

Natarajan and ors. Vs. C. S. Loganathan (Deceased) and ors.

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Court : Chennai

Decided On : Apr-16-1974

Reported in : (1976)1MLJ268a

Appellant : Natarajan and ors.

Respondent : C. S. Loganathan (Deceased) and ors.

Judgement :

S. Ratnavel Pandian, J.

1. This suit is filed for the recovery of Rs. 88,400 together with interest at six per cent. per annum on Rs. 80,000 from the date of the institution of the suit to the date of realisation for the defendants.

2. The plaintiffs entered into an agreement dated 6th March, 1967 with the first defendant (since dead) regarding the sale of 7000 Nos. of equity shares in the capital of the company called 'Nadukani Plantations Private Limited ' standing on that date in the names of the first defendant and one Thiru A.C. Murali and his family members. The plaintiffs paid Rs. 80,000 towards part payment of the total purchase amount on various dates, including the earnest money of Rs. 10,000 paid on 6th March, 1967. Since the contract fell through, the plaintiffs are suing the defendants to recover the amount paid. During the pendency of the suit, the first defendant died and so his legal representatives have been brought on record as defendants 2 to 6 as per order of Court dated 15th February, 1972 in Application

No. 2734 of 1971.

3. The case of the plaintiffs is that the plaintiffs and the first defendant, (since dead) entered into an agreement dated 6th March, 1967, whereby the first defendant agreed to sell 7000 Nos. of equity shares in the capital of the company viz., Nadukani Plantations Private Ltd., standing in the names of the first defendant and one Thiru A.C. Murali and his family members. The shares belonging to A.C. Murali and his family members were pledged with the first defendant. The agreed price of Rs. 2,05,000 was to be paid by the plaintiffs to the first defendant in three instalments viz., Rs. 10,000 to be paid on 6th March, 1967, the date of the execution of the letter of agreement; Rs. 90,000 by 6th April, 1967 and the balance within six months from the date of the agreement. It was further agreed between the parties that on payment of the second instalment, the plaintiffs would be put in possession of the estate by the first defendant. As agreed, the plaintiffs paid Rs. 10,000 on 6th March, 1967, a sum of Rs. 20,000 on 3rd April, 1967 and another sum of Rs. 50,000 on 9th June, 1967, i.e., in all the plaintiffs have paid Rs. 80,000. The plaintiffs further aver that when they tendered a sum of Rs. 45,000 on 12th June, 1967 as asked, the first defendant pleaded his inability to put the plaintiffs in possession of the estate and sought further time for the performance of his obligations. In spite of several demands made by the plaintiffs, the first defendant was not able to perform his obligation and so the plaintiffs did not make the said payment of Rs. 45,000. The first defendant agreed to return the amount of Rs. 80,000 as settled by the parties; but, curiously enough, the first defendant wrote a letter on 7th July, 1967 (vide Exhibit P-3) to the plaintiffs, stating that the entire sum of Rs. 80,000' had been forfeited. As it was never the intention of the parties that time was of the essence of the contract, the first defendant cannot withhold the payment made. Hence, after issuing a notice of demand on 18th July, 1967, followed by a notice through their lawyer on 5th October, 1967, the plaintiffs have filed this suit, for the recovery of Rs. 80,000 with interest at six per cent. per annum from 5th October,. 1967.

4. The first defendant (since dead) has raised several contentions in his written statement. It is stated that A.C. Murali and his family members transferred 3600 fully paid up equity shares and also pledged 3400 equity shares in the said

