

## APPELLATE CIVIL.

1915  
August, 2.

*Before Justice Sir Pramada Charan Banerji and Mr. Justice Muhammad Rafiq.*

THE MUNICIPAL BOARD OF ALLAHABAD (PLAINTIFF) v.

TIKANDAR JANG (DEFENDANT).\*

*Act No. IX of 1872 (Indian Contract Act), section 74—Sale—Construction of document—Conditions of sale—Penalty—Vendor not entitled to recover more than provided for by conditions of sale.*

A Town Improvement Trust, having acquired land for the purpose of making a new road, thereafter proceeded to sell sites along the road. Amongst the conditions of sale were that the purchaser was to deposit 10 per cent. of the purchase money immediately on the sale and the balance within nine months. There was a further condition that "if any purchaser fail to comply with any of these conditions, his deposit shall be forfeited, and the vendors shall be at liberty to resell the lot or lots sold to him either by public auction or by contract."

*Held*, on suit by the Trust against a purchaser who had paid only Rs. 1 at the time of his purchase and no more, that the plaintiff was only entitled to recover from the purchaser the 10 per cent. deposit which was one of the conditions of sale, and not the difference in price resultant on a resale of the property.

THE facts of this case were as follows :—

A scheme to open a congested area at Allahabad was started : considerable property was acquired, and a road was constructed. Plots of land on either side of the said road were sold by auction, and under the conditions of sale 10 per cent. of the purchase money was to be deposited by purchasers. The defendant purchased a plot for Rs. 3,900, paid one rupee only as earnest money, and failed to pay the balance within the time allowed under the conditions of contract. The property was sold a second time after due notice to the defendant and was sold at a loss. The present suit was brought for recovery of the difference in price between the two sales. The court of first instance decreed the suit. On appeal by the defendant the lower appellate court modified the decree, holding that the defendant was only liable to pay the 10 per cent. of the amount bid by him according to the conditions of sale. The following further condition of sale is material :—

" 8. If any purchaser fail to comply with any of these conditions, his deposit shall be forfeited, and the vendors shall be at

\* Second Appeal No. 506 of 1915, from a decree of S. R. Daniels, District Judge of Allahabad, dated the 22nd of January, 1915, modifying a decree of Gokul Prasad, Subordinate Judge of Allahabad, dated the 11th of July, 1914.

liberty to resell the lot or lots sold to him either by public auction or by contract." The plaintiffs appealed to the High Court.

Mr. B. E. O'Connor, (with him Hon'ble Pandit Moti Lal Nelru) for the appellants :—

Section 74 which provides a penalty for breach of the contract does not deprive us of our remedy under the general law. A forfeiture, I submit, does not operate as a bar to the vendor's common law right. The right to damages is not lost merely by laying down a condition as to forfeiture of deposit. The case-law in England is limited. Improvement Trusts are of recent growth in India and few cases on the question are to be found in the courts in India. The forfeiture of a deposit is not a penalty under section 74. This is a case in which there is a forfeiture, but it is not the sole remedy which the vendor can avail himself of in case of breach. I claim the loss under the general law under which a man who suffers loss can claim damages. Dart says that the vendor may either forfeit the deposit in case of failure or resell the property and claim damages even in the absence of such a condition (see page 179, 7th Ed.). This has been done in the present case; *Howe v. Smith* (1); *Icely v. Grew* (2); *Noble v. Edwardes* (3) is a case in point. The judgement was reversed in appeal, but upon another ground, and the decision of the single Judge is a pronouncement worthy of consideration. Gour's Transfer of Property Act, 4th Ed., 619, relies upon this case and also on *Soper v. Arnold* (4). The provisions of section 74 were considered by the Madras High Court, which held that that section did not apply to cases of forfeiture; *Manian Patter v. Madras Ry. Co.* (5). The right to resale gives a right to damages in case of loss on resale; *Levy v. Stogdon* (6); *Levy v. Stogdon* (7); *Cornwall v. Henson* (8); *Willis v. Smith* (9).

The Hon'ble Dr. Tej Bahadur Sapru, for the respondent :—

The parties must be governed by the written contract, and that contract is absolutely silent as to the right to recover damages

(1) (1884) 27 Ch. D., 89, 101. (5) (1905) L. L. R., 29 Mad., 118.

(2) (1886) 6 N and M., 467; 43 R.L., 553. (6) (1898) 1 Ch., 478.

(3) (1877) 5 Ch. D., 378.

(7) (1899) 1 Ch., 5.

(4) (1897) 85 Ch. D., 384.

(8) (1900) 2 Ch., 298.

(9) (1882) 21 Ch. D., 243.

