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DASHARATHI GHOSE v. KHONDKAR ABDUL HANNAN.

MUKERJI J.

Hamid Hossein v. *Mukdum Reza* (1) therefore applies to this case.

In my judgment the sale must, in the circumstances, be held to have been made contrary to the provisions of the Act and must be annulled.

The appeal is allowed, the decision of the District Judge is reversed and that of the Subordinate Judge restored with costs in this Court and of the Court of appeal below.

CUMING J. I agree.

A. C. R. C. *Appeal allowed.*

(1) (1904) I. L. R. 32 Calc. 229.

APPELLATE CIVIL.

Before B. B. Ghose and Roy JJ.

NADIAR CHAND GUIN

v.

SATIS CHANDRA SUKAL.*

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July 19.

Contract—Contract for purchase of goods—Refusal to purchase—Earnest money, forfeit of—Contract Act (IX of 1872) s. 73.

A plaintiff, who has entered into a contract for the purchase of goods and has made a deposit by way of earnest money but thereafter refuses to purchase, is not entitled to recover the earnest money.

* Appeal from Appellate Decree, No. 305 of 1925, against the decree of P. E. Cammiade, District Judge of Midnapore, dated Nov. 20, 1924, reversing the decree of Kumud Nath Roy, Subordinate Judge of that district, dated April 30, 1924.

The plaintiff under such circumstances must forfeit the deposit, although the defendant has not been able to establish that he has suffered any loss.

Unreported decision in S. A 2761 of 1919 referred to.

SECOND APPEAL by Nadiar Chand Guin, the plaintiff.

The plaintiff claimed a refund of Rs. 761 paid by him to the defendant as advance on account of bricks to be supplied, together with interest by way of damages, on the allegation that the defendant had failed to supply the bricks in spite of repeated demands. The defendant, however, asserted that he was always ready, and that he was still ready to deliver the bricks, as he had them in stock. He stated that the plaintiff was backing out of the contract as the price of bricks had fallen. The trial Court decreed the plaintiff's suit, but on appeal it was dismissed, the learned District Judge, Mr. P. E. Cammiade, I.C.S., observing: "It seems utterly unlikely, in fact totally incredible, that the plaintiff "should have asked for the delivery of the bricks "when he had not obtained Municipal sanction to the "erection of his house." . . . . "The defendant "had been prosecuted at about that time for burning "bricks without a license, and the Sanitary Inspector "of Ghatal Municipality, who has deposed for him "now, is the person at whose instance that prosecution took place, and deposed then as he has done "now that the defendant had burnt four stacks of "bricks, estimated by the Inspector at about 5 lakhs, "in the season in question." . . . "The reason "appears to be that for some reason or other the plaintiff is either giving up the idea of erecting a house "or is postponing its erection. It is the plaintiff "who has broken the contract. As his suit is one for

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"damages for breach of contract by the defendant, "it fails." Thereupon the plaintiff preferred the present second appeal in the High Court.

Dr. Sarat Chandra Basak and *Babu Santimoy Majumdar*, for the appellant.

Babu Tarakeswar Pal Choudhuri, *Babu Jnan Chandra Roy* and *Babu Anil Chandra Dutt*, for the respondent.

GHOSE J. In this case the plaintiff is the appellant. The appeal arises out of a suit for the refund of the money deposited by the plaintiff with the defendants for the purpose of purchasing bricks, which the defendants undertook to make for the plaintiff and to sell him at a certain rate. The agreement was that the plaintiff was to take delivery of the bricks at the brick-field of the defendants. It was stipulated that the bricks would be supplied within a certain date. The plaintiff complained in his plaint that the defendants had failed to perform their part of the contract and asked for the refund of the money deposited and for interest. The defendants pleaded that it was the plaintiff who was guilty of the breach of the contract as they had actually prepared the bricks and were always ready to give delivery to the plaintiff. They also pleaded that they called upon the plaintiff to accept the delivery but that the plaintiff failed to do so, because the price of bricks had gone down. The defendants stated that they had suffered loss on acconnt of the plaintiff's breach of contract for which they were entitled to get damages in excess of what the plaintiff claimed to the extent of Rs. 585 after setting off the claim of the plaintiff to the extent of Rs. 761. The trial Court held that the plaintiff was entitled to get his money with interest

