earnest money deposited with the vendor should be treated as part of the purchase money, if the sale is completed by the purchaser, but should be forfeited to the vendor if the purchaser makes default in completing the purchase. After going through the Contract Act, I think that the provisions of Sections 39, 55, 64, 65, 73, 74 and 75 of the Act, when read together, indicate in sufficient fullness and clearness the principles applicable to the decision of the question, now in dispute, relating to the rights and duties of a vendor who rightly rescinds a contract of purchase and with whom a portion of the purchase money agreed upon had been deposited with a stipulation for its forfeiture for the purchaser's default. The rule enacted by Section 39 of the Contract Act gives a right to the vendor to rescind the contract if the purchaser has "disabled himself from performing the contract." The result of applying Section 55 is that, if time is of the essence of the contract and if the purchaser fails to pay the balance of the purchase money within the time agreed upon for the completion of the purchase, the vendor might rescind the contract and the vendor will "be entitled to compensation from the purchaser for the losses occasioned" to the vendor by the purchaser's failure. Under Section 64, it seems to me that the vendor who properly rescinds the contract according to Section 55 on account of the purchaser's failure, should "if he (the vendor) have received any benefit thereunder" (that is, from the contract of sale and purchase) "restore such benefit to" the purchaser. Section 65 indicates that when a contract of sale becomes void (which might happen by the vendor lawfully rescinding it) the vendor, if he has received any advantage under the contract, is bound to restore it or to make compensation for that benefit to the purchaser. Illustration (c) to this section is very instructive. It is as follows: "A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung." Section 73 merely confirms the right given by Section 55 to the vendor to claim compensation from the purchaser for the loss occasioned by the latter's failure. Thus the obligation to restore the benefit received or to make compensation for it is laid down absolutely, even where A has made wilful default. If B sustained any loss by A's wilful default, he is, of course, entitled to make a cross claim for it from A under Sections 55 and 73 but this cannot affect the absolute obligation laid on B to restore the benefit received by him from A under the rescinded contract.

33. Section 74 is a very important section. It treats of stipulation by way of penalty. We know how Courts in India followed too closely the English decisions which made refined distinctions between penalty and liquidated damages and which treated a provision for enhanced interest from date of bond as a penalty but not a provision for enhanced interest from date of default. The amendment of Section 74 and the new illustrations added to it did away with all these distinctions imported into India from England and treated all stipulations in a contract 'by way of penalty "on the same footing

to be relieved by Courts according to justice, equity and good conscience, directing, however, the Courts to award" reasonable compensation" against the party guilty of the breach of contract, not exceeding the amount named as penalty or (as the case may be), the penalty stipulated for (if the penalty is any stipulation other than a sum named as to be paid for breach). [I have had occasion recently to consider this Section 74 at length in Muthukrishna Iyer v. Sankaralingam Pillaii (1913) I.L.R., 36 Mad., 229 (F.B.), and again in the Full Bench reference made in that appeal.] The very use of the expression" forfeit the deposit "(the agreement of sale in this case uses the word" forfeit ") conveys to my mind the notion of a "stipulation by way of penalty" referred to in Section 74. A man forfeits a thing as punishment or penalty for a fault, and hence every stipulation for forfeiture must be a stipulation by way of penalty. This view seems to me to be materially strengthened by the exception clause attached to Section 74 and the illustration (c) which relates to that exception. It is clear from the illustration that when A "forfeits" his recognizance in Rs. 500 to appear in Court, he must pay the whole "penalty" of Rs. 500. In short, I find myself unable to dissociate in my mind the idea of a stipulation by way of forfeiture from the idea of a stipulation by way of "penalty" or of "liquidated damages," if we retain in our mind the distinction between penalty and liquidated damages made in the English decisions. Section 75 of the Contract Act confirms the provisions in Sections 55 and 73 entitling the vendor to recover compensation from the purchaser for the latter's breach of contract.

