37, 1971

No. 22 of 1970.

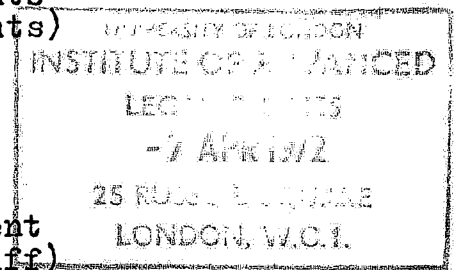
IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :-

LINGGI PLANTATIONS LIMITED — Appellants (Defendants)



AND

10 T. PASUBATHY AMMAL alias PASUBATHY JAGATHEESAN, Executrix of the last Will of S. K. JAGATHEESAN, Deceased — Respondent (Plaintiff)

CASE FOR THE APPELLANTS

RECORD

1. This is an appeal from an order of the Federal Court of Malaysia (Appellate Jurisdiction) dated 26th July 1969 allowing the Respondent's appeal from a judgment of Gill J. in the High Court in Malaya dated 25th November 1966, and ordering that the Appellants should pay to the Respondent the sum of $377,500. By an order dated 23rd February 1970 the Federal Court of Malaysia granted the Appellants final leave to appeal to His Majesty The Yang Di-Pertuan Agong (pp.71-72; pp. 9-20; pp. 75-76) 20

2. This action arises out of a contract made on 25th May 1962 under which the appellants agreed to sell some 1488 acres of land known as the Haron Estate, to An. Karuthan Chettiar. The purchase price was $3,775,000/-. and 10 per (pp. 76-82)

cent of this amount, i.e. $377,500/-. was paid by the purchaser to the Appellants under Clause 1 of the contract "by way of deposit and part payment". The contract was conditional, under Clause 2, upon the vendor obtaining Treasury consents to the sale. These were in fact obtained on 24th May 1962 and in the circumstances completion was required on or before the expiry of 90 days from the date of the contract under Clause 3 which further provided that "in the interpretation of this clause time shall be deemed to be of the essence". 10

p.78 ll. 2-3

3. Clause 5 of the contract stated that :-

p.78 ll.17-26

"If due to any act or default of the Purchaser the said purchase shall not be completed as herein provided the Vendor shall be entitled by notice in writing to the Purchaser to declare this agreement at an end and thereupon this agreement shall cease to be of any force or effect and the sum of $377,500/-. (Dollars three hundred and seventy-seven thousand five hundred) referred to in clause 1 hereof shall be forfeited to the Vendor to account of damages for breach of contract". 20

pp.85-87

pp. 91-92

p.93

p.82

4. On 17th July 1962 the purchaser assigned all his rights and obligations under the contract to S.K. Jagatheesan (now deceased but hereinafter also referred to as the Respondent). By letter dated 27th July 1962 the Respondent requested an extension of time for completion. This was refused by the Appellants in their letter of 1st August 1962. On 20th August 1962 at a meeting in London between the parties the Respondent renewed his request for an extension of time for completion but again this was refused. The contract was not completed on the due date as a result of the default of the Respondent. By letter dated 27th August 1962 the Appellants confirmed to the Respondent that the contract was at an end, that the deposit had been forfeited to them, and that they reserved their right of action for breach of contract. 30 40

5. There has been no issue between the parties as to the above facts. The only dispute of

fact was as to whether or not the Appellants had suffered any damage from the Respondent's breach of contract and, if so, as to its amount. By both paragraph 7 of the Statement of Claim and paragraph 2 of the Defence the Respondent put the Appellants to strict proof of damage suffered and of its amount. By paragraph 6 of their Defence the Appellants alleged that they had suffered damage as a result of the Respondent's breach of contract. In the Appellants' counterclaim that damage was alleged to have been caused by a fall in the value of the land at the due date for the completion of the contract as compared with the contract price and a claim was made for the amount by which it was claimed the fall in value had exceeded the amount of the deposit which had been forfeited and retained.

p.7 ll.21-25 p.9 ll. 1-5 p.7 ll. 8-16 pp. 7-8

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6. No findings of fact on the issue of damage were made either by Gill J. or Suffian F.J. and in the event nothing turned on this issue in any of the judgments. Ong Hock Thye C.J. however did make a finding of fact that the Appellants had suffered no damage. If and insofar as it may be relevant the Appellants will contend that this finding of fact on the quantum of damage should be set aside. Although the Appellants have abandoned their counterclaim there is no indication that the Respondent's claim for an assessment of damages has ever been discontinued, and the issue raised by paragraph 7 of the Statement of Claim and paragraph 6 of the Defence has not been disposed of. As is recorded in the judgment of Ong Hock Thye C.J. the case had proceeded on the basis of an agreement between the parties to the effect that the preliminary question of law should be decided before the issue of fact was considered. Although the Court was informed of this agreement by counsel for the Respondent, it was also departed from by counsel for the respondent. The Appellants respectfully submit that if the judgment of the Federal Court is affirmed the issue of damages should be referred to the High Court for trial.

p.52 l.28 p.53 l.27 p.49 ll. 1-4 p.5 ll. 21-25 p.46 ll. 2-6 p.47 ll. 1-5

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7. The major issue in this case has however been throughout a question of law. This was raised by paragraph 8 of the Statement of Claim

RECORD

p.5
ll. 21-25

in terms that the provision in the contract for the forfeiture of the deposit "operates in fact and was intended to operate as a penalty and is thus void".

