APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

VARADARAJA PERUMAL KOIL, BY ITS TRUSTEE GANAPATHISUNDARAM PILLAI (DEFENDANT), APPELLANT, 1929, July 25.

v.

MUNIAPPA PILLAI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Lessor and lessee—Deposit of an amount made by lessee with lessor —Interest on the amount to be adjusted towards half the rent—Principal amount to be adjusted towards rent of last year of the lease period—Default in payment of rent—Subsequent suit by lessee for return of deposit from lessor—No forfeiture clause in lease—Amount of deposit, whether forfeited—Deposit, essentials of.

A lease provided that the lessee should deposit a certain amount with the lessor, that the interest on the amount deposited was to be taken in part-payment of the rent, and that the principal amount was to be taken in discharge of the last year's rent. Upon default in payment of the first year's rent, and re-entry upon the land by the lessor, the lessee sued to recover the full amount deposited by him with the lessor.

Held, that the amount left by the lessee with the lessor was not a deposit in the strict legal sense of the term, liable to be forfeited on default of payment of rent;

and that the lessee was entitled to recover the return of his deposit, less the rent that became payable in the first year.

What is strictly known as a deposit in the legal sense must possess a twofold character; it must first be a part-payment and next it must be of the nature of money "staked"; *Howe* v. *Smith*, (1884) 27 Ch.D., 89, referred to.

APPEAL against the order of the District Court of Tinnevelly in Appeal No. 196 of 1925, preferred against

* Appeal Against Order No. 366 of 1926.

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the order of the Court of the Subordinate Judge of Tinnevelly in O.S. No. 85 of 1924.

The material facts appear from the judgment.

K. V. Sesha Ayyangar for appellant.

T. S. Venkatesa Ayyar and *K. Balasubrahmania Ayyar* for respondents.

The JUDGMENT of the Court was delivered by

VENKATASUBBA RAO, J.—This appeal raises an important question of law, relating to the right of a party in default to the recovery of the deposit paid by him under a contract. The suit is filed by a lessee for the return of his deposit, and the trial Court rejected the claim, holding that the amount became forfeited to the lessor. The lower Appellate Court took a different view and remanded the case for re-trial and disposal. The question is, was the order of remand rightly made? The District Judge's decision remanding the suit is contained in the following passage of his judgment:—

> "The landlord's loss in re-letting was alleged and put in issue but not tried. I think that the landlord is entitled to have the question decided, what damages he suffered by reason of plaintiff's default, and that he is entitled to deduct from the deposit whatever amount is found due to him as damages."

We have first to examine the terms of the lease deed. It bears date the 15th April 1920. The period of the lease was fixed as seven years and the lessee took possession. The lease was of agricultural land. The annual rent was agreed to be Rs. 3,210 to be paid in two instalments, a moiety before the 30th December and the remaining half before the 30th June of each year. Some further rent was to be paid in kind with which we are not concerned. The deed contains a provision for re-entry, it being stipulated that in default of payment of rent, the landlord is to be at liberty to re-enter and take possession not only of the land but

also of any crops standing upon it. The lessee paid a deposit of Rs. 2,676 and the clauses that follow are very material. He is entitled to interest on that sum at 6 per cent per annum and may adjust that interest against the rent payable on the 30th June of each year. Then as regards the principal of the deposit amount, it was to be adjusted against the rent payable for the last, that is, the seventh, year of the lease.

The lessee made default in the payment of rent that fell due on the 30th June 1921. The lessor made a demand for the rent which was not complied with. He immediately exercised his right of re-entry and took possession of the land with the standing crops thereon. The lessee made some ineffectual protest not in regard to the re-entry but in respect of certain subsidiary matters. With that protest, we are not concerned in this appeal.

The question to be decided is, is the lessee entitled to the return of his deposit, less the rent, that became payable on the 30th June 1921? We may observe that the claim is confined to this amount. Mr. Sesha Ayyangar, the learned Advocate for the appellant (the lessor), has drawn our attention to several English and Indian decisions on the point. The first question that arises is, is the amount claimed in this suit a deposit in the legal sense? What is strictly known as a deposit must possess a twofold character. It must first be a part-payment and next it must be of the nature of money "staked". That a "deposit" must possess these two distinctive marks is emphasized in the leading case on this subject, *Howe* v. *Smith*(1). This case has been referred to and followed in numerous Indian decisions, including *Natesa Aiyar* v. *Appavu Padayachi*(2).

(1) (1884) 27 Ch.D., 89. (2) (1913) I.L.R., 38 Mad., 178 (F.B.).