company to the first defendant as security for the due repayment of the sum of Rs. 1,00,000 advanced by the first defendant. Only for the purpose of the discharge of the liability of the said A.C. Murali to the first defendant, this agreement to purchase the 7000 shares was entered into as evidenced by the letter of agreement, Exhibit P-1, to which A.C. Murali was a party and in which he was also a signatory. The plaintiffs were acting as the agents on behalf of the said A.G. Murali and so, without making A.C. Murali a party, this suit is bad for non-joinder of a necessary party. It is further contended that the estate was, to the knowledge of the plaintiffs in the possession of A.C Murali who was to put the plaintiffs in possession and the first defendant was not aware of the agreement between Murali and the plaintiffs. The first defendant has also stated that the plaintiffs have failed and neglected to pay the second instalment within one month as agreed. Though this defendant has admitted that he had received Rs. 80,000 in total towards the sale amount, he had denied that he asked the plaintiffs to pay a sum of Rs. 45,000 by 12th May, 1967, that the plaintiffs tendered the same and that the first defendant pleaded his inability to put the plaintiffs in possession of the estate. The first defendant has further contended that time was the essence of the contract and that there was no settlement whereby he agreed to repay the amount. The plaintiffs had committed breach of the agreement, by failing to pay the balance amount in time. The plaintiffs' failure to pay the amount has prevented the first defendant from recovering the amount due to him from the said A.G. Murali by selling the shares to other parties. The defendant thereby sustained loss and the first defendant has reserved his right. Until such loss is ascertained by a sale of the said shares, the plaintiffs cannot seek to recover any amount paid by them to the first defendant. There was no settlement under which the first defendant agreed to return the sum of Rs. 80,000 paid by the plaintiffs. The plaintiffs had made the payment in part discharge of the liability of A.G. Murali to this defendant. The plaintiff's claim, if any, should be against A.G. Murali. The plaintiffs are therefore not entitled to the return of Rs. 80,000 further, there was no contract or agreement to pay any interest thereon. In this connection the first defendant states that the plaintiffs have deliberately failed to mention that even their own letter of 6th March, 1967 contemplated that the earnest money of Rs. 10,000 paid by them on that date could be forfeited in the event of their committing

default in making further payment.

5. The plaintiffs have filed a reply statement denying the allegations in the written statement of the first defendant. The plaintiffs have stated that the shares stood in the name of A.G. Murali and therefore A.G. Murali also signed, in token of his having approved the transaction. At no time were the plaintiffs given to understand, nor were they aware, of any transaction between the first defendant and A.G. Murali. The suit contract was between the plaintiffs and the first defendant, under which the first defendant agreed to put the plaintiffs in possession of the estate. The plaintiffs further state that they have nothing to do with A.G. Murali and they never agreed to repay his debt to the first defendant. The first defendant made no bona fide attempt to keep up his part of the contract. The first defendant cannot take advantage of his own wrong and claim to forfeit the earnest money.

6. Defendants 2 to 6, who are the legal representatives of the first defendant who died during the pendency of the suit, have filed a written statement, adopting the written statement of the first defendant and putting the plaintiffs to strict proof of their allegations:

The following issues have been set for trial:

1. Whether the suit is bad for non-joinder of Sri A.G. Murali?
2. Is time for payment the essence of the contract?
3. Whether the plaintiffs have defaulted in paying the balance of the amount and have therefore committed breach of contract?
4. Whether the defendant had committed breach of contract?
5. Whether the defendant had agreed to return the amount of Rs. 80,000 to the plaintiffs?
6. Whether the plaintiffs are entitled to refund of Rs. 88,400 as claimed in the plaint?

7. Whether the plaintiffs are entitled to interest on the sum of Rs. 80,000 as claimed in the plaint?

8. To what relief, if any, are the plaintiffs entitled?

On behalf of the plaintiffs, the first plaintiff examined himself as P.W.1 and marked Exhibits P-1 to P-7. The defendants have placed reliance on Exhibits D-1 and D-2 on their side and no oral evidence has been let in a part from marking these two documents through P.W.1. Issue No. 1. Learned Counsel for the defendants strenuously argued that the letter of agreement Exhibit P-1 dated 6th March, 1967 is only a tripartite agreement among the plaintiffs, the first defendant and A.G. Murali and this is evidenced by the signature of A.G. Murali in Exhibit P-1 and that the said A.C. Murali is also a party to this agreement as its preamble mentions A.C. Murali and the members of his family and that therefore the said A.C. Murali is a proper and necessary party to these proceedings as per Order 1, Rule 9, Civil Procedure Code. To substantiate this contention, he relies on Exhibit D-1 dated 25th June, 1967 viz., a copy of the letter addressed to the plaintiffs by one P.M.G. Nair with a copy to the first defendant and A.C. Murali and another, demanding payment of commission, alleging that he negotiated the transaction for the purchase of the estate between the plaintiffs on the one side as buyers and A.C. Murali and the first defendant on the other as sellers. Thus, the question for consideration is whether this suit is bad for non-joinder of A.C. Murali as alleged.

