
(1959) 12 MP CK 0002
In the Madhya Pradesh High Court
Case No : C.R. No. 146 of 1959

Kanhaiyalal Nandram

APPELLANT

Vs

C.P. Shah and Brothers, Indore

RESPONDENT

Date of Decision : 22-12-1959

Acts Referred:

Contract Act, 1872 — Section 74

Citation : (1960) JLJ 536 : (1959) MPLJ 759

Hon'ble Judges : V.R. Nevaskar, J

Bench : Single Bench

Advocate : S.S. Choudhary, for the Appellant; C.M. Raudhar, for the Respondent

Final Decision : Dismissed

Judgement

V.R. Nevaskar, J.

The only question material for consideration in this petition is as regards the competency of claim of the plaintiff for the return of money paid by him in anticipation of the performance of a contract which he later himself broke.

The facts were that the Plaintiff had agreed to purchase and the Defendant had agreed to supply to him a three horse power oil engine for Rs. 1,460 and had paid Rs. 100 to the Defendant in pursuance of it. An order form signed by the Plaintiff is produced on record. This mentions payment of Rs. 100 as "deposit".

The learned Small Cause Judge on examination of evidence found that the Plaintiff was in breach. He construed the deposit as earnest money and held that the Defendant was entitled to forfeit the same. He consequently dismissed the Plaintiff's suit.

In this petition it is contended that the amount of Rs. 100 paid by the Plaintiff to the Defendant was a mere advance payment which on the falling through of the contract became recoverable.

This is a case where the purchaser had paid only a small portion of the purchase

price to the vendor. The memo, mentioning the deposit did not mention any specific condition of forfeiture or otherwise. In such a situation it is presumed that the payment was made on condition that if the contract is fulfilled the payment would become a portion of the purchase price and the balance alone will have to be paid. But if the contract is broken by the purchaser it is lost to him for good and he cannot recover it back. In a case like this the use of the words like "earnest money" or "deposit" will not afford a proper test in determining whether it is in fact earnest money or not. Nor does the term "deposit" exclude the possibility of its being an earnest and its nature will have to be judged having regard to the entire circumstances.

In AIR 1947 193 (Nagpur) a Division Bench of this Court concurred with respect to the following observations of the Calcutta High Court in a case reported in *Katharine Stiffles v. Carr Mackertich Martin* 39 C.W. N. 174, viz.:?

Looking at the matter as a whole, I think that we should come to the conclusion that the money paid by the Plaintiff to the Defendant, was on the footing of, as he described it, "earnest money" under the contract which had been arrived at between them. There was a long discussion between us as to the precise meaning of the expression "earnest money, and as to whether or not there is any difference in law between payment of earnest money and payment of deposit or part of the purchase price. It is not necessary that I should attempt to go into that question at any length, because once one comes to the conclusion that there was a contract, it seems to me that it does not matter very much whether one calls the payment earnest money or describes it as "part payment". It seems clear that in this particular case the payment was really a sum remitted by the Plaintiff to the Defendant in part discharge of that percentage of the whole purchase money which was described as Down Cash or "Cash Down", that is to say, 25 per cent of the total purchase money of one lac. On the assumption that there was a contract and that the money was paid in pursuance of it, it is clear to my mind on the authorities that if the contract went off or rather if it was not followed by "completion" owing to the default of the Plaintiff, then the Plaintiff cannot recover.

In *Howe v. Smith* (1884) 27 Ch. D. 89, ? 500 were paid as deposit and part payment of purchase money. The purchaser failed to complete the contract by the contract date and the vendors sold the property to somebody else. In a suit by the purchaser for specific performance the same was refused. His claim for refund of deposit was also negatived as the same was held to be in the nature of guarantee and as such liable to forfeiture. Fry L. J. held:?

It (the deposit) is not merely a part payment but is then also an earnest to bind the bargain.

This decision was approved by the Privy Council in *Mayson v. Clouet* 1924 A. C. 980.

It seems from these and other decisions of the Indian High Courts such as *Manin*

Patter v. Madras Railway Company I L R 29 Mad. 118 , Dinanath Damodar Kale Vs. Malvi, Mody, Ranchhoddas and Co., , AIR 1929 30 (Nagpur) and W.J. Younie and Others Vs. Tulsiram Jankiram and Others, that neither Section 74 of the Contract Act nor the principles of law laid down in these decisions, dealing with promises to pay specified sums upon the breach of a contract, apply to cases of forfeiture of deposits for breaches of stipulations even when some of them be trifling and some are not and the forfeiture of a sum deposited as security for the performance will not be interfered with. The same view was taken in Jagdishpur Metal Industries and Others Vs. Vijoy Oil Industries Ltd.,

In the last mentioned case the following observations of Lord Macnaghten in Soper v. Arnold (1889) 6 I L T 702 were quoted with approval:?

The deposit serves two purposes; if the purchase is carried out it goes against the purchase money but its primary purpose is this, it is a guarantee that the purchaser means business and if there is a case in which a deposit is rightly and properly forfeited, it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not.

In the present case the money was paid by the purchaser along with an order for the supply of an Oil Engine. The vendor had to procure the machine for its being supplied to the purchaser. After the order was placed the purchaser wriggled out of his undertaking to purchase. The deposit of a small sum of Rs. 100 under the circumstances was rightly held to be a payment as a guarantee for the performance of the promise to purchase and stood forfeited on his committing breach of that promise by the Plaintiff. If the purchaser, in spite of his breach, is permitted to recover he would be in no worse position in spite of his own breach. This would be evidently unjust.

For these reasons the order of dismissal of the suit was proper and needs no interference.

The petition is therefore dismissed with costs.