8. As stated above there was no issue between the parties as to the fact that the Respondent was in breach of the contract in not completing by the due date. The reasoning of Gill J. was that :-

p.10
ll. 37-42

(i) the contract provided for the forfeiture of the deposit in the events which had occurred and the Appellants had accordingly been entitled to forfeit and retain that sum; 10

p.11 l.4 -
p.14 l.14

(ii) No equitable relief was available to the Respondent because the amount of the deposit so forfeited was not out of all proportion to the damage which the Appellants might suffer from non-performance on the part of the Respondent nor was it unconscionable to the Appellants to retain this sum, and 20

p.14 l.15-
p.19 l.34

(iii) the amount of the deposit so forfeited was reasonable compensation for the Respondent's breach of contract and no relief therefore was available to the Respondent under either section 65 or section 75 of the Contracts (Malay States) Ordinance 1950

9. In the Federal Court of Malaysia (Appellate Jurisdiction) the decision of Gill J. was reversed. Reasons were given for the judgments of Ong Hock Thye C.J. and Suffian F.J. but not for that of Ali F.J. who concurred with their judgments. The reasoning of Ong Hock Thye C.J. and Suffian F.J. was that :- 30

p.51 l.16-
p.52 l.27
p.67 l.40-
p.68 l.11

(i) The contract did not provide for the forfeiture of the deposit and the Appellants were in consequence required to repay this sum to the Respondent;

p.49 ll.10-25
p.64 l.43-
p.67 l.42

(ii) if the contract had provided for such forfeiture no equitable relief would have been available to the Respondent; 40

RECORD

(iii) that section 75 of the Contracts (Malay States) Ordinance 1950 applied so that while the deposit was recoverable by the Respondent the Appellants were, nevertheless, entitled to reasonable compensation, and (per Ong Hock Thye C.J. only) section 65 of the Contracts Ordinance also applied to the same effect.

p.53 l.28- p.58 l.11
p.61 l.17 - p.69 l.15

p.58 l.12 - p.59 l.17

The Appellants were therefore ordered to repay
10 the full amount of the deposit, but without interest as the use of the money meanwhile was estimated to be sufficient compensation for the breach of contract.

10. The judgments of Gill J. and of Ong Hock Thye C.J. and Suffian F.J. were therefore at variance on two issues of law :-

(i) does the contract provide for the forfeiture of the deposit?; and

(ii) if so, does either (or both) section 65 or
20 section 75 of the Contracts (Malay States) Ordinance 1950 apply to prevent this result?

The Appellants respectfully submit that the judgments of the Federal Court were wrong on both of these issues.

11. Both Gill J. and the Federal Court were in agreement that the Respondent could not obtain relief at common law or in equity. Should it be material the Appellants will respectfully submit that this is right and that the law in
30 this respect was correctly stated by Denning L.J. in Stockloser v. Johnson /1954/ 1 Q.B. 476 at 490:-

"Where there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause), then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity ..... Two things are necessary: first, the forfeiture clause
40 must be of a penal nature, in this sense, that the sum forfeited must be out of all proportion to the damage, and, secondly, it

must be unconscionable of the seller to retain the money".

p.10 ll. 37-42
p.51 l.16- p.52 l.27
p.67 l.40 - p.68 l.11

12. On the first main question of law it was assumed by Gill J. without discussion that the Appellants could upon a termination of the contract due to the default of the purchaser treat the deposit as forfeited and retain it. As a question of construction Ong Hock Thye C.J. and Suffian F.J. took the opposite view. The former reached the conclusion that :- 10

p.52 ll. 5-18

"The object and intention of clause 5 was clearly to reserve to the vendors the right to recover damages to any extent, over and above the sum actually received by them, in the event that it should turn out to be inadequate as compensation for their loss. That the natural meaning of these words expressed truly the intention of the contracting parties was supported by the letters of August 27th 1962 and April 9th 20 1963 from the Respondent's Solicitors as well as the counterclaim. This view was not disputed by the Appellant. The expressed intention being thus the common intention of the parties, in my judgment effect must be given to it".

The Appellants respectfully submit that this statement is a correct construction of the contract in this respect. The reasoning of Ong Hock Thye C.J. which follows :- 30

p.52 ll.20-27

"Since they (the Appellants) were entitled to claim more than $377,500/- by providing that the quantum of damage should be left at large the same synallagmatic provision ought to avail the (Respondent) for claiming a refund of any sum in excess of such damage"

is neither a logical deduction nor is it required or justified by any accepted canon of construction. Further it is based to some extent at least on a construction of the words "to account of" as 40 making an assessment of damages essential which also does not follow. For these reasons the Appellants submit that the decision of Ong Hock Thye C.J. on this issue is wrong.