7. A very close scrutiny of Exhibit P-1 would show that Exhibit P-1 has been entered into only between the plaintiffs and the first defendant. Exhibit P-1 is addressed by the plaintiffs to the first defendant and is not at all addressed in the name of A.C. Murali also. The last clause of the letter is 'Kindly confirm this agreement,' The first defendant has signed at the bottom of the agreement with an endorsement ' I confirm the above arrangement'. Though Murali has also signed below the signature of the first defendant it cannot be construed by any stretch of imagination that Murali was also a party to that or has signed the letter Exhibit P-1 confirming the arrangement. If the contention on behalf of the defendants is true, the letter should have been addressed to A.C. Murali along with the first defendant and the endorsement should have been worded as 'We confirm the above

arrangement'. Regarding this aspect, the first plaintiff has deposed that Thiru Murali is not a party to the agreement; but since the first defendant asked Murali to sign in Exhibit P-1 as he also had shares in the estate, Murali also signed. The other document Exhibit P-2, dated 3rd April, 1967 (second letter of agreement) is also addressed by the plaintiffs only to the first defendant. Murali was neither a party to it, nor has he signed in Exhibit P-2 confirming the arrangement. If Murali had been a party to Exhibit P-1, definitely his signature would have been obtained in Exhibit P-2 also. The absence of the name and signature of A.C. Murali in Exhibit P-2 is a telling circumstance that would lead to the only one inference that A.C. Murali was not at all a party to the agreement, but had signed Exhibit P-1 at the request of the first defendant. I accept the argument of Thiru V.P. Raman, Learned Counsel appearing for the plaintiffs, that A.C. Murali would become a proper and necessary party only if the suit is for specific performance.

8. It is the admitted case of the defendants that the amount of Rs. 80,000 including the earnest money of Rs. 10,000 was paid by the plaintiff's/only to the first defendant. No part of the amount had been paid to Murali. Since the suit is only for recovery of the amount paid to the first defendant by the plaintiffs, I hold that A.C. Murali is not a proper and necessary party to the suit. I his issue is found against the defendants.

Issue 2. - The subject matter of the purchase in this suit is 7000 Nos. of equity shares in the capital of the company. Section 82 of the Companies Act, 1956 (Central Act I of 1956) says that the shares or other interests of any member in a company shall be movable property. Having regard to the nature of the transaction, the characteristics of the subject matter (equity shares in this suit) and the absence of any evidence to the contrary, it has to be held that the equity shares in the capital of the company are of a highly speculative and volatile character. In *Roberts v. Berry* (1853) 3 De.G.M. & G. 291, Turner, L.J., is reported as saying:

Time may be made to be of the essence of a contract, by express stipulation between the parties by the nature of the property, or by surrounding circumstances, showing the intention of the parties that the contract was to be

completed within a limited time.

* * *

The above dictum was applied in *Hare v. Nicoll* (1966) 1 All E.R. 285. The brief facts of the said case were: A dispute arose in relation to an agreement under seal made in February, 1963, whereby the plaintiff agreed to sell the defendant 50000 ordinary shares in a company called Pontinental Limited at a fixed price. The agreement conferred on the plaintiff an option to repurchase 25000 of the shares for a certain amount on certain terms. The plaintiff gave notice of his intention to repurchase, 25000 of the shares, which was accepted as if the option had been given within the time prescribed. But, he did not pay the price by 1st June, 1963 as stipulated. The defendant gave notice terminating the purchase agreement. So the plaintiff claimed damages for the breach of the agreement covered by the option. The suit was dismissed and the plaintiff filed an appeal. Willmer, L.J. sitting in the Court of Appeal holding that the plaintiff was not entitled to damages and dismissing the appeal, observed as follows:

In the present case, it seems to me that both the nature of the property and the surrounding circumstances call for consideration. As to the nature of the property, the subject matter of the option consisted of shares of a highly speculative nature, liable to considerable fluctuation in value. Even without the assistance of authority, I should have been disposed to say that that itself was a reason for holding that time was of the essence of the contract.

In the same case, Winn, L.J., arriving at the same conclusion, observed:

In my judgment where there is a provision for the purchase of shares on payment by a stated date, it is to be presumed, in the absence of any contrary indication that the parties to such a contract have impliedly stipulated and mutually intended that the time of payment shall be of the essence of the contract.

Further in *Mahabir Prasad Rungta v. Durga Datta* : [1961]3SCR639 , it has been held that in commercial transactions, time is ordinarily of the essence of the contract.

