APPELLATE CIVIL.

Before Sir John Wallis, Kt., the Officiating Chief Justice, Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

THE VELLORE TALUK BOARD, BY ITS PRESIDENT (PLAINTIFF), PETITIONER,

v.

GOPALASAMI NAIDU (DEFENDANT), RESPONDENT.*

1913. October 24 and 29 and 1914. September 24

Contract, breach of—Damages, ascertainment of—Earnest-money, deposit of, forfeiture of—Credit for forfeited amount.

Where a person deposits a certain amount as earnest-money for the due performance by him of his part of the contract under which he agrees to pay the other party a certain sum but breaks the contract thereafter, the other party who becomes entitled to retain the deposit as forfeited under the terms of the contract must, in a suit by him for damages for the breach of contract, give credit for the amount retained as forfeited and can only recover the difference between the actual loss sustained and the amount of the forfeited deposit.

Ockenden v. *Henly* (1858) 1 E.B. & E., 485; s.c., 27 L.J., Q.B., 361, followed.

APPEAL under article 15 of the Letters Patent against the order of SADASIVA AYYAR, J., in Civil Revision Petition No. 596 of 1909, preferred against the decree of K. KRISHNAMA ACHARIYAR, the District Munsif of Vellore, in Small Cause Suit No. 133 of 1909.

This is a suit for Rs. 104, being the damages said to have been caused to the plaintiff, the Taluk Board of Vellore, by reason of defendant's breach of his contract of lease relating to the Karadigudi fair market for the year 1908-09.

The defendant took a lease of the market for the year 1908-09 but failed to pay his monthly rents according to the terms of his contract and thereupon the plaintiff resold the lease with effect from 1st October 1908 for Rs. 90. The amount of the lease of the plaintiff was Rs. 217, and the plaintiff sues to recover Rs. 104 after giving credit to Rs. 23 collected directly by the plaintiff himself as market fees. The defendant raised the following among other pleas, viz.: (1) that some more money was handed over to the plaintiff as market dues, and (2) the plaintiff ought also to give credit for Rs. 36 deposited by the defendant with the plaintiff as earnest-money for the due performance by him of his part of the contract. The District Munsif

* Letters Patent Appeal No. 37 of 1914.

THE PRESIDENT, VELLORE TALUK BOARD v. GOPALASAMI NAIDU.

held on the first plea, that Rs. 19 more was paid to the plaintiff as market fees and on the second plea that the plaintiff must give credit for the Rs. 36, the amount of the earnest-money deposited by the defendant, and gave a decree for the balance, viz., Rs. 49.

Thereupon the plaintiff preferred the above Revision Petition to the High Court (Civil Revision Petition No. 596 of 1909) and contended that the deposit amount having been forfeited according to the terms of the contract, ought not to be taken into account in assessing the damages. SPENCER, J., allowed the Revision Petition while SADASIVA AYYAR, J., dismissed it. The plaintiff whose Revision Petition was therefore dismissed under sections 98 and 141, Civil Procedure Code, preferred this Appeal under article 15 of the Letters Patent.

The other necessary facts appear from the judgment of SPENCER, J.

Civil Revision Petition No. 596 *of* 1909.

SPENCER, J. SPENCER, J.—*The appellant is the Taluk Board of Vellore.* The respondent was a contractor under the said Board of the right to collect market fees at the weekly fairs held at Karadigudi. As an earnest of his intention to perform the contract he deposited a sum of Rs. 36-2-8 being two months' rent in advance. Subsequently he made default in the regular payment of the monthly rents on the due dates, and acting on the terms of the contract, the Taluk Board resold the right at his risk.

The appellant was the plaintiff in the District Munsif's Court and brought this suit to enforce two of the stipulations in the contract, viz., (1) that any loss resulting from a re-sale held in consequence of the defendant's default should be recovered from his properties, (2) that the defendant should forfeit his deposit of Rs. 36-2-8.

The District Munsif allowed the plaintiff's claim on the first head and disallowed it as regards the second, on a consideration of section 74 of the Contract Act.

I am clearly of opinion that neither section 74 nor its exception has anything to do with this case.

In *Natesa Aiyar* v. *Appavu Padayachi*(1), WALLIS, J., refers to the opinion of Sir GEORGE JESSEL, M.R. in *Wallis* v. *Smith*(2)

(1) (1910) I.L.R., 33 Mad., 375 at p. 380; s.c., 20 M.L.J., 230.
(2) (1882) 21 Ch.D., 243.

on the determination of the question whether a stipulation for forfeiture is a penalty or not in these words —"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."

In the appeal to the Full Bench which appears in *Natesa Aiyar* v. *Appavu Padayachi*(1) the learned Chief Justice referring to *Howe* v. *Smith*(2) quoted the words of FRY, Lord Justice, to the effect that money paid as a deposit 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." In considering whether section 74 of the Indian Contract Act could be applied to such a case the learned Chief Justice went on to observe "Why should it be assumed that it (the deposit by way of advance) 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 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."

