
(1958) 07 MAD CK 0010
In the Madras High Court

Union of India (UOI)

APPELLANT

Vs

S.M. Arunachala Mudaliar and Company

RESPONDENT

Date of Decision : 30-07-1958

Acts Referred:

Contract Act, 1872 — Section 64, 74

Citation : (1958) 2 MLJ 528

Hon'ble Judges : Ramaswami, J

Bench : Division Bench

Judgement

Ramaswami, J.—This Second Appeal is preferred against the decree and judgment of the learned Subordinate Judge of Tiruchirapalli in

A.S. No. 251 of 1954, modifying the decree and judgment of the learned District Munsif of Karur, in O.S. No. 426 of 1952. The plaintiff firm

undertook to supply 1,000 tins of gingelly oil in two loads, 500 at Erode and 500 at Karur. Both the Courts have found that there was default on

the part of the plaintiff in regard to the supply of 280 tins of gingelly oil. On this default the defendant, the Southern Railway, forfeited a sum of Rs.

1,840 which had been given as security by the plaintiff-firm for the fulfilment of the terms of the contract.

2. How this sum of Rs. 1,840 came to be deposited as security deposit was as follows: The terms of the contract are to be found in Exhibits A-i

and B-i. Before submitting the tender to qualify one to become a tenderer, he must deposit a sum of Rs. 1,000 as earnest money. If his tender is

not accepted, the amount will be refunded to him. If his tender is accepted but the tenderer declines to take up the contract, the amount will be

forfeited to the railway. If his tender is accepted and the tenderer takes up the contract, he will have to pay such further amount as may bfc"

necessary to make up 5 per cent, of the value of the commodities ordered; if the value of the commodities ordered happens to be less than Rs.

1,000, the security deposit will be Rs. 1,000. In such cases, the earnest money will alone serve as security deposit. In either case, where extra sum

is to be deposited, the earnest money already deposited together with the later deposit will be the security deposit.

3. On the breach of the contract by the plaintiff-firm and the default committed by it, the railway has foreited a sum of Rs. 1,840 as per terms of

the contract. The plaintiff came to Court contesting his liability and the forfeiture of Rs. 1,840.

4. Both the Courts came to the conclusion that there was default and a breach of the contract by the plaintiff-firm in regard to 280 tins of gingelly

oil. The learned District Munsif further held that by reason of the breach, the railway was entitled to forfeit the amount of Rs. 1,840. On appeal the

learned Subordinate Judge who seems to have been ruled more by his heart than by his head observed:

Taking the entire aspects into consideration, I am not satisfied that there is, justification for the railway which is a benevolent Governmental concern

to seek to forfeit the entire security deposit taking a view lacking in magnanimity and which does not save the ends of justice.... Bestowing

equitable considerations over the matter in dispute I think the ends of justice will be met by directing the defendant to refund the security deposit

proportionate to the extent the contract has been already fulfilled by the plaintiff. The plaintiff will forfeit the security deposit at the rate of 5 per

cent, on the value of 280 tins of gingelly oil, not supplied, working on the basis of the contract rate. In the result, the appeal is allowed in part.

Parties to bear their own costs throughout.

5. The railways have not unnaturally preferred this Second Appeal contending that the lower appellate Court has not decided the appeal bearing in

mind the correct principles of law which have been laid down by this Court.

6. The learned advocate for the appellant draws my attention to the following three decisions: In Manian Patter v. The Madras Railway Company

by its Agent and Manager (1905) 16 M.L.J. 37 : ILR Mad. 118, a Bench of this Court composed of Subramania Ayyar, O.C.J., and Sankaran

Nair, J., held that neither Section 74 of the Indian Contract Act, nor the principles

of law laid down in decisions dealing with promises to pay specified sums in case of breach of contract apply to cases of forfeiture of deposits for breach of stipulations even when some of them are but trifling while others are not such. The English decision in *Wallis v. Smith* (1882) L.R. 21 Ch. D. 243 at page 258, was relied on. In such cases, it was held, that where the instrument refers to a sum deposited as security for performance, the forfeiture will not be interfered with, if reasonable, in amount. (It will be remembered that in the instant case the forfeited amount represented 5 per cent, of the value of the articles supplied by the plaintiff-firm).

7. In *Natesa Aiyar and Another Vs. Appavu Padayachi (died) and Another*, a Full Bench of this Court held (Sadasiva. Ayyar, J., dissenting) that

in similar circumstances, A, the plaintiff, was not entitled to a return of the deposit; neither Section 64 nor Section 74 of the Contract Act is

applicable to such a deposit and a stipulation for its forfeiture in case of breach is not one by way of penalty; that the law of India on this subject

does not differ from the English law; and that a stipulation to forfeit ten percent, of the consideration in case of breach is neither unreasonable nor

extraordinary. (It will be remembered that in this case the stipulation was to forfeit five per cent.).

8. In *Abdul Gani and Co. Vs. Trustees of the Port of Bombay*, a Bench of the Bombay High Court held that Section 74 of the Indian Contract

Act does contemplate the case of a deposit made for the due performance of a contract, that such deposit cannot be considered as amount to be

paid in case of a breach, nor can it be considered to be "" any other stipulation by way of penalty "" and that therefore a party committing a breach

of the contract is not entitled to the benefit conferred by the section in a suit filed by him for the refund of the deposit. *Dinanath v. Malvi and Co.*

(1929) 32 Bom. L.R. 272, followed. It was further held that the equitable jurisdiction of the Court to give relief against forfeiture and to relieve a

party against penalty is conditioned by the fact that ordinarily the Court will not help a wrong doer or a party in default in obtaining a deposit which

he had made for the due performance of a contract when he himself broke the contract or repudiated the contract and that there is no-difference in

this respect between a contract for sale of land and other contracts.

9. Ex park Barrell, In re Parnell (1875) L.R. 10 Ch. Appeals 512, Howe v. Smith (1884) L.R. 27 Ch. D. 89 , Natesa Aiyar and Another Vs.

Appavu Padayachi (died) and Another, , and Sprague v. Booth L.R. (1909) A.C. 576, followed.

10. The net result of this analysis is that the decree of the learned Subordinate Judge cannot be supported as it is opposed to the decisions of this

Court. This Second Appeal is allowed with costs and the decree of the learned Subordinate Judge is set aside and the decree of the learned

District Munsif is restored.

11. For the reasons set out above, the memorandum of cross-objections is dismissed. No costs and no leave in both. C.M.P. Mo. 4188 of 1958.

The valuation in the memorandum of Second Appeal will be brought into conformity with the amended decree.