

(1963) 03 KL CK 0015
In the High Court Of Kerala
Case No : Second Appeal No. 655 of 1959

S.V. Harihara Iyer

APPELLANT

Vs

Mathew George

RESPONDENT

Date of Decision : 04-03-1963

Acts Referred:

Contract Act, 1872 — Section 39, 64

Citation : AIR 1965 Ker 187

Hon'ble Judges : S. Velu Pillai, J

Bench : Single Bench

Advocate : T.K. Kurien, for the Appellant; George Vadakel, for the Respondent

Final Decision : Allowed

Judgement

S. Velu Pillai, J.—The appellant contracted to give and the respondent to accept, for a consideration of Rs. 10,080, the assignment of a decree which the former had obtained. On the date of the contract, the appellant was paid a sum of Rs. 1,000/- as part of the consideration, and more than three months later another sum of Rs. 1,000/- was also similarly paid. Alleging default on the part of the appellant, the respondent has sued the appellant to enforce repayment of the sum of Rs. 2,000/- which he paid. The appellant pleaded, that the respondent had committed breach of contract in not taking the assignment which the appellant was still prepared to give. The two courts have found that the respondent had committed a breach and yet have decreed the suit holding that the appellant's remedy lay in damages against the respondent.

2. In this appeal the learned counsel first attempted to establish, that the payment made by the respondent was in the nature of a deposit by way of earnest or of guarantee for the due performance of the contract. The appellant had no such case in the written statement and the second instalment of the payments was not made on the date of the contract, but only about three months later. There is nothing to distinguish between the nature of the two payments and this contention has only to be repelled. The distinction between a

deposit with the seller by way of earnest and a part payment of the consideration to him, lies in the intention with which the deposit or the payment is made, in the former, the intention is to assure the seller that the buyer is in earnest or is sincere and guarantees or secures the due performance of the contract on his part and when the transaction goes through the amount deposited is adjusted towards the sale consideration; in the latter, this intention is not present, but there is simply a part payment. In the former the deposit is forfeited on default, though decided cases have evolved certain principles of equity which it is unnecessary to consider.

3. The question in the present case is whether the respondent who had committed breach of contract is entitled to recover from the appellant, who not only is ready and willing to perform his part of the contract but also insists upon the respondent doing likewise. In the case of breach, of contract, the injured party, according to Cheshire the learned author, may take one of two courses.

"He may, despite so violent a breach, hold the defaulting party to his promise if he adopts this course, he himself remains liable on the contract, but he may recover damages for any loss sustained. This alternative course is to accept the breach as discharging the contract"

--Cheshire and Fifoot on Law of Contract, 5th Edition, page 495. In the latter event, he would be relieved from further performance of the contract and may sue for damages. "One who simply breaches his contract does not thereby rescind it, though his act may give the other party a right to claim rescission and restoration" -- Black on Rescission and Cancellation, 1916 edition, Volume I, page 5.

The respondent though guilty of breach of contract, cannot be supposed to have by such breach rescinded or put an end to the contract by himself; that is a right which the other party to the contract may avail himself of.

""Upon the rescission of a contract, either of the parties will be entitled to demand and recover from the other whatever was paid to him as the consideration of the contract or in execution of its terms, making allowance, of course, for the set-off of corresponding demands on the other side."

--See Black on Rescission and Cancellation, Volume II, page 703. Mayne and Megregor observe in their work on Damages, 12th edition page 238, that

"If there is no agreement, whether express or implied, that money paid shall not be returnable on default, then nothing in the nature of agreed, liquidated damages exists in the contract and the defaulter is entitled, if the other party rescinds on the basis of the default and does not keep the contract open and available for performance, to recover the money he has paid over in part performance in an action for money had and received."

The statement is categorical according to which, the respondent's right to repayment of money paid, is conditional upon rescission by the appellant, Whose

right it is, instead of rescinding, to keep the contract open and to hold the respondent liable for whatever legal consequences may flow from his Breach. Certain passages occurring in paragraphs 256 and 257 of the above text-book, and particularly *Steedman v. Drinkle*, (1911) 1 A C 275 : (AIR 1915 PC 94 and *Stockloser v. Johnson*, (1954) 1 Q. B. 476 were relied on for the respondent, but they concern the application of equitable principles to the refund of money deposited by way of earnest or to guarantee performance of the contract, and have no relevance, so far as part payments simpliciter are concerned. The statement of the law as based on text-books dealing with the subject will not be complete, without a reference to *Salmond and Williams on Contracts*, 2nd edition, where the learned authors at page 566 say, that