34. On the facts of this case, I agree that the plaintiff (purchaser) did commit breach of contract by not paying the balance of purchase money within the stipulated period. I differ (with respect) from the opinion of Sankaran Nair, J., (if such be his opinion, as I am not quite sure) that, even when time is of the essence of the contract and the stipulated time is allowed by the purchaser to expire, the vendor cannot rescind the contract unless the purchaser had also "no intention of performing the contract or repudiates it." Observations tending to that effect in Howe v. Smith (1881) 27 Ch.D., 89 cannot affect the law as laid down in the Indian Contract Act. As remarked by Pollock in the preface to his book on the Contract Act "In many of the arguments and some of the judgments in the reports of the Indian High Courts, there appears, if I mistake not, a tendency to follow the English authorities too literally, though (in any case) these are not positively binding on Indian Courts." As to the allowing of a further "reasonable time after the stipulated date" before the vendor could rescind the contract (a doctrine also evolved from loose expressions used in some of the English decisions), I do not see how, when time is of the essence of the contract and the vendor therefore has the legal right to rescind the contract on the expiry of the stipulated time without the purchaser having performed his promise, a further reasonable time could be allowed so as to deprive the vendor of his legal right to rescind the contract as soon as the purchaser's breach of the latter's promise takes place.

35. Granting then (as I must) that the vendor rescinded the contract properly in this case, what are the respective rights and liabilities of the parties consequent on such rescission? The English Courts have in many cases, treated these stipulations for forfeiture of deposit money as standing on a different footing altogether from stipulations for penalty and stipulations for liquidated damages but in other cases they have treated such stipulations as standing on the footing of stipulations for liquidated damages. I shall refer to only a few of these cases. In Wallis v. Smith (1882) 21 Ch. D., 243, Jessel, M.R., held that in such cases "the bargain of the parties is to be carried out." In an

English case, a learned Judge is reported to have gone so far as to say "There is no breach of contract at all. You have taken your chance with respect to your deposit and you are not entitled to have that deposit back." The position that "there is no breach of contract at all" shows how widely the principles of the Indian Contract Act by which Indian Courts are bound differ from the technical considerations which have guided the English Judges in some of the English cases. Surely there has been a clear breach of contract under the Contract Act and the bargain between the parties is not a mere game of chance in which one party has lost his deposit according to the rules of the game as agreed upon.

36. But against these cases is In re Dagenham (Thames) Dock Company, Ex parte Hulse (1873) 8 Ch., App., 1022 where it was held that a stipulation that half the purchase money (paid in advance) should be forfeited was a penalty and should be relieved against. I do not see how, on principle, a deposit to be forfeited should be treated as a penalty if it is 50 per cent, of the purchase money, but it should be treated as money to be retained by the vendor according to the bargain between the parties, if it is of a less proportion than half. If once you admit that the reasonableness of the sum agreed upon to be forfeited for breach can be considered in arriving at the conclusion whether the stipulation is to be treated as a penalty or not, I think it is impossible to treat such stipulations on any other footing than the footing of stipulations for penalty (if the amount is harsh or unconscionable) or stipulation for liquidated damages (if the amount is a reasonable one). In Wallis v. Smith (1882) 21 Ch.D., 243 itself, Fry, J., in the original trial held that the deposit money must be treated as liquidated damages if it was a reasonable amount. So also in Sedgwick on Damages, seventh edition, volume I, page 593 (quoted in Manian Patter v. The Madras Railway Co. (1906) I.L.R., 29 Mad., 118, it is said that the forfeiture will not be interfered with if reasonable in amount. As I said, the introduction of the idea of the reasonableness or otherwise of the sum is consistent (at least to my mind) only with the principle that the amount is considered as reasonable compensation for the damage sustained by the vendor owing to the purchaser's breach of contract.

