
(1962) 06 AP CK 0016

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 985 of 1959

Managing Director, Hindustan Shipyard Private Ltd.,
Visakhapatnam

APPELLANT

Vs

Attili Appalaswami

RESPONDENT

Date of Decision : 15-06-1962

Acts Referred:

Contract Act, 1872 — Section 74

Citation : AIR 1963 AP 71

Hon'ble Judges : P. Chandra Reddy, C.J

Bench : Single Bench

Advocate : P. Kodandaramayya, for the Appellant; D.V. Reddipantulu, for the Respondent

Final Decision : Allowed

Judgement

P. Chandra Reddy, C.J.—This is a revision petition against the decree of the District Munsif, Visakhapatnam in S. C. S. No. 839 of 1958 decreeing the plaintiff's suit for a sum of Rs. 500/-.

2. The respondent entered into a contract with the petitioner for removal of timber scrap in the ship-yard of the petitioner for a period of six months on terms and conditions which need not be set out here. He deposited Rs. 200/- along with his tender and another sum of Rs. 300/- after his tender was accepted for the due performance of the contract. It was inter alia provided in the tender notice that the successful tenderer would be called upon to pay a further sum of Rs. 300/- as security deposit for the due fulfilment of the contract and it would be refunded to him after the completion of the contract and that the tender deposit of the successful tenderer would be refunded to him after satisfactory completion of the contract. The terms of the tender notice were incorporated in the contract that was entered into between the parties subsequently. As the respondent failed in the performance of the contract, the petitioner refused to refund the tender deposit as well as the security deposit in spite of the request of

the respondent. Hence, he laid the suit out of which this petition has arisen for recovery of Rs. 500/- representing the security deposit and the tender deposit.

3. The answer of the defendant-petitioner was that as the plaintiff failed to clear off the scrap and thus committed a breach of contract, he was not entitled to have his money back and that it was open to the defendant to forfeit both the deposits.

4. Disagreeing with this defence, the trial court entered judgment for the plaintiff. In the opinion of the District Munsif, in the absence of an express agreement for forfeiture, the defendant had no right to retain the deposits, its only right being to postpone the payment till satisfactory completion of the contract by the plaintiff. This conclusion of the District Munsif is assailed in this revision.

5. It is argued for the petitioner by Sri Kodan-daramayya that the absence of an express provision for forfeiture does not prevent the defendant to forfeit the two sums when the deposits were made for the due performance of the contract. The learned counsel also questions the correctness of the decision of Govinda Menon, J. of the Madras High Court in R.M.K. Venkataperumal Naidu Vs. The Thiruppuvanam Panchayat Board, Thiruppuvanam, on which the trial court rested its opinion. In the cited case, the plaintiff agreed with the defendant to construct a bus-stand on a land belonging to him and after doing so to lease out the building to the Panchayat Board on a rental of Rs. 200/- a year. The plaintiff did not perform his original contract for a long time. Later on, he wrote to the Panchayat Board stating that for the due performance of the contract within a period to be extended by the Panchayat Board he would deposit a sum of Rs. 500/-. Yet, he did not build the bus-stand. Since he failed to construct the bus-stand even within the extended period, the amount of Rs. 500/- paid by him was forfeited. The question arose whether it was competent for the Panchayat Board to retain this sum of Rs. 500/- and the learned Judge answered it in the negative in the opinion that there should be an agreement of forfeiture in default and such a thing could not be implied from the fact of mere failure to perform the contract and that, if so advised, it was open to the defendant to file a suit for non-performance of the contract. The judgment shows that the learned Judge was under the impression that such a case was governed by Section 74 of the Indian Contract Act.

6. In my opinion the case of a deposit made of as security for the due fulfilment of the obligations under a contract is not governed by Section 74. The rule as to penalty dealt with in Section 74 is not applicable to cases of forfeiture of deposits. Where the instrument refers to some deposit as a guarantee for the performance of the contract, the party in default cannot claim a refund of the deposit, since such a deposit operates as a motive to the parties to carry out the obligations under the contract.

7. The very ruling relied on by the learned Judge, namely, Rattamma v.

Krishnamurthi 54 MLJ 40 : AIR 1928 Mad 326 contains the rule that if the money by the purchaser was by way of security for fulfilment of the bargain, it was liable to be forfeited on his default. The head note represents the decision correctly and it was extracted in R.M.K. Venkataperumal Naidu Vs. The Thiruppuvanam Panchayat Board, Thiruppuvanam, .

"A sum of money paid as advance by the purchaser to the vendor in respect of the sale of goods can be recovered by the purchaser, even though the transaction of sale fell through owing to the purchaser's default, unless the vendor proves a contract express or implied that the money paid as advance should be treated as security for the purchaser's fulfilment of the bargain, and as such liable to be forfeited on his default."

It is clear from 54 MLJ 40 : AIR 1928 Mad 326 that the deposit made as security for the due performance of a contract could be forfeited. The only obligation, according to that judgment, of the party who wants to forfeit the amount is to show that there was an express or implied contract that the amount paid should be treated as a security deposit. In my opinion 54 MLJ 40 : AIR 1928 Mad 326 does not lend any support to the ruling in R.M.K. Venkataperumal Naidu Vs. The Thiruppuvanam Panchayat Board, Thiruppuvanam, . On the other hand, it lays down that if money paid was agreed to be treated either expressly or by implication as a deposit, it was liable to be forfeited in the event of default being committed by the contracting party.

8. My view is also fortified by a Full Bench judgment of the Madras High Court in Natesa Aiyer v. Appavu Padayachi ILR Mad 178 : AIR 1915 Mad 896 (FB) which decided that Section 74 of the Indian Contract Act would not apply to cases of deposits and that the vendor could be given relief by way of rescission and in the absence of an express stipulation to the contrary, would be allowed to retain the deposit. Their Lordships quoted the following observations of Fry, L. J. in *Howe v. Smith* (1884) 27 Ch D 89 with approval.

"Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case, no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. 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".

9. I am further supported by the judgment of the Bombay High Court in *Abdul Gani and Co. Vs. Trustees of the Port of Bombay*, . The learned Judges (Chagla C. J. and Tendolkar J.) ruled that Section 74 of the Indian Contract Act was inapplicable to deposits made for the due performance of a contract, that it was not necessary in a contract to have an express provision with regard to forfeiture

of a deposit and that if the deposit was for the due performance of the contract and if the contract was repudiated by a party the other party became entitled to forfeit the deposit. Chagla C, J. who spoke for the Court observed as follows:

"It is a guarantee for the performance of the contract, and it supplied a motive to the parties to fulfil their obligations under the contract. It acts "in terrorem" and by reason of the fear that the deposit might be forfeited if the contract is not performed, the parties are induced to carry out their obligations under the contract".

This decision makes it plain that even if there is no clause in the contract as to forfeiture of the deposit, if the party commits default in the performance of the contract he cannot have the money back if the money paid was as security for the due fulfilment of the obligations under the contract. It follows that the view of the District Munsif that because here was no express agreement providing for forfeiture of the deposit in the event of default being committed by the plaintiff the defendant was not entitled to retain the money, cannot be sustained and his decision has to be reversed.

10. In the result, the petition is allowed and the suit dismissed. In the circumstances of the case, the parties will bear their own costs throughout.