"money which has been paid or property which has been transferred by either party to the other prior to such rescission must in general stay where it is and cannot be recovered"

and at page 567 as follows :

"What however, is the position of the other party to the determined contract--the party through whose breach the rescission has come about? Has he any right or remedy at all in respect of his partial execution of the contract before its rescission? Take the case where he has rendered services in part performance of the contract. If A, for example contracts to build a house on B's land for the lump sum of ? 5000 payable on completion, and after doing work worth ? 2000 on B's land abandons the contract or commits some other essential breach of it. B may rescind and determine the contract. In such a case can A recover from B any compensation for the work so done by him, or is B, on the contrary, entitled to retain the benefit of the work so done upon his land and pay nothing for it?..... It seems to be established as a general principle that the party in default has no such right or remedy. He cannot sue on the express contract for it contained no term providing for payment otherwise than on completion of the work, and the law refuses to recognise in his favour any substituted implied contract under which he may recover compensation for his expenditure and services before rescission."

On this statement of the law, I am of the opinion that the respondent as a defaulter is not entitled to recover what he had paid under the contract to the appellant who still holds on to the contract and is ready and willing to perform his part. On the exposition of the law by eminent text-writers, I am led to think, that the respondent's claim for refund of the consideration can arise only on rescission of the contract by the appellant.

4. These principles appear to be codified in two Sections of the Indian Contract Act. Section 39 reads:

"When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its

continuance."

This enacts the principle, that breach of contract is not rescission but gives a right to the injured party to put an end to the contract at his choice. The phrase "put an end" has been interpreted to mean "rescind" in AIR 1943 34 (Privy Council) Section 64 of the Contract Act appears to be the only provision on which the claim for refund can be made, but it does not help the respondent for it provides, that

"When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall if, he has received any benefit there under from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received."

This enacts that the right to restoration of the benefit is conditional upon rescission by the other party. Thus the provisions of the Indian Contract Act are based on the same principles.

5. The case relied on by the lower court is *P. Paranchukutty v. Dharmashi Madhavji Visram*, 1957 Ker L. J. 787. This was a case of rescission of the contract by the defendant against whom refund was claimed, by his selling the property to another in violation of the contract with the plaintiff, and is for that reason distinguishable. In *Jagdishpur Metal Industries v. Vijoy Oil Industries LTD.*, AIR 1959 Pat 176, decided by a single Judge, in spite of the breach of contract committed by the plaintiff, restoration was allowed of a sum which he had paid towards the sale consideration. This does not appear to be a case of rescission. The learned Judge has, at page 181 of the report, referred to a few cases which he considered as supporting this view.

Of these, *Ballabhdas v. Palkaji*, AIR 191C Nag 104 was one of earnest money which was forfeited. AIR 1929 30 (Nagpur) related to earnest money, but the question referred embraced restoration of purchase money as well. This was also a case where the vendor has put an end to the contract. The answer negating the right of refund of purchase money that

"if such part payment was of such proportion of the purchase money and of such a nature generally as would enable the Court to regard it as akin or analogous to earnest money",

seems to me, with respect, by no means conclusive. *Krishna Chandra Rudrapal Vs. Khan Mamud Bepari and Others*, , was of course a case of part payment so far as the sum of Rs. 100 sued for was concerned but the contract was broken by the defendant. *Khuda-I-Tala through K.B. Qazi Mohammad Zafar Ahmad Khan Vs. Mt. Hamida Khatoon*, , was also a case of earnest money. The decision in *Madan Mohan v. Jawala Parshad*, AIR 1950 E. P. 278 so far as it related to part payment was based on the decision in *Krishna Chandra Rudrapal Vs. Khan Mamud Bepari and Others*, . In *Chiranjit Singh v. Har Swamp*, AIR 1926 PC 1

decided by the Privy Council, the claim so far as it related to earnest money had been negatived by the High Court, but so far as it related to purchase money the Privy Council observed thus :

"The purchaser must, having broken the contract, lose his earnest money of Rs. 20,000, but must be repaid Rs. 1,45,000 the balance of his payment to account."

This is the only relevant part of the Judgment dealing with the right of refund of the sale consideration. The facts of the case do not appear fully from the report, and it is not even clear whether the defendant against whom the claim was allowed to prevail had not rescinded the contract. These were the cases referred to in Jagdishpur Metal Industries and Others Vs. Vijoy Oil Industries Ltd., .

6. I am therefore of the opinion, that the respondent who had committed breach of contract cannot in justice or in law, claim to be repaid the part of the sale consideration which he had paid to the appellant. The decrees of the courts below are reversed" and the suit is dismissed with costs in all the courts. The respondent's counsel prayed for leave to appeal. Leave granted