It may be objected that the above was a case of vendor and purchaser and that the purchaser was suing for the return of the deposit paid by him, but the same reasoning must apply, whichever party brings the suit on the contract, when the stipulations as to forfeiture are similar.

In fact the question is so concluded by authority that it barely admits of argument, *vide Manian Patter* v. *The Madras Railway Company by its Agent and Manager*(3) and *Singer Manufacturing Company* v. *Raja Prosad*(4) which was a case in which the depositary was the plaintiff and sued to enforce the stipulation as to forfeiture of the deposit as well as to recover rent.

The respondent's pleader relies on certain remarks at page 249 of "Mayne on Damages" to the effect that in estimating the

(1) (1915) I.L.R., 38 Mad., 178 at pp. 181 and 185; s.c., 24 M.L.J., 488 (F.B.).
(2) (1884) 27 Ch.D., 89 at p. 101. (3) (1906) I.L.R., 29 Mad., 118.
(4) (1909) I.L.R., 36 Calc., 960.

THE PRESIDENT, VELLORE TALUK BOARD v. GOPALASAMI NAIDU.

SPENCER, J.

loss on a re-sale, the deposit although forfeited, is to be taken into account as diminishing the deficiency. These are based on a judgment of Lord CAMPBELL of the year 1858 in *Ockenden* v. *Henly*(1). I think that case may be distinguished by the fact that the agreement of sale, which was the subject of the decision, mentioned all the consequences arising upon a default by the purchaser of goods as parts of a single condition, namely actual forfeiture of the deposit, an option of re-sale to be exercised by the vendor, and an obligation on the defaulter to make good any deficiency upon re-sale together with the expenses which on non-payment might be recovered as liquidated damages, whereas in the present case the muchilika provides "not only shall I (the defaulter) be deprived of the lease for the remaining months, but there shall be a re-sale at my risk and any loss resulting there from shall be made good from the moveable or immoveable properties belonging to me : and *I shall also forfeit* the aforesaid deposit of Rs. 36-2-8 paid by me." These are separate stipulations and there are others, which I have omitted as being unimportant. In case the distinction I have drawn is fanciful, I would still allow the present claim relying on the decisions quoted above especially that in *Singer Manufacturing Company* v. *Raja Prosad*(2) as being a case where the person who sued was the depositary.

To allow this appeal will be only to bind the parties by the terms of the contract which they made for themselves.

I think that this is what should be done when it has been found that none of the sections of the Contract Act, which might take the case out of the general rules, can be applied.

The District Munsif's decree in my opinion should be amended by giving the plaintiff a decree for Rs. 86-0-8 with proportionate costs throughout and further interest at 6 per cent. till realisation.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The facts have been set out by my learned brother in the judgment just now pronounced by him and I need not repeat them. I would, however, define the suit not as a suit to enforce both the stipulations in the contract referred to in my learned brother's judgment but to enforce only the first of those stipulations ; the plaintiff Board having before bringing the suit treated the deposit of Rs. 36-2-8 which it had as already forfeited. I agree with my learned brother that the Full Bench

(1) (1858) 27 L.J., Q.B. 361. (2) (1909) I.L.R., 36 Calc., 960.

decision in *Natesa Aiyar* v. *Appavu Padayachi*(1) is binding upon us. Under that decision, a provision for the forfeiture of a resonable amount of deposit money under a contract could not be treated as a penal clause to be relieved against in a suit brought by the person who has forfeited that money for the recovery of such deposit or a portion of such deposit on the ground that the actual damage or loss incurred by person with whom the money was deposited was either *nil* or less than the amount deposited. But the question in the present case is whether, if the person for whose benefit the forfeiture clause was entered in the contract did not content himself with retaining the deposit as a forfeiture but sued for the *actual* loss incurred by him through the default of the other party on the ground that the deposit amount (which according to all the English cases was security for the due performance of the contract by the defaulter) was insufficient to cover such a loss or on the ground that the contract provided for both the forfeiture of the deposit and also for the right to recover the loss, whether in such a case, the plaintiff was not legally bound to give credit to the deposit money and whether he could recover more than the difference between the damages incurred and the deposit money.

I am inclined to hold that the plaintiff in such a case cannot recover more than the difference between the loss incurred by him and the deposit money. In Mayne on Damages, pages 248 and 249 it is stated as follows :—"It results from this that if the seller seeks to recover damages beyond the amount of the deposit, he must give credit for the deposit which he has retained." Then *Ockenden* v. *Henly*(2), is quoted as authority. In that case, the condition in favour of the innocent party was as follows :—"The deposit . . . shall be *actually forfeited to the vendor*, who shall be at liberty to re-sell . . ."; "*and any deficiency upon* . . ." "*resale together with the expenses* . . ., *shall* . . . *be made good by the defaulter*; and on non-payment . . . shall be recoverable as . . . liquidated damages." Thus in that case (as in this case) there was a provision in favour of the plaintiff both for forfeiture of the deposit and for a right to recover the loss on resale and yet the

(1) (1915) I.L.R., 38 Mad., 178; s.c., 24 M.L.J., 488 (F.B.).
(2) (1858) 1 E.B. & E., 485; s.c., 27 L.J., Q.B., 361.