37. The distinction between penalty and liquidated damages has been abolished by the Indian Contract Act, Section 74, and the Court has got full power to do equitable justice between the parties. Where the probable damages sustained are uncertain, the Court will usually give the whole deposit money as compensation if it is a reasonable sum. In the English Courts, this reasonable sum is, in some cases, styled liquidated damages and it was so held in Palmer v. Temple (1839) 9 Ad. and E., 508, and Wallis v. Smith (1882) 21 Ch.D., 243. (See Fry, J.S. judgment in the original trial.) In cases (as in this case) where it is proved as a fact that no damages at all have been sustained, the Court would, if the defendant claims it, give a nominal amount as compensation out of the stipulated Sum, because it has been held that some compensation should be given, if claimed under Section 74 of the Contract Act. [See Annamalai Chetty v. Veerabadram Chetty (1908) I.L.R., 26 Mad., 111. That the sum to be forfeited is, even under the English decisions, "damages" due to the vendor is clear from the fact that, when the vendor finds that he has sustained damages beyond the forfeited amount, he could admittedly sue only for the balance and cannot sue for the whole amount of damages excluding altogether the forfeited amount from consideration. Usually, the earnest or deposit money is a very small proportion of the price fixed. The probable damages consequent on the breach by the purchaser are uncertain in most cases as the vendor rarely cares to sell the land at once to other purchasers, Courts would therefore be fully justified in treating the whole deposit

amount (or Acharapanam in Tamil) as reasonable compensation in most cases. But this fact (as I think) should not make us forget the principle that the deposit money is a stipulated (that is, agreed upon) penalty and that the provisions of Section 74 of the Contract Act are, therefore, applicable to it and must govern it. Even according to Howe v. Smith (1884) 27 Ch.D., 89, earnest money is intended to create by the fear of its forfeiture, a motive in the purchaser to fulfil the contract. Just as the word 'forfeiture inevitably raises the idea of' penalty 'in my mind, the word' fear 'raises the very same idea. Whatever may be the view of the other High Courts, Srinivasa v. Rathnasabapathi (1893) I.L.R., 16 Mad., 474 decided by this Court treats such stipulations as stipulations by way of penalty.

38. As I said in the beginning, I find it difficult to hold that no principle was laid down by any of the sections of the Indian Contract Act which could be applied to stipulations for forfeiture of deposit money except the general principle that the bargain between the parties must be strictly enforced. Sections 64 and 65 of the Contract Act are worded quite generally and their Lordships of the Privy Council did not hesitate to hold that Section 65 of the Contract Act applied to the facts of Bassu Kuar v. Dhum Singh (1889) I.L.R., 11 All., 47, where an agreement became wholly ineffectual as one party to it properly threw it up altogether on account of the other party not admitting the existence of other unwritten terms alleged by the former. I must confess that I have been unable to follow the arguments advanced by the appellants' learned vakil to the effect that Sections 64 and 65 of the Contract Act could not be applied because the deposit money retained by the defendant was not a 'benefit or' advantage received under the contract of sale. One of the terms of the contract for sale was that the deposit money was to be treated as part of the purchase money under the contract, having been expressly paid as such. It no doubt, contained another term that the deposit money was to be treated as forfeited for the defendant's benefit if the plaintiff failed to fulfil his promise to pay the remainder of the purchase money within a stipulated time. But the advantage which accrues to the vendor of retaining the deposit money by such failure of the purchaser is clearly an advantage derived under the terms of the original contract. The contract might contain some provisions which might be called "main provisions" and others which might be called "ancillary provisions," and this provision about the retaining of the deposit money by the vendor might be an ancillary provision, but the benefit derived from this provision is, it is clear to my mind, a benefit derived under the contract. Again Sedgwick, who is relied on in Manian Patter v. The Madras Railway Company (1906) I.L.R.,29 Mad., 118 heads his chapter 12 (in which Section 414 occurs) as a chapter on "Liquidated Damages" and begins Section 414 as follows: "Deposit to be forfeited on default-the forfeiture, if reasonable in amount, will be enforced as liquidated damages." To my mind, it is impossible to put it on any other footing but that of liquidated damages and, as the Contract Act does away with the distinction between penalty and liquidated damages, it must come under a stipulation by way of penalty.

