

(1929) 07 MAD CK 0032
In the Madras High Court

Varadaja Perumal Koil and Others

APPELLANT

Vs

V. Muniappa Pillai and Others

RESPONDENT

Date of Decision : 25-07-1929

Acts Referred:

Citation : (1930) ILR (Mad) 141

Hon'ble Judges : Venkatasubba Rao, J;Madhavan Nair, J

Bench : Division Bench

Judgement

1. This appeal raises an important question of law, relating to the right of a party in default, to the recovery of the deposit paid by him under a contract. The suit is filed by a lessee for the return of his deposit and the trial Court rejected the claim holding that the amount became forfeited to the lessor. The lower Appellate Court took a different view and remanded the case for trial and disposal. The question is, was the order of remand rightly made? The District Judge's decision remanding the suit is contained in the following passage of his judgment:

The landlord's loss in re-letting was alleged and put in issue but not tried, I think that the landlord is entitled to have the question decided what damages he suffered by reason of plaintiff's default and that he is entitled to deduct from this deposit whatever amount is found due to him as damages.

2. We have first to examine the terms of the lease deed. It bears the date, the 15th of April, 1920. The period of the lease was fixed as seven years and the lessee took possession. The lease was of agricultural land. The annual rent was agreed to be Rs. 3,210, to be paid in two instalments, a moiety before the 30th December and the remaining half before the 30th June of each year. Some further rent was to be paid in kind with which we are not concerned. The deed contains a provision for reentry, it being stipulated that in default of payment of rent, the landlord is to be at liberty to re-enter and take possession, not only of the land but also of any crops standing upon it. The lessee paid a deposit of Rs. 2,676 and the clauses that follow are very material. He is entitled to interest on that sum at 6 per cent. per annum and may adjust that interest against the rent

payable on the 80th June of each year. Then as regards the principle of the deposit amount, it was not to be adjusted against the rent payable for the last, that is the seventh year of the lease.

3. The lessee made default in the payment of rent that fell due on the 30th June, 1921. The lessor made a demand for the rent which was not complied with. He immediately exercised his right of re-entry, and took possession of the land with the standing crops thereon. The lessee made some ineffectual protest, not in regard to the reentry but in respect of certain subsidiary matters. With that protest, we are not concerned in this appeal.

4. The question to be decided is, is the lessee entitled to the return of his deposit, less the rent, that became payable on the 30th June, 1921? We may observe that the claim is confined to this amount. Mr. Sesha Aiyangar the learned Advocate for the appellant (the lessor) has drawn our attention to several English and Indian decisions on the point. The first question that arises is the amount claimed in this suit a deposit in the legal sense? What is strictly known as a deposit must possess a two-fold character. It must first be a part payment and next it must be of the nature of money "staked." That a "deposit" must possess these two distinctive marks, is emphasised in the leading case on this subject, *Howe v. Smith* (1884) 27 Ch. D. 89 : 53 L.J. Ch. 1055 : 50 L.T. 573 : 32 W.R. 802 : 48 J.P. 773. This case has been referred to and followed in numerous Indian decisions including *Natesa Aiyar v. Appavu Padayachi* 19 Ind. Cas. 462 : 38 M. 178 : (1913) M.W.N. 341 : 24 M.L.J. 488 : 13 M.L.T. 391. The very word "staked" is used in the judgment of Bowen, L.J., who observes: "In the present case we have in the first place, turning to the language of the instrument, a description of the manner in which the money is staked or deposited. It is a deposit, and it is to be both a deposit and in the nature of part payment."

5. The force of the word "staked" is brought out in the judgment of Fry, L.J., wherein it is stated: "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."

6. A deposit then serves not merely as a part payment but there is a further characteristic which it possesses, namely, it is paid as a "guarantee that the contract shall be performed", in other words, as "a security for the completion of the purchase: ", (see the judgments of Cotton, L.J., and Bowen, L.J.) This dual nature of what is known as deposit, is most tersely referred to by Cotton, L.J., thus: "If the sale goes on...it goes in part payment of the purchase money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract...he can have no right to recover the deposit."