13. Suffian F.J. reached the same conclusion as to the interpretation of the contract by an entirely different route. He stated :-

p.67 l.43- p.68 l.11

"On a proper construction of the agreement here, can it be said that the money paid by the buyer was earnest money to guarantee the completion of the bargain? It could have been earnest money if the parties had, in the words of Shah J. in the Indian Supreme Court decision cited /Fateh Chand v. Balkishan Das A.I.R. 1963 S.C. 1405/, "so named it in the agreement of sale", or used other words to make this intention clear beyond all doubt. But it had not been so named, and reading the agreement as a whole and considering the subsequent conduct of the seller as revealed by the correspondence and the turn of events at the trial in the lower court, I am of the opinion that there is an ambiguity as to the exact intention of the parties and in my view this ambiguity should be resolved in favour of the buyer and I accordingly hold that the money was not earnest money".

The Appellants respectfully submit that both this construction and that of Ong Hock Thye C.J. are wrong, in that they do not give the words in the contract their natural and grammatical meaning in this context and in particular that it fails to give effect to the meaning of "deposit" in Clauses 1 and 2 and "forfeited" in clause 5. Further in the Judgment of Suffian F.J. reference is made to the need to use the term "earnest money" or to use words to the same effect. The fact that a "deposit" with provision for forfeiture must bear the same meaning is not considered

p.67 l.19 - p.68 l.11

14. On the second main question of law Gill J. held that Section 75 of The Contracts (Malay States) Ordinance 1950 did not apply. Section 75 provides :-

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in the case of such breach, or if

RECORD

> the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or as the case may be, the penalty stipulated for."

p.14 l.15 - l.43 and p.16 ll.24-39 p.15 l.37 - p.16 l.23 p.16 l.40- p.18 l.16 p.55 ll.8-28

The authorities cited for the above view by Gill J. and in the Federal Court: Natesa Aiyar v. Appavu Padayachi A.I.R. (1915) Madras 896 Manian Pattar v. The Madras Railway Company I.L.R. (1906) 29 Madras 118, S.S. Maniam v. The State of Perak (1967) M.L.J. 75; and Naresh Chandra v. Ram Chandra A.I.R. (1952) Cal. 93 were it is respectfully submitted, correctly applied. 10

15. The only authority cited against the above view was the decision of the Indian Supreme Court in Fateh Chand v. Balkishan Dass A.I.R. 1963 S.C. 1405 and the Privy Council decision in Bhai Panna Singh v. Bhai Arjun Singh A.I.R. (1929) P.C. 179. In both of these cases a distinction was made between :- 20

(a) earnest money to guarantee the completion of the bargain;

(b) a deposit; and

(c) an instalment of the purchase price simplicitor

Although in each case it was decided that the earnest money could be forfeited the additional "deposit" was held to be subject to the terms of the equivalent section of The Indian Contract Act. It is respectfully submitted that these decisions were wrongly applied in the Judgments of Ong Hock Thye C.J. and Suffian F.J. Further the dicta of Shah J. in the Fateh Chand case, relied upon in both of those judgments, refer to the forfeiture of property, which words include payments by way of deposit. The words underlined are not contained in either the Indian Contract Act or in Section 75 of the Contracts 30

p.57 ll.28-29 and p.68 ll.38-39

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(Malay States) Ordinance 1950 but are a gloss upon the statute.

16. The Appellants also respectfully submit that section 65 of the Contracts (Malay States) Ordinance 1950 which was applied in the Respondent's favour by Ong Hock Thye C.J. was wrongly construed. The material provisions of section 65 are ;-

10 "The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received."

The decision in Natesa Aiyar v. Appavu Padayachi A.I.R. (1915) Madras 896, is authority for the proposition that a deposit paid by a purchaser is a benefit received under the contract within the meaning of the corresponding section of the
20 Indian Contract Act rather than security under another and collateral contract. Further it is respectfully submitted that the Privy Council decision in Murlidhar Chatterjea v. International Film Co. Ltd. A.I.R. (1943) P.C. 34 is not authority for a contrary proposition and was wrongly applied by Ong Hock Thye C.J.

17. The Appellants respectfully submit that this appeal should be allowed, that the judgment of the Federal Court should be reversed and that
30 the order of the High Court should be restored for the following (among other)

R E A S O N S

(1) BECAUSE the decision of the High Court was right for the reasons given in the judgment.

(2) BECAUSE on its true construction the contract provided for the forfeiture of the sum stipulated to be payable as a deposit in the events which occurred.

40 (3) BECAUSE no relief is available at common law to the Respondent

RECORD

(4) BECAUSE a provision for forfeiture of a deposit is not affected by either Section 65 or Section 75 of The Contracts (Malay States) Ordinance 1950

(5) BECAUSE the judgment of the Federal Court of Malaysia (Appellate Jurisdiction) was wrong.

C. S. STAUGHTON

M. A. PICKERING

No. 22 of 1970

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O N   A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)

B E T W E E N :-

LINGGI PLANTATIONS LIMITED

Appellants

AND

T. PASUBATHY AMMAL alias PASUBATHY JAGATHEESAN, Executrix of the last Will of S. K. JAGATHEESAN, deceased.

Respondent

CASE FOR THE APPELLANTS

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