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Present : Wood Renton C.J. and Ennis and De Sampayo JJ.

NAGUR PITCHI *v.* USOOF.

201—D. C. Puttalam, 2,763.

Ordinance No. 7 of 1840, s. 2—Informal agreement—Action to recover money advanced.

A party who advances money on an informal agreement (void by virtue of the provisions of section 2 of Ordinance No. 7 of 1840) is entitled to a refund only if the other party refuses or is incapable of completing the transaction.

THE plaintiff advanced a sum of Rs. 945 to the defendant on a verbal agreement for the lease to him by the defendant of two parcels of land. He did not afterwards wish to take a lease, though the defendant was willing to execute one. He brought this action to recover the sum advanced. The learned District Judge found that there was an agreement that if the plaintiff failed to take the lease the deposit should be forfeited, and dismissed plaintiff's action.

The plaintiff appealed.

A. St. V. Jayewardene (with him *Arulanandan*), for the plaintiff, appellant.—The defendant has admitted the receipt of the money. We are entitled to get back the money, as the agreement to lease is not notarially executed. Such an agreement is of no force or avail in law, as provided by Ordinance No. 7 of 1840. The Evidence Ordinance and the case law are in favour of our view. Counsel cited (*1836*) *Morgan's Digest 82 ;* (*1859*) *3 Lorenz 175 ;* (*1873*) *Grenier, vol. II., part II., p. 34 ; 2 C. L. R. 191 ; 3 N. L. R. 105 ; S. C. M., May 30, 1898, C. R. Kandy, 6,147 ; 4 A. C. R. 74 ; S. C. M., May 3,*

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1904, C. R. Batticaloa, 9,159; 11 N. L. R. 272; 12 N. L. R. 87, 18 N. L. R. 292, 449 ; 19 N. L. R. 193 ; Carson v. Roberts, 31 Beaven 613 ; 32 L. J. Ch. 105 ; L. T. J., July 2, 1910, p. 223 ; Ramanathan (1863-68) 83 ; Asirwatham's Reports 22.

Bawa, K.C. (with him *M. W. H. de Silva*), for the respondent.— The cases cited do not apply to the facts of this case. In this case there is an agreement to forfeit the money advanced if the plaintiff does not complete the contract. This is a separate agreement, and is not affected by section 2 of Ordinance No. 7 of 1840.

If the plaintiff be allowed to prove the agreement, even for a collateral purpose, the defendant also should be allowed to prove what the actual agreement was (see *12 M. I. A. 157*).

The plaintiff cannot recover, as he was the party who made default. See *Halsbury's Laws of England, vol. XXV., p. 402; Thomas v. Brown, 1 Q. B. D. 714; Voet 18, 1, 25; 2 Nathan 715; 1 S. C. R. 60 ; 22—D. C. Kegalla, 4,420, S. C. M., August 7, 1917.*

A. St. V. Jayewardene, in reply.

Cur. adv. vult.

August 23, 1917. ENNIS J.—

The plaintiff-appellant sued for the recovery of Rs. 945 paid on a verbal agreement to the defendant for the lease of certain lands for a term of years. The learned Judge found that the defendant was ready and willing to execute the lease, and that there was an agreement that if the plaintiff failed to take the lease the deposit should be forfeited. He gave judgment in defendant's favour, holding that in law the defendant was entitled to retain the amount as forfeit. The plaintiff appeals; and a series of cases have been cited in support of his contention that he is entitled to recover the money paid. Mr. Bawa, for the respondent, urged that these cases all differ from the present case, in that in this case there was a definite agreement for forfeiture, and that such an agreement is separate, and not affected by the provisions of section 2 of Ordinance No. 7 of 1840. It seems to me that the test as to whether or not the agreement to forfeit is a separate agreement can be found in the terms of section 92 of the Evidence Ordinance. Had the agreement to lease been reduced to writing and notarially executed, as required by section 2 of Ordinance No. 7 of 1840, no evidence of a separate agreement to forfeit the advance would be admissible in evidence, except the document; and if the document did not contain this provision, it could not be proved as a separate verbal agreement. Consequently, I am of opinion that the agreement to forfeit, as an agreement separate from the agreement to lease, cannot be proved in the present case, and that, as a term of the agreement to lease, it is of no effect in law by virtue of the provisions of section 2 of Ordinance No. 7 of 1840.

It has been argued that the principle enunciated in *Shah Mukkun Lall and others v. Baboo Sree Kishen Singh and others* [1] would apply, and that the plaintiff should not be allowed to prove an agreement, even for a collateral purpose, without it being open to the defendant to prove the terms of it. Counsel for the plaintiff has, however, now taken up the position that he does not seek to prove the agreement at all, that it is sufficient for him to show that money was paid under an agreement which cannot be proved, and that he is entitled to recover. Against this it was urged that in any event the plaintiff could not recover, as he was the party making default, the defendant being ready and willing to execute the lease. There are conflicting English cases on the point. In *Carson v. Roberts* [2] it was held that where there is no contract which can be enforced the purchaser is entitled to a return of his deposit, and in that case the purchaser himself was the party who refused to complete the contract. In *Thomas v. Brown* [3] it was held that where upon a verbal contract for the sale of land the purchaser pays the deposit and the vendor is always ready and willing to complete, an action cannot be brought to recover back the money.