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The very word "staked" is used in the judgment of BOWEN, L.J., who observes

"In the present case, we have, in the first place, turning to the language of the instrument, a description of the manner in which the money is *staked* or deposited. It is a deposit, and it is to be *both a deposit and in the nature of part-payment.*"

The force of the word "staked" is brought out in the judgment of FRY, L.J., wherein it is stated

"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."

A deposit then serves not merely as a part-payment but there is a further characteristic which it possesses, namely, it is paid as a "guarantee that the contract shall be performed," in other words, as "a security for the completion of the purchase." (See the judgments of COTTON, L.J., and BOWEN, L.J.) This dual nature of what is known as deposit is most tersely referred to by COTTON, L.J., thus :—

"If the sale *goes on*, . . . it goes in part-payment of the purchase-money for which it is deposited; but if, on the default of the purchaser, the contract *goes off*, that is to say, if he repudiates the contract, . . . he can have no right to recover the deposit."

The same idea is conveyed by the judgment of FRY, L.J. After stating that a deposit corresponds to "the earnest or *arrha* of our earlier writers," the learned Lord Justice goes on to say

"The expression used in the present contract that the money is paid "as a deposit and in part-payment of the purchase money," relates *to the two alternatives*, and declares that in the event of the purchaser making default the money is to be forfeited, and that in the event of the purchase being completed, the sum is to be taken in part-payment."

This definition of the word "deposit" receives further support from the judgment of Lord DUNEDIN in

Sprague v. *Booth*(1). After referring with approval to *Howe* v. *Smith*(2), the learned Lord observes :—

"If payment is made of the purchase money, it is to be credited to such payment; if default is made in the payment of the money, then the deposit is forfeited."

We have now clearly shown that a sum paid under a contract cannot be called a deposit unless it fulfils these two requirements. These being then the nature and incidents of a deposit, can it be said that the money paid under the contract in question answers that description? In our opinion, the answer must be in the negative. In the first place, there is a broad distinction between an executory contract of sale and an *executed* contract of lease. In the former case, a deposit amount is paid in order to create "by the fear of its forfeiture a motive in the payer to perform the rest of the contract." In the case of a lease partially performed, the matter stands on a different footing. This very contract illustrates what we mean. The parties did not contemplate either by express terms or by implication that the money was to be forfeited. The lease deed contains express stipulations on the point. It says that the interest on the deposit was to be adjusted against the moiety of the rent due on each 30th of June and the principal itself was to be deducted from the rent for the last year of the lease. There was not the remotest idea that the amount was ever to be forfeited. The sum was therefore paid in part-payment of the rent, but not in addition as security or guarantee for the performance of the contract. The second requisite is therefore wanting and we are not prepared to hold that the sum in question can be treated as a deposit in law.

The cases quoted by Mr. Sesha Aiyangar do not apply, for in each of them the lease contains an express

(1) [1909] A.C., 576. (2) (1884) 27 Ch.D., 89.

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forfeiture clause, *Orr* v. *Chinna Yegappa Chetty*(1), *Venkatachari* v. *Ramalinga Thevan*(2), *The President, Vellore Taluk Board* v. *Gopalaswami Naidu*(3).

Mr. Sesha Aiyangar contends that, even in the absence of a forfeiture clause, the deposit amount becomes liable to be forfeited. He relies upon *Howe* v. *Smith*(4), the case already cited, *Hall* v. *Burnell*(5), and *Ex parte Barrel, In re Parnell*(6). The law on the point may be thus shortly stated. In each case, we have to look to the document to see what was the bargain that was made. The parties may agree just as they please as to what is to be done with the money deposited. In the absence of an express clause, the term most naturally to be implied, having regard to the nature and incidents of a deposit, is that on repudiation of the contract by the payer, the amount shall be forfeited to the payee. (See *Howe* v. *Smith*(4), the judgment of FRY, L.J., at page 101.)

In the present case, we have held that the amount paid under the contract is not a deposit and the principle above stated does not therefore apply.

There was some discussion whether, on the facts, the lessee's conduct amounts merely to a breach or constitutes a repudiation of the contract. In the view we have taken, it is unnecessary to deal with this question.

To avoid any misunderstanding, it remains to observe that the respondent's learned Advocate confines his claim to the amount, the subject-matter of the appeal in the lower Appellate Court.

The appeal fails and is dismissed with costs.

K.R.

(1) (1915) 17 M.L.T., 229.
(2) (1918) 7 L.W., 404.
(3) (1913) I.L.R., 38 Mad., 801.
(4) (1884) 27 Ch.D., 89.
(5) [1911] 2 Ch., 551.
(6) (1875) L.R., 10 Ch. App., 512.