THE PRESIDENT, VELLORE TALUK BOARD v. GOPALASAMI NAIDU. — SADASIVA AYYAR, J.

learned Judges Lord CAMPBELL, C.J., COLERIDGE, J., ERLE, J., AND CROMPTON, J., held that the plaintiff could not retain the deposit and also recover the full damages caused to him but could only recover the difference. The judgment is a short but instructive one and I shall quote the greater portion of it: "There having been an actual forfeiture of the deposit by the express words of the seventh condition, the deposit, if paid, could not in any event have been recovered back by the purchaser, and the seller would have been entitled to any additional benefit . . . to the forfeited deposit, *and making a further demand of damages sustained on the resale*, it becomes necessary to consider what was the nature of the deposit. Now, it is well settled that, by our law, following the rule of the civil law, a pecuniary deposit upon a purchase is to be considered as a payment in part of the purchase money, and not as a mere pledge (Sugden's Vendors and Purchasers, Chapter I, sec. (iii), art. 18, page 40, thirteenth edition). Therefore in this case, had the deposit been paid, the balance only of the purchase money would have remained payable. *What then, according to the seventh condition is the deficiency arising upon the resale which the seller is entitled to recover*? We think the difference between the balance of the purchase money on the first sale and the amount of the purchase money obtained on the second sale: or, *in other words, the deposit, although forfeited so far as to prevent the purchaser from ever recovering it back, as without a forfeiture he might have done (Palmer* v. *Temple)*(1) *still is to be brought by the seller into account if he seeks to recover as for a deficiency on the resale.*"

I am unable to distinguish the present case from the decision in *Ockenden* v. *Henly*(2) so far as the legal principles applicable to the rights of the parties are concerned and I would therefore dismiss the Revision Petition with costs. Under sections 98 and 141 of the Civil Procedure Code the petition will stand dismissed with costs, three months being granted to the Vellore Taluk Board to pay the costs.

From this an appeal under article 15 of the Letters Patent was preferred by the plaintiff.

---

(1) (1839) 9 A. & E., 508.

(2) (1858) 1 E.B. & E., 485 at pp. 492 and 493; s.c., 27 L.J., Q.B., 361.

Letters Patent Appeal No. 37 *of* 1914.

THE PRESIDENT, VELLORE TALUK BOARD v. GOPALASAMI NAIDU.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the appellant.

C. R. Subrahmanya Ayyar for the respondent.

WALLIS, OFFG. C.J., AYLING AND SESHAGIRI AYYAR, JJ.

JUDGMENT.—We think the case is covered by the authority of *Ockenden* v. *Henly*(1), which was distinguished in *Essex* v. *Daniell*(2), and referred to with approval by FRY, L.J., in *Howe* v. *Smith*(3), and was apparently followed by JOYCE, J., in the most recent case of *Shuttleworth* v. *Clews*(4).

We accordingly agree with SADASIVA AYYAR, J., and dismiss the appeal with costs.

PRIVY COUNCIL.*

ANNIE BESANT (DEFENDANT),

v.

NARAYANIAH (PLAINTIFF).

1914. May 4, 5 and 25.

[On appeal from the High Court of Judicature at Madras.]

Guardian—Hindu father entrusting sons for custody and education in England to another person who defrays expense of their maintenance and education—Revocation of such authority and demand for sons to be restored to his custody—Suit to enforce demand in District Court—Questions to be determined in such a suit—Jurisdiction of the District Court—Guardians and Wards Act (VIII of 1890), *sec.* 9—*'Ordinarily resident,' meaning of—Suit, not the appropriate procedure—Transfer of suit from the District Court to the High Court under clause* (13) *of the Letters Patent,* 1865—*Powers of the High Court in dealing with the suits so transferred—Mandatory order of the kind asked for, not to be made—What a Court of competent jurisdiction in India could do under the circumstances—Order declaring a guardian, when to be made—Guardians and Wards Act (VIII of* 1890), *sec.* 19—*Order declaring a guardian during respondent's life, propriety of.*

Among Hindus, as in England, the father is the natural guardian of his children during their minority; but this guardianship is in the nature of a sacred trust, and he cannot therefore during his lifetime substitute another person to be guardian in his place. He may, in the exercise of his discretion as guardian, entrust the custody and education of his children to another; but the authority he thus confers is essentially a revocable authority, and if the welfare of his children require it, he can, notwithstanding any contract to the

(1) (1858) 1 E.B. & E., 485; s.c., 27 L.J., Q.B., 361.
(2) (1875) L.R., 10 C.P., 538. (3) (1884) L.R., 27 Ch. D., 89
(4) (1910) 1, Ch. 176.

* *Present*: The LORD CHANCELLOR (Lord HALDANE), Lord MOULTON, Lord PARKER, SIR JOHN EDGE AND MR. AMEER ALI.