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on the resale of the property. The conditions of sale were drawn up by an eminent barrister, and, regard being had to the formality of the document it should be strictly construed against the Trust. It is not the case that the right to recover such damages in the case of immovable property is known to common law. The passage in *Dart on Vendors*, relied on by the other side, does not contain a correct statement of law. The English cases referred to by *Dart* in his foot note do not bear out the statement of law. *Williams on Vendors and Leake on Contracts*, 6th Ed., 711, state the effect of those cases correctly. There is no case which goes the length to which the plaintiffs wish the court to go. In every English case cited by the other side there was an express clause providing for recovery of damages on resale, which is not the case here. The case of *Icely v. Grew* (1) was not a case of damages accruing on resale and is no authority in support of the plaintiff. Besides, there was an express clause providing for recovery of damages on resale. Even if the rule of common law is otherwise, it should not be applied in India, because, while section 107 of the Contract Act gives a right to the vendor to recover the difference between the price of the first sale and that of resale of goods there is no such section in the Transfer of Property Act which applies to immovable property. Further, it is a case governed by section 74 of the Contract Act. The case in 29 Madras is not a case directly in point and it overlooks the fact that under section 74, as amended by Act VI of 1899, the parties may treat the forfeiture of the deposit itself as a penalty. In the present case clause 8 of the conditions of sale is that the deposit shall be forfeited if the sale is not concluded and the vendor can resell. This provision is in the nature of a penalty, and, there being no other provision for further damages, all the Trust is entitled to claim is the deposit money and nothing more. He then discussed the cases cited by the appellant.

. Mr. B. E. O'Connor, was heard in reply.

BANERJI and MUHAMMAD RAFIQ, JJ. :—The suit out of which this appeal has arisen was brought by the Allahabad Improvement Trust, represented by the Municipal Board of Allahabad, under the following circumstances. For the improvement of the town of

(1) (1886) L<sup>c</sup> and M., 467; 43 R. R., 553.

Allahabad a road called the Hewett Road was opened out and land was acquired under the Land Acquisition Act. Portions of the land so acquired, not used for the road, were sold by auction under certain conditions set forth in a document which was signed by the Chairman of the Municipal Board and the persons bidding at the auction sales. The defendant purchased a plot of land for Rs. 3,900; he made a deposit of Re. 1 only and did not pay the balance of the price. The Municipal Board, after issuing notice to the defendant, resold the land. The amount realized at the resale was Rs. 875. The present suit was accordingly brought to recover the difference, namely, Rs. 3,024 from the defendant. The court of first instance decreed the suit. Upon appeal, the learned District Judge modified the decree of that court and passed a decree in the plaintiff's favour for the amount of deposit which the defendant was bound to make under the terms of the contract. In our opinion the whole case turns upon the true construction of the provisions of the instrument called, "the Conditions of Sale," which was the contract between the parties to which we have referred above. Clause 4 of this document provides that "each purchaser shall, immediately after the sale, pay into the Municipal Office, Allahabad, to the credit of the Allahabad Improvement Trust, a deposit of 10 per cent. of his purchase money and shall sign an agreement in the form subjoined and shall pay the residue of the purchase money to the vendors within a period of nine months from the date of the sale, and on payment of the said amount the purchase shall be completed." Clause 8 provides that "if any purchaser fail to comply with any of these conditions, his deposit shall be forfeited and the vendor shall be at liberty to resell the lot or lots sold to him either by public auction or by contract." As we have stated above, the deposit required by clause 4 was not made, nor was the residue of the purchase money paid within the term fixed. There was thus a failure to comply with the conditions laid down in the document, and the provisions of clause 8 could be enforced. As we understand that clause, it gives the vendor the right to resell the lot; but the penalty which it provides is the forfeiture of the deposit which the purchaser was bound to make. The Municipal Board, upon the purchase being made by the defendant, was entitled to

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obtain from the defendant the deposit of 10 per cent. of the purchase money. This amount they were entitled to recover under clause 8, as soon as a breach of the conditions of the document was committed. They also acquired the right to resell the property; but under clause 8 the right to resale did not carry with it a right to recover damages sustained by reason of any deficiency arising in the amount of purchase money realized by the resale. The parties must be bound by the contract which they entered into, and we have to consider what their intention was when clause 8 was inserted in the document. If it had been intended that upon failure to perform any of the conditions of the sale, the vendee would be liable to pay damages arising upon a resale, one would have expected that such a condition would find place in the document. The absence of such a condition leads to the inference that the only penalty incurred by the vendee is the forfeiture of the 10 per cent. of the purchase money which he was bound to deposit. In this view the English cases and other authorities cited before us have no bearing on this case and need not be considered. In our opinion the decision of the lower appellate court is right and this appeal must fail. We accordingly dismiss it with costs.

*Appeal dismissed.*

### FULL BENCH.

1915  
November, 29.

*Before Justice Sir George Knox, Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.*

JIBAN KUNWAR (PETITIONER) v. GOBIND DAS (OPPOSITE PARTY).  
*Act No. II of 1899 (Indian Stamp Act), schedule I, article 55—Stamp—Release—Partition deed.*

Two persons, each of whom claimed the sole right to the property of a deceased relation, arrived at a compromise of their respective claims and gave effect thereto by means of two deeds of even date, by which deeds each relinquished in favour of the other his (or her) claim to a portion of the estate of the deceased.

*Held* that these deeds were releases, assessable to stamp duty under article 55 of the first schedule to the Indian Stamp Act, 1899. *Elknath S. Gownde v. Jagannath S. Gownde* (1) and *Reference under Stamp Act, section 46* (2) referred to, *Reference under Stamp Act, section 46* (3) distinguished.

\* Civil Miscellaneous No. 183 of 1915.

(1) (1885) I. L. R., 9 Bom., 417. (2) (1894) I. L. R., 18 Mad., 233.

(3) (1889) I. L. R., 12 Mad., 198.