In the present suit, the price and time of payment are expressly stated in Exhibits P-1 and P-2. The purchase of shares is commercial in nature. Basing my opinion on the above cited observations, I reject the contention of the plaintiffs that the first defendant, by accepting only Rs. 20,000 and being a party to Exhibit P-2 has waived the condition that time was of the essence of the contract, and hold that time was of the essence of the contract in this suit, because there is a clause in Exhibit P-2 that the same terms and conditions in Exhibit P-1 would continue and thus there is no waiver.

Issues 3 and 4. - As per the conditions in Exhibit P-1 dated 6th March, 1967, the plaintiffs agreed to pay Rs. 10,000 as earnest money on the date of the execution of the document and Rs. 90,000 within one month, i.e., by 6th April, 1967, and the balance of Rs. 1,05,000 within six months from that date. The third clause of the agreement is that only on payment of the second instalment of Rs. 90,000 the plaintiffs would be put in possession of the estate. The fourth clause says that only on the final payment being made, the shares would be transferred either in the names of the plaintiffs or in the names of their nominees. But, the plaintiffs, after paying the earnest money of Rs. 10,000 did not pay the balance of Rs. 90,000 by 6th April, 1967 and instead paid Rs. 20,000 on 3rd April, 1967 and executed another letter of agreement Exhibit P-2 dated 3rd April, 1967, whereby they agreed to pay Rs. 95,000 on or before 6th June, 1967 and the balance of Rs. 80,000 on or before 6th October, 1967 and they were to be put in possession of the estate on payment of Rs. 95,000 as mentioned above. They further agreed that all other terms and conditions mentioned in Exhibit P-1 would continue. P.W.1 in his evidence, says that he paid only Rs. 50,000 on 7th June, 1967 towards the instalment mentioned in item 1 of Exhibit P-2 and promised to pay the balance of Rs. 45,000 on 17th June, 1967. He has also deposed that when he met the first defendant on 12th June, 1967, on 19th June, 1967 and finally on 30th June, 1967 and paid the balance of Rs. 45,000 asking the first defendant to put them in possession, the first defendant refused to receive the amount and surrender possession of the estate. The plaint contains the following averment in paragraph 3.

When the plaintiffs tendered the sum of Rs. 45,000 on 12th June, 1967, the defendant pleaded his inability to put the plaintiffs in possession of the estate and sought further time for the performance of his obligation.

These averments are based on Exhibits P-4 and P-5 viz., the letter and notice sent by the plaintiffs to the defendant. P.W. 1, has not spoken anything in his evidence before this Court, that the 1st defendant pleaded his inability to perform his obligations and sought further time. Exhibit D-2 is the letter written by the plaintiffs to the defendant on 5th July, 1967, demanding repayment of the amount of Rs. 80,000 on the ground that the arrangement to purchase the estate fell through. It is the first letter written by the plaintiffs after the arrangement fell through. In this letter, this is what the plaintiffs have written:

We are only small business people and we require this amount to roll in our business and as this big amount has been borrowed from several people. I request you to send the amount of Rs. 80,000 by a cheque drawn in favour of A Natarajan at your earliest, to enable us to repay the amount to our creditors.

9. Thus, this document clearly spells out that the plaintiffs were in financial difficulties. In fact, it is quite consistent with the defendant's case that the plaintiffs defaulted to pay the amount as stipulated. To the letter Exhibit D-2, the first defendant had written a reply in Exhibit P-3 dated 7th July, 1967 stating that the plaintiffs had defaulted in paying the balance and completing the transaction in spite of the extension of time agreed to by the first defendant at the request of the plaintiffs, and thereby the plaintiffs had committed breach of contract. It is only after the receipt of Exhibit P-3, the plaintiffs have sent Exhibit P-4, dated 18th July, 1967 and Exhibit P-6 (notice through lawyer) dated 5th October, 1967, wherein they have alleged that it was the first defendant who had pleaded his inability to perform his obligation and sought further extension of time and thereby failed to perform his part of the agreement. If these allegations are really true, they would have been mentioned in Exhibit D-2. The explanation given by them in Exhibits P-4 and P-5 that the letter Exhibit D-2 was written only at the suggestion of the first defendant, is wholly unbelievable. If really the first defendant had made such a suggestion, it is understandable why he should issue Exhibit P-3. It is also

