

(1888) 01 CAL CK 0012
In the Calcutta High Court

Manohur Koyal

APPELLANT

Vs

Thakur Das Naskar

RESPONDENT

Date of Decision : 11-01-1888

Acts Referred:

Contract Act, 1872 — Section 62, 63

Citation : (1888) ILR (Cal) 319

Hon'ble Judges : Norris, J;Beverley, J

Bench : Division Bench

Judgement

1. The facts of this case appear to be these: The suit was brought by the plaintiff to recover a sum of Rs. 1,473. How that sum is arrived at is stated at the top of page 3 of the paper-book.

2. It appears that in Falgoon 1288 the defendant executed a bond for Rs. 801 in favour of the plaintiff. The money was to be repaid in Magh 1289. From the date of the bond up to the date fixed for repayment of the money interest was to be paid at eighteen per cent, per annum. If the money was not paid on the date it was covenanted to repay it, namely, Magh 1289, then interest upon the original sum and upon the interest up to Magh 1289 was to run at the rate of twenty-four per cent, per annum. The money was not repaid on the date fixed for its repayment, namely, Magh 1289. The defendant not being able to pay went to the plaintiff, and said in effect this to him: "I am not able to pay you what is due to you under the bond; but I will pay you in cash Rs. 400, and I will execute a fresh kistibundi bond in your favour for Rs. 701." The plaintiff accepted these terms, but the defendant failed to carry them out. He did not pay the plaintiff the Rs. 400, nor did he, as he ought to have done, tender the kistibundi bond for Rs. 701 to the plaintiff. The plaintiff therefore has brought this action upon the basis of the old bond, and seeks to recover the amount which I have already mentioned, namely, Rs. 1,473.

3. The Subordinate Judge gave the plaintiff a decree for the whole amount claimed by him.

4. The Additional District Judge on appeal has modified that decree, and has allowed the plaintiff's claim only to the extent of Rs. 400. The ground upon which the Additional District Judge has proceeded is this; He says in effect, "I find that the provisions of Section 62 of the Contract Act apply. I find that the parties to the first contract agreed to substitute a new contract for it, and therefore the original contract need not be performed; and, though the defendant has not carried out his part of the new contract, the plaintiff is not relegated to his rights under the old contract."

5. We are of opinion that the Judge has erred in applying the provisions of Section 62 of the Contract Act to this case at all. Section 62 is but a legislative expression of the common law; and its provisions do not apply after there has been a breach of the original contract. The parties may make a new contract in substitution of the old one, or may rescind or alter the old contract, and if they do so while the original contract is subsisting and unbroken, the original contract need not be performed. As I pointed out in the course of the argument, the law on this matter is laid down in the well-known and universally accepted text-book, Bullen and Leake's Pleadings, 3rd edition, page 673. It is said there: "It is competent to the parties to a contract at any time before breach of it by a new contract to add to, subtract from, or vary the terms of it, or altogether to waive and rescind it. The substituted contract forms a good defence to an action on those terms of the previous contract which have been altered by it, and may be so pleaded without any performance or satisfaction which is required to constitute a good plea after breach." Then the form of the plea is given at page 675--"that after the alleged contract and before any breach thereof it was agreed by and between the plaintiff and the defendant that the said contract should be rescinded, and they then rescinded the same accordingly;" and there is a similar form in the case of a substituted agreement setting out the substituted agreement. Now is the case within Section 63? It is quite clear that Section 63 not only modifies, but is in direct antagonism to the law in England. It was laid down, as pointed out, in the case of *Foakes v. Beer* L.R. 9 App. Cas. 605 that for the last pretty nearly three hundred years it has been the law in England that if A owes B five thousand rupees, and B consents to take two thousand rupees in payment of the debt, that is what is called in law *nudum factum*, and that B after taking the two thousand rupees can subsequently bring his action for the unpaid three thousand rupees. The law in this country by virtue of Section 63 of the Contract Act is different; and it says: "Every promise may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit." We think that the finding of the lower appellate Court in this case is that the plaintiff accepted in satisfaction of what was due to him at the time the agreement was made Rs. 400 in cash and a fresh bond for Rs. 701. We think that is the finding. We do not think that the plaintiff ever intended to accept the naked promise to pay Rs. 400 and. to give a bond for Rs. 701. The defendant has not given the satisfaction. He has not paid the money. He has not tendered

the bond. The question is, what were the rights of the parties under these circumstances? It seems to us perfectly clear that the parties were relegated to their rights and liabilities under the original contract, and that the plaintiff, upon breach by the defendant of the terms which he had made, and upon the non-performance by him of the satisfaction which he had promised to give, was. relegated to his rights under the old contract, and was entitled to bring the suit on the basis of the old bond, and to recover the money which he claimed.

6. The appeal must therefore be allowed, the decision of the Additional Judge set aside, and that of the Second Subordinate Judge restored, with costs in all the Courts.