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to the extent of Rs. 761 and the defendant's claim by way of set off was dismissed with costs. The defendants appealed against that decision and the learned Judge accepted the story of the defendants and held that it was the plaintiff who was guilty of breach of contract and not the defendants. The learned Judge also held that neither party produced any independent testimony as to the fluctuation of the price of the bricks and therefore he was unable to find that the fall in the price of bricks was the cause of the plaintiff's backing out of the contract. He gave certain other reasons for which the plaintiff might have committed the breach. In the end he dismissed the plaintiff's suit on the finding that it was the plaintiff who broke the contract, and he observed that as the suit was one for damages for breach of contract by the defendants, the suit failed. From this judgment the plaintiff appeals and on his behalf the learned advocate has urged that the learned Judge below was wrong in holding that the suit was for damages for breach of contract. His argument is that the suit was not for damages for breach of contract but for the recovery of the deposit or the advance made by the plaintiff to the defendants for the performance of the contract. Although it has been found that the plaintiff broke the contract, the defendants were only entitled to damages under section 73 of the Contract Act and as the learned Judge has found that there was no evidence to assess the actual damages suffered by the defendants, the plaintiff's suit for the refund of money ought not to have been dismissed. The question then resolves itself into this, whether a plaintiff who has entered into a contract for the purchase of goods and has made a deposit by way of earnest money and then refuses to purchase, is entitled to recover the earnest money. There have been

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several cases in various High Courts on this question and apparently the decisions have been to the effect that the plaintiff is not so entitled. This has been held following the principle laid down in the cases relating to specific performance of contract both in England as well as in this country. All these cases have been discussed and followed in an unreported case (S. A. 2761 of 1919) decided by Mr. Justice Chatterjea and Mr. Justice Pearson*, on March 3, 1922, where the learned Judges held that the plaintiff under such circumstance must forfeit the deposit, although the defendant has not been able to establish that he has suffered any loss. With this decision we agree. The appeal must, therefore, be dismissed with costs.

ROY J. I agree.

Appeal dismissed.

* CHATTERJEA AND PEARSON JJ. The appellants agreed to purchase certain quantities of steam coal and rubble from the respondent under three several contracts, dated the 20th December, 1916, 25th December, 1916, and 2nd January, 1917, respectively. At the time of entering into the two last named contracts the appellants paid to the respondent the respective sums of Rs. 152-8 and Rs. 520, the agreement being that those amounts were to remain in deposit with the respondent, they paying cash for the earlier orders to be given under the contracts, and the deposits being eventually credited as payments or part payments against the final order.

In regard to the last two contracts, the respondent sued to recover damages but the suits were dismissed on the finding that in the state of the market he had suffered no damage. The appellants also sued for the recovery of the two sums mentioned above, namely Rs. 152-8 and Rs. 520, and it is with these that we are concerned in the present appeal. The first Court decreed the amount, and the lower Appellate Court has reversed that decree and dismissed the suit.

Various contentions were put forward by the appellants *First*, that it was in consequence of the default of the respondent in respect of the deliveries under the first contract that they failed to place orders under the other two contracts: *secondly*, that the supply of wagons was stopped by Government; and thirdly, that the performance

of the last two contracts was conditional upon the due performance of the first on the part of the respondent. It is, however, found by the lower Appellate Court that there is not sufficient evidence of the interdependence of the contracts in the way alleged: it is also found that there is not sufficient evidence as regards the stoppage of wagons: that the appellants were dissatisfied with the respondent and did not act and were not willing to act according to the contracts: and, that, in these circumstances, it must be held that the contracts were broken by the appellants.

The question therefore is whether under these circumstances the plaintiffs are entitled to a refund of the deposit.

So far as the English Law is concerned, the law is well settled. As pointed out by Lord Macnaghten in *Soper* v. *Arnold* (1). "The deposit "serves two purposes—if the purchase is carried out it goes against the "purchase money, but its primary purpose is that it is a guarantee that "the purchaser means business". In the case of *Ex parte Barell. In re Parnell* (2), it was held that where a contract for sale goes off for default of the purchaser the vendor is entitled to retain the deposit. James L. J. remarked that "the money was paid to the vendor as a guaran-"tee that the contract should be performed. The trustee refuses to perform "the contract, and then says "Give me back the deposit. There is no ground "for such a claim." Mellish L. J. said:—"It appears to me clear that, even "when there is no clause in the contract as to forfeiture of the deposit "if the purchaser repudiates the contract he cannot have back the money as "the contract has gone off through his default". In *Collins* v. *Stimson* (3), Baron Pollock said, "According to the law of vendor and purchaser the "inference is that such a deposit is paid as a guarantee for the perfor-"mance of the contract and where the contract goes off by "default of the purchaser, the vendor is entitled to retain the deposit", and "in *Palmer* v. *Temple* (4), it was held that in the absence of any "specific provision the question whether the deposit is forfeited depends "upon the intent of the parties to be collected from the whole instru-"ment".