significant to note that when the attention of P.W.1 (first plaintiff)- was drawn to these aspects, he has not deposed anything about the first defendant's inability to perform his obligation and his seeking further time or that the letter dated 5th July, 1967 was written at the instance of the first defendant. In response to the notice Exhibit P-5, the first defendant had sent a telegraphic reply Exhibit P-6, followed by a letter of confirmation Exhibit P-7, stating that he was willing to fulfil his obligations in case the plaintiffs were ready to pay the entire balance by the next day with interest at 6 per cent per annum. This was a really a concession given by the first defendant. Even then, the plaintiffs have not sent any reply to Exhibit P-6, expressing their readiness to pay the amount-Under these circumstances, I am of the view that on a true construction of item 2 of Clause 2 of Exhibit P-1 and item 1 in Exhibit P-2, the fact of non-payment of the amount according to the times stipulated in the agreement between the parties is practically admitted and therefore it is the plaintiffs who committed the breach of the contracts. Payment of money as stipulated in the agreement between the parties is practically admitted and therefore it is the plaintiffs who committed the breach of the contract. Payment of money as stipulated in the agreements is a vital consideration to perform the contract. The fact of non-payment of the amount in this case as agreed speaks for itself. Further, it is the conduct and the defiant attitude of the plaintiffs that were responsible for the breach of the contract. So, I find these issues against the plaintiffs and in favour of the defendants.

10. Issue 5. - Regarding the question whether the first defendant had agreed to return the amount of Rs. 80,000 to the plaintiffs, we have got the evidence of P.W. 1 and the averments in Exhibits P-4 and P-5 coupled with the pleadings. P.W. 1 has deposed in his evidence touching this issue, as follows:

I filed the suit for the return of the money from the defendant, paid by him under the agreement and also since Mr. Mudaliar (first defendant) had himself agreed to pay the amount.

11. A reading of Exhibits P-4 and P-5 would make it appear as though the first defendant agreed to refund the money on 30th June, 1967. But, immediately after the agreement fell through, the plaintiffs have sent the letter Exhibit D-2 dated 5th

July, 1967 for the first time, requesting the first defendant to send back the amount of Rs. 80,000. But in Exhibit D-2 which was written much earlier to Exhibits P-4 and P-5, there is no whisper that the first defendant agreed to return the entire amount. The first defendant also immediately replied by Exhibit P-3, stating that there was no question of repayment at the default was committed by the plaintiffs. In the above circumstances, I hold that the first defendant had not or much less could not have agreed to repay the entire amount of Rs. 80,000. So, this issue is answered in favour of the defendants.

12. Issues, 6, 7 and 8. - There is no dispute regarding the quantum of amount received by the first defendant from the plaintiffs. The first defendant's contention in his letter to the plaintiffs and his averment in his written statement is that since the plaintiffs had defaulted in paying the balance and completing the transaction in spite of the extension of time agreed to on their request, the first defendant had been prevented from concluding his offer for the purchase of the said shares and that the failure on the part of the plaintiffs to complete the transaction had caused serious prejudice and loss to him, rendering the plaintiffs liable in damages. Hence the question of repayment of Rs. 80,000 would not arise under the circumstances.

13. At this juncture, it would be pertinent to refer to the terms of the agreement entered into between the parties, to find out the intention of the parties. Clauses 2, 3, 4 and 6 in Exhibit P-1 dated 6th April, 1967 viz., the first document, are as follows:

2. The agreed price of Rs. 2,05,000 will be paid to you as follows:

(1) Rs. 10,000 (Ten thousand) on the execution of this letter.

(2) Rs. 90,000 (ninety thousand) within one month from this date.

(3) The balance of Rs. 1,05,000 (one lakh five thousand) with interest at 10 (ten) per cent per annum thereon within 6 (six) months from this date.

3. On payment of the second instalment of Rs. 90,000, we will be put in possession of the estate, but we shall not cut any timber without your written permission or disturb the plantation.

4. The shares covered by this agreement will be transferred to our names or the names of our nominees only on the payment of the balance of Rs. 1,05,000 with interest thereon as provided above.

6. In the event of our failing to pay the second instalment of Rs. 90,000 within the time agreed, the earnest money of Rs. 10,000 paid by us will be forfeited.

In the event of our defaulting to pay the balance of Rs. 1,05,000 with interest within the time allowed, we undertake to surrender possession of the estate and also agree to forfeit the earnest money of Rs. 10,000.