7. The same idea is conveyed by the judgment of Fry, L.J. After stating that a deposit corresponds to "the earnest or arrha of our earlier writers" the learned Lord Justice goes on to say: "The expression used in the present contract that

the money is paid" "as a deposit and in part payment of the purchase money" relates to the two alternatives and declares that in the event of the purchaser making default the money is to be forfeited and that in the event of the purchase being completed the sum is to be taken in part payment."

8. This definition of the word " deposit " receives further support from the judgment of Lord Dunedin in *Sprague v. Booth* (1909) A.C. 576 : 78 L.J.P.C. 164 : 10 L.T. 211. After referring with approval to *Howe v. Smith* (1884) 27 Ch. D. 89 : 53 L.J. Ch. 1055 : 50 L.T. 573 : 32 W.R. 802 : 48 J.P. 773 the learned Lord observes: "If payment is made of the purchase money, it is to be credited to such payment, if default is made in the payment of the money, then the deposit is forfeited."

9. We have now clearly shown that a sum paid under a contract cannot be called a deposit unless it fulfils these two requirements. This being then the nature and incidents of a deposit, can it be said that the money paid under the contract in question answers that description? In our opinion, the answer must be in the negative. In the first place, there is a broad distinction between an executory contract of sale and an executed contract of lease. In the former case a deposit amount is paid in order to create "by the fear of its forfeiture a motive in the payer to perform the rest of the contract." In the case of a lease partially performed, the matter stands on a different footing. This very contract illustrates what we mean. The parties did not contemplate either by express terms or by implication that the money was to be forfeited. The lease deed contains express stipulations on the point. It says that the interest on the deposit was to be adjusted against the moiety of the rent due on each 30th of June and the principal itself was to be deducted from the rent for the last year of the lease. There was not the remotest idea that the amount was ever to be forfeited. The sum was, therefore, paid in part payment of the rent, but not in addition as security or guarantee for the performance of the contract. The second requisite is, therefore, wanting and we are not prepared to hold that the sum in question can be treated as a deposit in law.

10. The cases quoted by Mr. Sesha Aiyangar do not apply; for, in each of them the lease contains an express forfeiture clause: [*Orr v. Chitha Chinna Yegappa Chetty* 28 Ind. Cas. 318 : 17 M.L.T. 229 : (1915) M.W.N. 249, *Venkatachari v. Ramalinga Tevan* 45 Ind. Cas. 417 : 7 L.W. 404 : (1918) M.W.N. 197, *Vellore Taluk Board v. Gopalasami Naidu* 26 Ind. Cas. 226 : 38 M. 801 : 17 M.L.T. 84.]

11. Mr. Sesha Aiyangar contends that even in the absence of a forfeiture clause the deposit amount becomes liable to be forfeited. He relies upon *Howe v. Smith* (1884) 27 Ch. D. 89 : 53 L.J. Ch. 1055 : 50 L.T. 573 : 32 W.R. 802 : 48 J.P. 773 the case already cited, *Hall v. Burnell* (1911) 2 Ch. 551 : 81 L.J.Ch. 46 : 105 L.T. 409 : 55 S.J. 757 and *Ex parte Barrell, In Re: Parnell* (1875) 10 Ch. A. 512 : 33 L.T. 115 : 23 W.R. 846. The law on the point may be thus shortly stated. In each case, we have to look to the document to see what was the bargain that was made. The parties may agree just as they please as to what is to be done with

the money deposited. In the absence of an express clause, the term most naturally to be implied, having regard to the nature and incidents of a deposit, is that on repudiation of the contract by the payer, the amount shall be forfeited to the payee. See *Howe v. Smith* (1884) 27 Ch. D. 89 : 53 L.J. Ch. 1055 : 50 L.T. 573 : 32 W.R. 802 : 48 J.P. 773, the judgment of Fry, L.J., at page 101. Page of (1884) 27 Ch.D.--[Ed.]

12. In the present case, we have held that the amount paid under the contract is not a deposit and the principle above stated does not, therefore, apply.

13. There was some discussion whether on the facts the lessee's conduct amounts merely to a breach or constitutes a repudiation of the contract. In the view we have taken, it is unnecessary to deal with this question.

14. To avoid any misunderstanding, it remains to observe that the respondent's learned Advocate confines his claim to the amount, the subject matter of the appeal in the lower Appellate Court.

15. The appeal fails and is dismissed with costs.