With regard to the Ceylon cases, in *Cassim Pulle v. P. Miguel and another* [4] it was held that money paid by a purchaser at an auction, of which the conditions of sale were not notarially executed, could be recovered. In *Perera v. Silva*,[5] where a vendor was sued for the return of the purchase money, such a return was allowed. In *Wambeck v. Le Mesurier*,[6] where the defendant had been placed in possession of land on an invalid lease, it was held that if he refused to accept a lease he must quit the land. In *Girigoris v. Tillekeratne* [7] the defendant refused to give a valid lease to complete his contract, and plaintiff was allowed to recover his deposit.

Other Ceylon cases were cited, and it will be sufficient to give the reference: *Ramanathan (1863-68) 83; Morgan's Digest 82; 2 Grenier, vol. II., part II., p. 34; C. R. Kandy, 6,147, S. C. M., May 30, 1898; Asirwatham's Reports 22; 62—C. R. Batticaloa, 9,159, S. C. M., May 3, 1904; 11 N. L. R. 272; 19 N. L. R. 193.*

The Ceylon cases do not go to the extent of saying that in every case where money has been paid on an invalid agreement it can be recovered, and they cannot be said to be directly in conflict with the decision in *Thomas v. Brown*.[3] The more recent English cases seem to show that where the vendor or lessor is ready and willing to complete the contract, the deposit paid cannot be recovered.

Lord Halsbury's Laws of England (vol. XXV., p. 402), commenting on the English cases, says: " Where a deposit has been paid under

[1] *12 Moore Ind. App. 157.*
[2] *(1862) 31 Beav. 613.*
[3] *(1876) 1 Q. B. D. 714.*
[4] *(1859) 3 Lorenz 175.*
[5] *(1908) 4 A. C. R. 74.*
[6] *(1898) 3 N. L. R. 105.*
[7] *(1893) 2 C. L. R. 191.*

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a verbal contract for the sale of land, a vendor who resists the purchaser's action on the contract by the plea of the Statute of Frauds is liable to return the deposit as money had and received to the use of the purchaser; but it seems that if the purchaser sets up the Statute in order to escape from his contract, he cannot recover the deposit."

I would follow this principle.

In the present case it is the plaintiff who sets up the Ordinance No. 7 of 1840 to escape the completion of his agreement, and he cannot recover his deposit. Had he been willing to carry out the agreement and the defendant had refused, the position would have been reversed, and he could have recovered.

I would dismiss the appeal.

DE SAMPAYO J.—

The question for decision is whether the plaintiff, who advanced a sum of Rs. 945 to the defendant on a verbal agreement for the lease to him by the defendant of two parcels of land, but who, according to the finding of the District Judge, did not afterwards wish to take a lease, though the defendant was willing to execute one, can recover the deposit from the defendant.

If the English law on this point were followed, the question should be answered in the negative. Where a deposit is made on an informal agreement, within section 4 of the Statute of Frauds, the right to recover it depends on the further question, whether the person who has made the deposit is himself the party in default or not. That is to say, if he is desirous of completing the transaction, but the other party refuses or is unable to carry out his part of it, the deposit is recoverable; but not in the converse case. Of course, no interest or damages will in any case be allowed, since such relief can only arise from a valid contract. See *Vilde v. Fort*,[1] *Gosbell v. Archer*,[2] *Sweet v. Lee*,[3] *Wright v. Colls*,[4] *Thomas v. Brown*.[5] The reason for this inquiry as to who was in default is that where the party receiving the money fails to give to the party paying it the property or right for which the money has been paid, the latter is entitled to a refund, on the general principle that money paid on a consideration which fails may be recovered back as money had and received; whereas if the party receiving the money is willing to carry out the agreement, but the other party is not, there cannot be said to be a failure of consideration, and consequently no right of action can arise. Mr. Jayewardene, for the defendant, however, relies on *Carson v. Roberts*,[6] and strenuously contends

