APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan, and Mr. Justice A. H. deB. Hamilton

1940
March, 28

MADAN THEATRES, LIMITED (DEFENDANT-APPELLANT) *v.* NARAYAN DAS (PLAINTIFF-RESPONDENT)*

Contract—Penalty—Damages—Money payable by instalments —Provision that in case of default money already paid will be forfeited—Provision is penalty—Only reasonable damages can be allowed—No provision in contract for payment of interest—Interest, whether can be allowed.

A provision in an agrement to pay money by instalments that in case of default the money already paid would be forfeited is a penalty and in such a case on a default only a reasonable sum can be claimed by way of damages. *Steedman* v. *Drinkle* (1), relied on.

No sum can be decreed as interest which is not within the contract nor which interest is by way of damages nor which is specifically provided for by statute. *Bengal-Nagpur Railway Company, Limited and Ruttanji Ramji* (2), relied on.

Mr. *H. D. Srivastava,* for the appellant.

Messrs. *Haider Husain* and *Makund Behari Lal,* for the respondent.

ZIAUL HASAN and HAMILTON, JJ.:—This is an appeal by defendant No. 1, Madan Theatres, Limited, against a decision of the Civil Judge of Mohanlalganj, against them decreeing a suit of the plaintiff Narayan Das.

There was originally a second defendant but he is not a party to the appeal and we are not concerned with him.

The plaintiff took the rights of the distribution of a film "Sukhi Lutera" for the United Provinces and Delhi Province. The defendant-appellant owned the film and was to hand over two copies of it to the

*First Civil Appeal No. 24 of 1937, against the order of Mr. Sheo Gopal Mathur, Civil Judge of Mohanlalganj, Lucknow, dated the 30th of September, 1936.

(1) (1915) A.I.R., P.C., 94. (2) (1937) L.R., 65 I.A., 66.

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plaintiff who was to make arrangements with various cinemas that the film might be shown there. An agreement, which is Ex. A-1, was entered into on the 5th March, 1934, and gave the plaintiff the right for two years to lease the film to cinemas in the area already stated. The plaintiff was a distributor under the name of the Shree Vishnu Talkies and he had to pay Rs.15,000 to the appellant; Rs.3,000 were to be paid on the 3rd March, 1934, Rs.3,000 were to be paid on receipt of the railway receipt of the film and the balance of Rs.9,000 was to be paid by five equal monthly instalments of Rs.1,800, the first instalment becoming payable in the first week of May, 1934, and the last, therefore, being payable in the first week of September, 1934. Admittedly this last instalment was not paid then and has in fact never been paid. The reason given for not paying it is that the plaintiff thought that the takings had been so bad that he would never get Rs.15,000 before the end of the year. Under para. 8 of the agreement the plaintiff as distributor was to lease the film to cinemas for 60 per cent. of the takings for the first run, 50 per cent. for the second run and 40 per cent. for the third and subsequent runs. From these takings he was entitled to 10 per cent. for himself, the balance going to the appellant. Under para. 18 of the agreement if the takings did not amount to Rs.15,000 within one year from the date of the agreement, the plaintiff had the right to recover the deficit from the appellant. The case of the plaintiff, therefore, is that by September, 1934, he guessed that Rs.15,000 would not be recovered from cinemas as takings and, therefore, the difference between Rs.15,000 and the actual takings would have to be returned to him by the appellant so that it was unnecessary for him to make this last payment. The court below has found that this was no justification for not paying the last instalment, and the learned counsel for the plaintiff-respondent has

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not really disputed the correctness of the decision of the lower court. We have it, therefore, that the plaintiff did not fully comply with the terms of the contract. On failure to comply with any of the terms of the contract on the part of the plaintiff, the appellant was, according to this agreement, entitled under para. 4 to stop the screening of the film, to take possession of all copies of the film in possession of the plaintiff, to forfeit all the money paid by the plaintiff without affecting the right to sue for the money and under para. 17 to cancel the above agreement after giving a fortnight's notice. In fact none of these things was done.

It has been argued by the learned counsel for the appellant that his client did forfeit the money, but he had not been able to point to any document or oral evidence showing that there was such forfeiture. It is clear from Ex. B 1/D. W. 1, a letter from the appellant, dated the 4th December, 1934, that he had not forfeited anything for he then merely asked for that last instalment which in reality should have been paid in the month of September. The learned Civil Judge came to the conclusion that there was waiver by the appellant of the rights which we have enumerated above and he, therefore, went into the evidence of accounts and came to the conclusion that the plaintiff was entitled to the amount claimed which consisted of the balance between Rs.13,200 actually paid by the plaintiff towards the sum of Rs.15,000 and Rs.7,977-14 consideration of takings, thus arriving at the principal sum of Rs.5,222-2 plus Rs.77-14 as interest by way of damages.

The learned counsel for the appellant has urged before us that the suit was premature or without cause of action as the film did not run for a full year. He urges that it was the duty of the plaintiff under para. 3 of the agreement to continue screening the said film in the territory and stations allotted during the period

stipulated above (i.e. one year) and as he did not do so he is not entitled to maintain the suit.