39. It is therefore clear to my mind, that just as in Bassu Kuar v. Dhum Singh (1889) I.L.R., 11 All., 47, the book-debt amount retained by the vendor-debtor as part of the purchase money was treated as a benefit which the said vendor got under the contract and which he must give up under Section 65 of the Contract Act on the contract having become ineffectual, so, the defendant in this case was bound to refund the benefit of the deposit money on the contract becoming ineffectual, his only right against the plaintiff being to make a counter-claim under Sections 55, 73 and 75 of the Contract Act for compensation for the damages, if any, caused to him by the plaintiffs' breach and,

where no actual damages have been really sustained (as in this case), to make a counter-claim for some compensation out of the stipulated penalty under Section 74 of the Contract Act. That the provisions of Section 65 of the Contract Act as to restitution of benefits is distinctly wider than the rules laid down in English decisions is admitted by Pollock in the last paragraph of his commentaries to Section 65 of the Contract Act, I am also not disposed to limit the wide provisions of Section 74 of the Contract Act (especially after the Legislature was obliged to amend it, owing to the unfortunate introduction, by Indian Courts of the "artificial and more or less arbitrary rules of construction" concerned with penalty and liquidated damages laid down by English decisions); I am not disposed to limit the wide provisions of Section 74 by drawing a further distinction between a "penalty" and a "deposit" paid with a condition of forfeiture or a distinction between a deposit of a reasonable proportion of the purchase money and a deposit of an unreasonable proportion of the purchase money, or a distinction between what is called "liquidated satisfaction" in an English case Societe General De Paris v. Walker (1886) 11 A.C., 20 at p. 34, and damages "or penalt" on the other and so on and so forth. (There seems to me to be no magic in the word "liquidated" or in the word "deposit") Suppose that in this case two alternative states of facts were proved:

> (a) that the plaintiff had paid all but Rs. 1,000 of the purchase money of Rs. 41,000 before the due date.
>
> (b) that the plaintiff had paid only the Rs. 4,000 first deposited and not a single pie of the remaining Rs. 37,000.

40. In either case, the whole Rs. 4,000 should be forfeited according to the terms of Exhibit A and I cannot conceive that such a provision is not a penalty.

41. Having read Sections 39, 64, 65, and 75 of the Contract Act together, my mind is clear that the framers of the Contract Act intended that money received by a vendor under a rescinded contract of sale (rescinded properly by the vendor) should be returned to the purchaser, leaving full liberty to the rescinding vendor to recover damages from the purchaser for the latter's breach of contract. We have got the authority of Mr. Stokes for saying that the illustrations (6) and (7) to Section 65 of the Contract Act properly belong to Section 64 to that Act. It is further very significant that the very same set of facts is mentioned in the illustration (a) to Section 39, illustration (c) to Section 65 and the illustration to Section 75. I shall here set down the three illustrations to the three sections together, and they make it almost conclusive to my mind that the obligation of the vendor to return the deposit money was intended to be quite independent of his right to recover damages sustained by him by the purchaser's default, though, of course, the said obligation and the said right can be put in issue and dealt with in the same suit. The three illustrations to the three sections are:

42. A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her Rs. 100 for each night performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to put an end to the contract [illustration (a) to Section 39].

43. A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months and B engages to pay her Rs. 100 for each night's performance. On the sixth night, A wilfully absents herself from the theatre and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung [illustration (a) to Section 65].

44. A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months and B engages to pay her Rs. 100 for each night's performance. On the sixth night, A wilfully absents herself from the theatre and B, in consequence, rescinds the contract, B is entitled to claim compensation for the damages which ho has sustained through the non-fulfillment of the contract (illustration to Section 75).

45. For the above reasons, I hold that the conclusion of Sankaran Nair, J. is right and I would affirm his decision and dismiss this appeal.

46. The Court-The result is the appeal is allowed and the suit is dismissed with costs throughout.