
(1964) 01 CAL CK 0023
In the Calcutta High Court

Shree Hanuman Cotton Mills and Others	APPELLANT
Vs	
Tata Air Craft Ltd.	RESPONDENT

Date of Decision : 29-01-1964

Acts Referred:

Contract Act, 1872 — Section 64, 65, 74

Citation : 68 CWN 476

Hon'ble Judges : Bachawat, J;Arun K. Mukherjee, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Bachawat, J.—On the 3rd September, 1949 the firm of Shree Hanuman Cotton Mills and Jagannath Agarwalla, one of their partners, instituted suit No. 2475 of 1947 against Tata Air Craft Ltd., asking for recovery of a sum of Rs.2,50,000/- paid to Tata Air Craft Ltd. on the 18th November, 1946. On the 3rd March, 1954 one Madanlal Juja a receiver appointed by an order of Court dated the 1st of August, 1950 in Suit No. 2165 of 1950 (Rameswardas Agarwalla & Ors. v. Jagannath Prasad Agarwalla & Ors.) was added as a plaintiff in Suit No. 2475 of 1947. By a decree dated the 16th July, 1959 suit No. 2745 of 1947 was dismissed. On the 23rd February, 1960 Shree Hanuman Cotton Mills, Jagannath Prasad Agarwalla and Madanlal Jaju preferred this appeal from the aforesaid decree. On the 15th May, 1961 one Bachraj, the receiver appointed in Suits Nos. 2165 of 1950 and 2930 of 1950 was substituted as an appellant in place of Madanlal Jaju since deceased. It is common case before us that Jagannath Agarwalla died on the 29th of May, 1961. His heirs have not been substituted in his place. It appears that Shree Hanuman Cotton Mills agreed to buy and respondents Tata Air Craft Ltd. agreed to sell the aluminium aero scrap at Dump No. 1 at Panagarh at and for the price of Rs.10,00,000/-. The contract was concluded by two letters dated the 18th November, 1946 and the 20th November, 1946 passed between the respondent and Jagannath Agarwalla C/o. Shree Hanuman Cotton Mills. It is common case before us that the contract concluded by this correspondence was between the respondents and the

appellant firm Shree Hanuman Cotton Mills represented by Jagannath Agarwalla and that the sum of Rs.2,50,000/- was paid by Jagannath Agarwalla as partner of and as representing the appellant firm. In view of this common case the respondents' counsel conceded that in spite of the death of Jagannath Prasad Agarwalla, the appeal has not abated. The appellants have formally abandoned their case that (a) no contract was concluded by the correspondence, (b) that there was a mistake as to a matter of fact essential to the agreement and (c) that the contract was induced by false and fraudulent representations.

2. The respondents' printed terms of business were incorporated in the contract by express reference in the letter dated the 18th November, 1946 written by the respondents to Jagannath Agarwalla. Clause 9 of the printed terms was:

The buyer shall deposit with the Company 25 p.c. of the total value of the stores at the time of placing the order. The deposit shall remain with the company as earnest money and shall be adjusted in the final bills, no interest shall be payable to the buyer by the company on such amounts held as earnest money." Clause 10(b) of the printed terms provided that: "If the buyer shall make default in making payment for the stores in accordance with the provisions of this contract the company may without prejudice to its rights under clause II hereof or other remedies in law forfeit unconditionally the money paid by the buyer and cancel the contract by notice in writing to the buyer* * * *"

3. On the 18th November, 1946 the appellant firm through their partner Jagannath Agarwalla paid a sum of Rs.2,50,000/- to the respondents. The appellants' firm also agreed to pay to the respondents a further sum of Rs.2,50,000/- on the 22nd November, 1946 and the balance sum of Rs.5,00,000/- on the 14th December, 1946. Reading the two letters dated the 18th November, 1946 and dated the 20th November, 1946 together with the printed terms of business, it would appear that the sum of Rs.2,50,000/- was paid by the appellant firm as earnest and in part payment of the price.

4. On the 22nd November, 1946 the appellant firm repudiated the contract and refused to perform it. In spite of repeated reminders by the respondents, the appellant firm refused to pay any further sum of money to the respondents. The last of such reminders was sent on the 19th of December, 1946. Eventually the respondents forfeited the earnest money and cancelled the contract. The appellants no longer contend that the respondents were not ready and willing to perform their part of the contract. It is now conceded on behalf of the appellants that the repudiation by the appellant's firm was wrongful. Nevertheless the appellants contend that they are entitled to recover from the respondents the sum of Rs.2,50,000/- paid on the 18th November, 1946.