This point is first raised in this Court for we find no mention of it anywhere before. Apart from that, the appellant relies merely on the statement of P. W. 1 that the film was kept in use till January or February, 1935, as meaning that after that period and up to the 5th Mrch, 1935, the film was not shown anywhere. The exact date when the film was no longer shown is not given, and if we are to take it as being the end of February, there were only some five days left. The plaintiff had no cinema of his own in which to show the film but he had to find cinema managers willing to take it and if he tried his best and they would not take it, it could not possibly be said that he had broken his contract. It was only if he was negligent that it could be said that he had not carried out the terms contained in para. 3 of the agreement, and there is no evidence that he was negligent for, as we have said, the point was never raised before. We are unable, therefore, to find that because the film did not appear in any cinema between the end of February and the 5th March, this was a breach of the contract by plaintiff.

The next point urged by the learned counsel for the appellant is that the film has never been returned and the claim of the plaintiff should not have been allowed without an order for the return of the film. This appears in para. 8 of the memorandum of appeal in this Court and the learned counsel for the plaintiff-respondent says that he has no objection to the decree in favour of his client being made conditional on the return of such copies of the films as his client has.

The next point urged by the learned counsel for the appellant is the most important one. He urges that the failure of the plaintiff to pay the last instalment prevents him from maintaining this suit at all. There is no doubt that under the contract the appellant was

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given the right to do various things, which we have already stated, among others that of forfeiting the money already paid, but we are unable to find that he did in fact exercise any of his rights and we agree, therefore, with the decision of the lower court that he waived those rights and if there was any breach of the contract on the part of the plaintiff, the appellant would only be entitled to damages and he has distinctly stated that he would sue for those separately. We are satisfied that the provision that the money already paid could be forfeited is a penalty, for a right to forfeit, as in the present case, some Rs.13,000 because of the non-payment of the last instalment of Rs.1,800, is obviously a penalty and cannot be compared with the forfeiture of a small sum paid in advance. In cases of penalty *Steedman* v. *Drinkle* (1) shows that only a reasonable sum can be claimed, but in this case not even a reasonable sum can be claimed because that reasonable sum will be the damages for which the appellant says he will sue separately, and presumably for this reason he gave no indication as to what this reasonable sum would be. The position, therefore, is reduced to this: what did the plaintiff actually realise and then what is the difference between the sum realised and the Rs.15,000 minus the last instalment, for he was entitled to recover this difference under the terms of the agreement? The plaintiff has stated on oath that as shown by the accounts which he has put in and by certain vouchers given him by cinema managers the amount is that which he has claimed in the plaint. We have, therefore, his statement on oath as to the amount which is supported by a book of accounts, Ex. 108, which contains items of takings as well as other items, and he has also filed vouchers on papers belonging to various cinemas which purport to be the actual takings. By filing these accounts and the vouchers of these cinemas he has given an opportunity

(1) (1915) A.I.R., P.C., 94.

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to the defendant-appellant to prove that he has not admitted receipt of moneys which are not contained either in his account book or in these vouchers, but the defendant has produced no evidence to show that any other amount was realised. It was also the duty of the plaintiff under para. 11 of the agreement to submit regularly the booking of the film and accounts of the takings with statements of ticket sales signed by the managers of the cinemas and counter-signed by the distributor. The plaintiff has sworn that he did submit these accounts which, it is clear from this statement, would be statements similar to those vouchers which he has submitted in this case, for he says that one set of vouchers he kept and the other set of vouchers he sent to the appellant. Again this evidence on oath by the plaintiff supported, at any rate, to some extent by his accounts and these vouchers, the defendant has not given any evidence by coming into the witness-box and saying that he received no such accounts. The nearest he has got to giving evidence was that defendant No. 2 stated that defendant No. 1 did not send these vouchers to him, and therefore, he came to the conclusion that none were submitted by the plaintiff to defendant 1. This evidence obviously is entirely useless. The learned counsel for the appellant also asks us to hold that Ex. B-7, a letter by the plaintiff to the appellant, which states that the "cheque of instalment together with up-to-date account of statements shall be sent to you by tomorrow as soon as completed" means that no such accounts had been submitted by that time. In the first place we are not prepared to hold that this amounts to anything more than what it says, namely, that full accounts up to the date of that letter had not yet been submitted, and we cannot presume that no accounts at all had been submitted up to that date much less that the promise to submit whatever accounts had not yet been submitted on the following day was not

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carried out. We consider that the plaintiff had discharged the burden which lay on him to submit *prima facie* proof of the amount which he had actually received, and in the absence of anything to make us doubt his statement on oath reinforced by the documents he has produced, we are entitled to accept it.

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The last point raised by the learned counsel for the appellant is that in view of the decision of their Lordships of the Privy Council in *Bengal-Nagpur Railway Company, Limited and Ruttanji Ramji* (1) no sum should have been decreed as interest as it was not within the contract nor was such interest by way of damages and nor was it specifically provided for by statute.

We accept this contention with the result that the decree of the court below is modified only in that the plaintiff is only entitled to execute his decree after the return of such copies of the film as he has and he is only entitled to Rs.5,222-2 and not also to Rs.77-14 interest. As the appellant was disputing the decree of the court which decreed Rs.5,300 against him and has only succeeded as regards Rs.77-14 and an order for the return of the two films which are probably of little use as he has never asked for them back, we think this is a fit case in which the respondent should be allowed his costs.

We, therefore, allow only to the extent stated above, this appeal but allow the respondent his costs.

Appeal partly allowed.

(1) (1937) L.R., 65 I.A., 66.