It is crystal clear from the above terms that the plaintiffs were given the option of paying the second instalment of Rs. 90,000 by 6th April, 1967 and getting possession of the estate and secondly on payment of the entire balance of Rs. 1,05,000 getting the transfer of the shares either to the names of the plaintiffs or of their nominees as stipulated in Clauses 2, 3 and 4. So the plaintiffs were allowed to pay the entire amount in three instalments including the earnest money of Rs. 10,000 which was to be adjusted towards the purchase amount of Rs. 2,05,000. Further this agreement also provides, by a specific clause (Clause No. 6) in unequivocal terms, that under two conditions, the earnest money of Rs. 10,000 would be liable to be forfeited, the conditions being (1) that if the plaintiffs failed to pay the second instalment within the time agreed, the earnest money of Rs. 10,000 would be forfeited, and (2) that even in the event of the failure of the plaintiffs to pay the balance with interest thereon the same earnest money of Rs. 10,000 would be forfeited and further the plaintiff should also surrender possession of the estate. As the plaintiffs have not been put in possession of the property due to the non-payment of the second instalment, there is no question of surrendering possession and only condition No. 1 would be applicable. But the plaintiffs would forfeit only the earnest money of Rs. 10,000 at the maximum. In other words, the first defendant has reserved the right to forfeit the earnest money of Rs. 10,000 only. Neither is there any clause in Exhibit P-1 forfeiting the entire amount, nor could it be inferred on a true construction of the provision of the agreement that the amount of Rs. 80,000 would be forfeited or adjusted towards the alleged liability of A.C. Murali to the first defendant. Moreover, it seems to me,

on a consideration of the terms of the agreement, the wording of the recitals in Exhibit P-1 with their fairly plain meaning, the surrounding circumstances and the conduct of the parties, that the intention of the parties was that in the event of the plaintiffs' committing default, the earnest money of Rs. 10,000 alone was liable to be forfeited and not any other amount. Further, even in the second letter of agreement Exhibit P-2, after having agreed for the extension of time for payment of the instalments and thus varying the conditions with regard to the dates and quantum of instalments they have specifically stipulated, by inserting the final clause, that 'all the other terms and conditions in Exhibit P-1) will remain the same.' In other words, Exhibit P-2 has to be read along with Exhibit P-1 with regard to the terms of the contract. So, the argument of the Learned Counsel for the plaintiffs that there is a novation by the execution of Exhibit P-2 and that the clause of forfeiture has no effect, cannot be accepted. There is no novation of the contract. There is only an extension of the time for payment of the instalments and a slight variation with regard to the quantum of instalments.

14. It is averred in the written statement of the first defendant that the plaintiffs were acting as the agent or on behalf of the said A.C. Murali in agreeing to pay the first defendant the said sum of Rs. 2,05,000 and taking over the shares and the plaintiffs have made the payment in part discharge of the liability of A.C. Murali to the first defendant and as such the said amount of Rs. 80,000 will have to be applied in part discharge of such liability. The Learned Counsel for the defendants also argued, toeing the line with the above said averments in the written statement, that the plaintiffs cannot personally enforce the repayment of the amount paid since they were only the agents of A.C. Murali and so Section 230 of the Indian Contract Act operates against the plaintiffs. The defendants have not substantiated their contention satisfactorily by letting in either oral evidence or any other documentary evidence. There is absolutely no shred of evidence to prove that the plaintiffs were acting only as agents for A.C. Murali except the suggestions made to P.W.1 and the averments in the written statement. Therefore, I find myself unable to accept the argument put forward on behalf of the defendants.

15. Learned Counsel for the plaintiffs then argued that in case of forfeiture, the maximum amount that would be liable to be forfeited in this case is only Rs.