The question was discussed in *Howe* v. *Smith* (5), where Fry L. J. traced the history of earnest and deposit and at page 101 observed:—

"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

(1) (1899) 14 App. Case, 429, 435. (3) (1883) 11 Q. B. D. 142, 143.
(2) (1875) L. R. 10 Ch. App. 512. (4) (1839) 9 A. D. & E. 508.
(5) (1884) 27 Ch D 89, 101.

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"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 rule was approved by the Judicial Committee in *Sprague* v. *Booth* (1).

The principle has been followed in this country. See *Bishan Chand* v. *Radha Kishan Das* (2), *Roshan Lal* v. *The Delhi Cloth Mills Co.* (3), *Raghu Nath* v. *Chandra Protap* (4), (express agreement for refund of the deposit), *Habibullah* v. *Arman Dewan* (5), *Natesa* v. *Appavu* (6), (express agreement for forfeiture of the deposit).

It is contended however on behalf of the appellant that the rule is not an inflexible one, that in the absence of any statutory provisions on the point we should decide the case according to the principles of justice, equity and good conscience, and that as the defendant had not suffered any loss, he should not be allowed to make a gain by retaining the deposit. We were referred to the observations of Cotton L. J. in *Howe* v. *Smith* (7), in support of the contention. In that case Cotton L. J. observed as follows :—

"I do not say that in all cases where this Court would refuse specific "performance, the vendor ought to be entitled to retain the deposit. It "may well be that there may be circumstances which would justify this "Court in declining, and which would require the Court, according to its "ordinary rules, to refuse to order specific performance, in which it could "not be said that the purchaser had repudiated the contract, or that he had "entirely put an end to it so as to enable the vendor to retain the deposit. "In order to enable the vendor so to act, in my opinion 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 his conduct amount to a repudiation on his part of the "contract."

There is not doubt that it is not in every case of default on the part of the purchaser that the vendor is entitled to retain the deposit, but the observations of Cotton L. J. apply to cases where there is a suit for

(1) [1909] A. C. 576.
(2) (1897) I. L. R. 19 All. 489.
(3) (1910) I. L. R. 33 All. 166.
(4) (1912) 17 C. W. N. 100.
(5) (1919) 30 C. L. J. 113.
(6) (1913) I. L. R. 38 Mad. 178.
(7) (1884) 27 Ch. D. 89, 95.

specific performance of a contract and there is no *repudiation* on the part of the purchaser. In the case of *Alokeshi Dasi* v. *Hara Chand Dass* (1) which was also relied upon by the appellant the learned Judges observed :— "It is admitted that there is nothing either in the Specific Relief Act or "in the Contract Act which touches the question. We have therefore to "consider what is just and equitable and may fairly consider the law in "England upon the subject", and referred to the observations of Cotton L. J. in *Howe* v. *Smith* (2) quoted above. In the case of *Alokeshi Dasi* (1) however, the defendant denied the contract *in toto* and it was found that there *was no repudiation of the contract* by the plaintiff who brought the suit for specific performance of the contract and it was held that he was entitled to a refund of the deposit. We have not been referred to any case in which the plaintiff has been held entitled to refund of the deposit money even where there was repudiation of the contract on his part. In the present case the appellants were dissatisfied with the dealings of the respondent under the first contract, and they accordingly did not place any orders under the 2nd and 3rd contracts. They admittedly were not willing to perform their part of the contracts and their defence practically amounts to a justification for repudiation of the contracts. The findings of the Court of Appeal below, however, are against them.

It may be hard that the plaintiffs should forfeit the deposit although the defendant did not suffer any loss, but having regard to the findings arrived at by the Court of Appeal below, and to the authorities on the point, we feel constrained to dismiss the appeal. We direct, however, that each party do bear his own costs in all the Courts.

G. S. *Appeal dismissed.*

(1) (1897) I. L. R. 24 Calc. 897. (2) (1884) 27 Ch. D. 89, 95.