5. Now it is well settled that in the absence of an agreement to the contrary, the seller is entitled to retain earnest money paid by the buyer as forfeited, if the bargain goes off by default of the buyer (See *Howe v. Smith* (1) (1884) 26 Ch. D. 89, *Soper v. Arnold* (2) (1889) 14 AC 429, 435. The law in India is the same. In

Chiranjit Singh v. Har Swarup (3) AIR 1926, PC 1, Lord Shaw observed, "Earnest money is part of the purchase price when the transaction goes forward; it is forfeited when the transactions falls through, by reason of the fault or failure of the vendee." The contract in the instant case did not show an intention to exclude the forfeiture. On the contrary clause 10(b) of the printed terms provided for forfeiture of the monies paid by the buyer if he made default in making payments in accordance with the contract. The rule as to the forfeiture of earnest money applies equally to contracts for sale of goods, see Muhammad Habibullah v. Muhammad Shafi, (4) ILR 41 All 324, Nadiar Chand Guin v. Satis Chandra Sukal, (5) ILR 55 Cal 638, see also Benjamin on Sale, Eighth Edition, 946.

6. The appellants rely upon the decision in Muralidhar Chatterjee v. International Film Company Limited (6) LR 70 IA 35. That case is distinguishable. Upon rescission of the contract by the seller on account of the wrongful refusal by the buyer to perform it, the contract becomes void and the duty of restitution of the benefits received under it arises under Sections 64 and 65 of the Indian Contract Act 1872. The defaulting buyer is, therefore, entitled to recover from the seller the instalments of price paid by the buyer subject to a set off by the seller for damages caused by the breach of contract on the part of the buyer. But the defaulting buyer cannot recover the earnest money paid by him as a guarantee for the due performance of the bargain. The rescission of the main contract of sale does not involve the rescission of the ancillary contract of guarantee. The ancillary contract of guarantee does not become void and the seller is not obliged to restore the earnest money received by him under this ancillary contract, see Natesa Aiyar v. Appavu Padayachi, (7) ILR 38 Mad, 178 at 185. Money paid as earnest and as part payment of the purchase price is primarily a guarantee for the due performance of the bargain and becomes a part of the purchase price only when the contract is completed, see Dinanath Kole v. Malvi Mody Ranchhoddas & Co., (8) AIR (1930) Bom 213, 214, Nawab Khaja Habibuyllah v. Arman Dewan, (9) 30 CLJ 113, 115-6.

7. In Natesa Aiyar v. Appavu Padayachi (7) ILR 38 Mad 178 at 187 Miller, J. observed: "There may be cases where the Courts must find that the amount of the deposit or payment in advance is so great in comparison with the amount payable under the contract, that the parties cannot have intended it as a mere security for performance, but rather as a punishment for non-performance of the contract, and in those cases the Court may doubtless refuse to allow the retention of the whole of the deposit;***". We are unable to hold that 25 p.c. of the price is so great in comparison with the total price that the parties could not have intended the payment as a mere security for performance. The decided cases show that the seller is entitled to retain 25 p.c. of the purchase money paid as earnest, if the bargain goes off by the default of the buyer, see Gowal Das Sidany v. Luchmi Chand Jhawar, (10) ILR 57 Cal 106; Dinanath Damodar Kale Vs. Malvi, Mody, Ranchhoddas and Co., . Even conditions 6 and 8 of the usual proclamation of sale in Form 29 of Appendix E to the 1st Schedule of the

CPC 1908 contemplate forfeiture of 25 p.c. of the purchase money paid as deposit.

8. The appellants can get no relief u/s 74 of the Indian Contract Act 1872. The stipulation as to the forfeiture of earnest money allows retention of sums already paid and is not a provision for the recovery of an amount to be paid in the case of a breach of contract, see *Natesa Aiyer v. Appavu Padayachi*, (7) ILR 38 Mad 178 at 185.

9. Nevertheless, even apart from Section 74 of the Indian Contract Act, 1872 the Court under its wider equitable jurisdiction may relieve against a penalty when the intention of the penalty is to secure the payment of a sum of money, see *Halsbury's Law of England*, Third Edition Vol. 14, paras 1147 and 1148, pages 620-21. Where the purchase money is payable by instalments, with a provision for forfeiture of all the instalments paid on failure of payment of any instalment, the provision is in the nature of a penalty, from which relief can be granted, see *Kilmer v. British Columbia Orchard Lands Ltd.* (12) 1913 AC 319 PC, *Steedman v. Drinkle*, 1916 1 AC 275, 279. But the condition of relief in such cases is that the buyer is ultimately prepared to make good the default and complete the contract, see *Halsbury's Law of England*, Third Edition Vol. 34, Article 543, pages 320-321, foot-note (h). Accordingly in the case of *Mussen v. Van Dieman's Land Company* (13) (1938) Ch. 253 the relief was refused because the purchaser was not prepared to make good the default and was not ready and willing to complete the contract. In the instant case the appellant firm was at no time prepared to make good the default and to complete the contract. Performance of the contract has now become impossible. I may add that I am not aware of any case where a Court of equity has given relief against a forfeiture of earnest money. From whatever point of view the matter is looked at, the appellants are not entitled to any relief.

10. At the first sight the bargain appears to be somewhat harsh and we were prepared to grant the appellants relief, if we could. But on a careful consideration of the matter we think that we have no power to grant the appellants any relief.

11. The appeal is dismissed. In all the circumstances of the case we direct that the parties will pay and bear their own costs of and incidental to the appeal.

Arun K. Mukherjea, J. 12. I agree.