10,000 and however, it is also subject to the doctrine of reasonableness. In support of the first part of this contention, the Learned Counsel cited before me the decision of the Supreme Court in *Shree Hanuman Cotton Mills and Anr. v. Tata Aircraft Limited* : [1970]3SCR127 , wherein it has been decided that every deposit made by the purchaser is not liable to forfeiture and only the earnest money is liable to be forfeited. In that case, the price of the aero scrap agreed to be sold by the respondents to the appellants was Rs. 10 lakhs. An advance of Rs. 2,50,000 was paid by the appellants. The balance of Rs. 7,50,000 was agreed to be paid in two instalments. The appellants failed to pay the said balance. Hence, the respondents ultimately forfeited the entire sum of Rs. 2,50,000 which, according to it, was earnest money. The Court held that it was earnest money and, in the peculiar facts and circumstances of the case, held that the amount was liable to be forfeited. While doing so, the Supreme Court distinguished the decision in *Fateh Chand v. Balakishan Das* : [1964]1SCR515 . In the said decision, an earnest money of Rs. 1,000 was paid to the plaintiff. Again, the buyer had paid another sum of Rs. 24,000 under the contract. There was a clause in the agreement that both the amounts could be forfeited in case of default by the purchaser in completing in transaction. The Court held in that case that only the earnest money of Rs. 1,000 was liable to be forfeited because of the default of the buyer to complete the transaction. The sum of Rs. 24,000 could not be treated as earnest money and therefore the forfeiture clause relating to that amount was not valid. In *Hanuman Cotton Mills'* case : [1970]3SCR127 the sum of Rs. 2,50,000 was stipulated as the earnest money. While discussing the nature of earnest money, the Supreme Court laid down the following principles:

- (1) It must be given at the moment at which the contract is concluded.
- (2) It represents a guarantee that the contract will be fulfilled or, in other words, 'earnest' is given to bind the contract.
- (3) It is part of the purchase price when the transaction is carried out.
- (4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.

These principles were laid down by the Supreme Court after a review of the decisions on the subject. The amount of Rs. 10,000 paid by the plaintiffs to the first defendant, in this case, also satisfied the above conditions and there can be no doubt that it was paid as earnest money. As a matter of fact, the agreement itself described the said amount of Rs. 10,000 only as earnest money. Then the Learned Counsel for the plaintiffs contended that even the earnest money, in order to be forfeited, should be reasonable, and in support of the said contention, relied upon the decision of the Madras High Court in *Meenakshinada Deikshitar v. Murugesu Nadar and Anr.* : (1969)1MLJ474 . In that case, the plaintiff agreed to purchase a land from the defendant and paid a sum of Rs. 225 as advance towards the total purchase price of Rs. 1,537 which advance, in terms of the agreement, was liable to be forfeited in case the sale was not completed within the prescribed time and due to the plaintiff's default. The transaction did not go through and the plaintiff filed a suit for the return of the advance. The defendant solely relied upon the above clause relating to the forfeiture and contended in the lower Court that they were entitled to forfeit the same. It was observed by Ramaprasada Rao, J., that what may be called 'advance' may be 'deposit' and what may be termed a 'deposit' may ultimately be proved to be 'advance' and that in either case it was the intention of the parties that governed. Such an intention could be gathered from the express terms of the contract or from conduct and by surrounding circumstances incidental to such a contract. Though the learned Judge approved of the principle that deposit or earnest money is outside the place of Section 74 of the Indian Contract Act, he also observed:..in a given contract if a sum is paid under the caption of 'deposit' or 'earnest money' or has to be interpreted as such according to the intentions of parties, and is made forfeitable in case of breach, even then Courts have to adjudge the reasonable compensation to which a party would be entitled to, in such circumstances. Such determination of reasonable compensation can be made either in a suit filed by the depositor (purchaser) against the depositee (vendor) or in a suit by the depositee (vendor), complaining of such breach.

The Learned Counsel laid emphasis on this observation and contended that even the earnest money in order to be forfeited, should be reasonable. In this connection, I find, the Supreme Court in Hanuman Cottor Mills' case : [1970]3SCR127 , has also observed thus:

We express no opinion on the question as to whether the element of unreasonableness can ever be considered regarding the forfeiture of an amount deposited by way of earnest and if so what are the necessary factors to be taken into account in considering the reasonableness or otherwise of the amount deposited by way of earnest. If the appellants were contesting the claim on any such grounds, they should have laid the foundation for the same by raising appropriate pleas and also led proper evidence regarding the same, so that the respondents would have had an opportunity of meeting such a claim.

In the said case, the appellants never raised any contention that the forfeiture of the amount amounted to a penalty or that the amount forfeited was so large that the forfeiture was bad in law. Nor did they raise any contention that the amount of deposit was so unreasonable and therefore forfeiture of the entire amount was not justified. Even though the amount forfeited was Rs. 2,50,000 that is, one fourth of the total purchase price, the Supreme Court held that Section, 74 was not attracted, because the said amount of Rs. 2,50,000 was specifically agreed to be the earnest money. Thus, though the Supreme Court has ultimately decided that the earnest money should be forfeited, from the above cited passage, it is clear that the Supreme Court was not called upon to decide the question whether the earnest money, in order to be forfeited, should be reasonable or not. It was because the appellants therein never raised any contention that the forfeiture of the amount amounted to a penalty or that the amount forfeited was so large that the forfeiture is bad in law-Here also, I need not go into the question whether the amount of Rs. 10,000 paid as earnest money by the plaintiffs would be reasonable if forfeited, because the plaintiffs have not disputed in the pleadings the reasonableness of the earnest money. They have only pleaded that the first defendant committed default. Only now, a contention with regard to the reasonable nature; of the earnest money is sought to be raised in the course of the arguments. So, I am not called upon to decide whether the amount of Rs. 10,000

in order to be forfeited, would be reasonable or not.

16. The Learned Counsel for the defendants relied upon the decision of the Supreme Court in *Mania Bux v. Union of India* : [1970]1SCR928 , for the proposition that forfeiture of earnest money under a contract for sale of property, moveable or immoveable, if the amount is reasonable, does not fall within Section 74 of the Indian Contract Act. This principle is now well settled. Since the amount of Rs. 10,000 is a reasonable sum, Section 74 is not attracted.

17. I was also referred to the observation of Ramaprasada Rao, J., in *Meenakshinada Deikshitar's case* : (1969)1MLJ474 , that the vendor who seeks to forfeit the earnest money has to prove the damages sustained by him. That case related to the sale of some land. The vendor had not adduced any proof as to the damage sustained by him. But, this case relates to the sale of shares and the total purchase price under the contract amounted to Rs. 2,05,000. The earnest money is only Rs. 10,000. The first defendant has contended in his written statement that he was not able to sell the shares to others. Hence, the above observation in *Meenakshinada Deikshitar's case* : (1969)1MLJ474 , is not applicable to this case. Moreover, since the plaintiffs have not in their plaint questioned the reasonableness of the earnest money to be forfeited, they are not entitled to raise that point at this stage. Anyway, prima facie the amount of Rs. 10,000 mentioned in the agreement as earnest money is liable to be forfeited in case of default of this nature. I am also of the view that in cases of this type, where contracts of commercial nature are involved, the vendor may not be able to measure the amount of damages that he may sustain due to the fault of the vendee, and in such cases the earnest money mentioned in the contract has prima facie to be taken as reasonable.

18. For the foregoing reasons, I hold that the forfeiture clause, contemplated by the parties, is only with reference to the amount of Rs. 10,000 and therefore, the first defendant was bound to return the amount paid by the plaintiffs less Rs. 10,000. Since the plaintiffs have paid Rs. 80,000 the first defendant was liable to return Rs. 70,000. In Exhibit P-5 dated 5th October, 1967 the plaintiffs have claimed the return of the amount with interest at six per cent. per annum from 7th

June, 1967. Learned Counsel for the defendants contended that the plaintiffs cannot claim any interest on the amount of Rs. 70,000 and in support of that contention, cited the decision of the Supreme Court in Mahabir Prasad Rungta v. Durga Datta : [1961]3SCR639 . In that case, interest was not allowed till date of suit, because in that suit the notice issued prior to suit did not specify the sum which was demanded and therefore the Interest Act did not apply. But in this case, the plaintiffs have specifically mentioned the amount and claimed interest at six per cent per annum from a specified date. Hence, the said decision is not helpful to the defendants. In this case, in spite of the notice Exhibit P-5, the first defendant did not return the amount. He also had the benefit of the money till now. The defendants now have the benefit of Rs. 10,000 the earnest money, by way of forfeiture. Hence, I hold that the first defendant was liable to return Rs. 70,000 with interest thereon at six per cent per annum from 5th October, 1967 (as claimed in the plaint) till date of realisation. I find issue, 6, accordingly. In view of my finding on issue 6, no separate finding is necessary on issue 7. Defendants 2 to 6 are the legal representatives of the first defendant. So, they are liable to repay the amount to the plaintiffs, from out of the assets of the first defendant in their hands. Issue 8 is answered accordingly.

19. In the result, there will be a decree in favour of the plaintiffs for the recovery of a sum of Rs. 70,000 with interest thereon at six per cent per annum from 5th October, 1967 till date of realisation and proportionate costs of suit, against the estate of the first defendant in the hands of defendants 2 to 6.

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