[1] *(1812) 4 Taunt. 334.*
[2] *(1835) 2 A. & E. 500.*
[3] *(1841) 3 M. & G. 452.*
[4] *(1849) 8 C. B. 150.*
[5] *(1876) L. R. 1 Q. B. D. 714.*
[6] *(1862) 31 Beav. 613 ; 32 L. J. Ch. 105.*

that Lord Romilley's judgment in that case is the more authoritative view of the English law, and that it decides that the party who had deposited money on an agreement invalid under the Statute of Frauds may recover the deposit in any event, without reference to any question as to who was in default. It is not quite clear that Lord Romilley expressed such a view. The two reports in which the case is reported differ in very important particulars, and all that can safely be said on the above point is that Lord Romilley thought that an inquiry by Court as to who was in default was inconvenient and unsatisfactory. But the decision, I think, turned on a particular fact in that case. It is true that the vendee there did not wish to complete the purchase, but it also appears that subsequently certain prior mortgagees had the property sold against the vendor, and the real point in the decision appears to be that as, under the circumstances, the deposit could no longer be applied for the purpose for which it was intended, the vendee was entitled to recover it back. That is how I find *Leake on Contract (3rd ed., p. 87)* has understood the case, for it is cited as authority for the proposition that " if the contract is mutually abandoned, or is incapable of completion, the purchaser is presumptively entitled to a return of the deposit." That case, therefore, does not, in my opinion, alter the ruling to which I have referred, or affect the reasoning on which it is based.

The more important question is whether the principle of the English decisions should be adopted here. I was doubtful on this point, but on consideration I cannot see why it should not. There is no essential difference between the English Statute and our Ordinance which may deprive us of the benefit of the English authorities. It is true that section 4 of the Statute of Frauds only provides that no action shall be brought on a contract which is not in writing as thereby required, and therefore other rights arising out of a contract, which is not void, though unenforceable may be established and secured by action. Section 2 of our Ordinance of Frauds and Perjuries, on the other hand, declared the contract to be of no force or avail in law. At the same time, that section of our Ordinance requires notarial writing only for the purposes therein mentioned; it does not declare a non-notarial contract to be void for other purposes, and much less illegal. Therefore, I think the two Statutes, so far as the point under consideration is concerned, are brought in essence into line with each other; as it may be said here, as it has been said in England, that the contract exists as a fact, which the Court can take cognizance of for other purposes than those stated, and that the only effect of the Statute is to render the kind of evidence required indispensable when it is sought to enforce the contract. (*Maddison v. Alderson*,[1]) That being so there does not appear to be any difficulty in concluding

[1] *(1883) L. R. 8 A. C. 475.*

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that with us also a party who advances money on an informal agreement is entitled to a refund only if the other party refuses, or is incapable of completing, the transaction, and the consideration for the advance therefore fails.

It is necessary, however, to take account of certain local decisions on the subject. I was certainly much impressed at the argument with the number of them, and with the long period of time which they covered. But when the cases are closely examined, it will be found that they are neither individually strong, nor collectively such as to form a *cursus curiæ*. None of them contains any discussion of principles or exposition of the law. The first case is D. C. Walligama, 1,571.[1] The report gives a mere note of the case, without any statement of facts; but from the remark that the purchaser was not entitled to recover the land, but only the money advanced, and also the expenses incurred in improving the land, it may be gathered that it was the vendor, defendant, who was in default. In *Cassim Pulle v. Miguel* [2] there is no judgment, the Appellate Court merely affirming the judgment of the lower Court, but it is clear from the statement of facts that there, too, the defendant was in default, and also had no title to the property. It is interesting to note incidentally that counsel in that case cited English authorities and relied on English legal principles. The case which is mostly cited in subsequent cases is C. R. Panwila, 3,713.[3] There the defendant denied the transaction, and it seems necessarily to follow that he was the party in default. Moreover, the Court practically did no more than to follow the case in *Morgan's Digest*. In *Girigoris v. Tillekeratne*,[4] Withers J. said that as he was sitting alone he followed C. R. Panwila, 3,713 (*supra*), but he obviously did so in spite of his own view of the law. Similar remarks apply to the judgment of Browne J. in the unreported case C. R. Kandy, 6,147,[5] and to the judgments of Wood Renton J. in *Perera v. Silva* [6] and *Martelis v. Jayewardene*.[7] This being the state of local authority, I think the way is clear for us to adopt the principle of the English decisions, and to hold that the plaintiff in this case, on the findings of fact of the District Judge, is not entitled to a refund of the Rs. 945 which he advanced to the defendant. In view of this opinion, it becomes unnecessary to consider the effect of the defendant's plea, which has apparently been established to the satisfaction of the District Judge, that the plaintiff agreed that if he failed to pay the balance sum in respect of one year's lease money and complete transaction the deposit should be forfeited to the defendant.

I would dismiss the appeal, with costs.

[1] *(1838) Morg. Dig. 82.*
[2] *(1859) 3 Lor. 175.*
[3] *(1873) Gren. vol. II, pt. II, p. 34.*
[4] *(1893) 2 C. L. R. 191.*
[5] *S. C. Min., May 30, 1898.*
[6] *(1908) 4 A. C. R. 74.*
[7] *(1908) 11 N. L. R. 272.*

Wood Renton C.J.—

I have had the advantage of reading the judgments of my brothers Ennis and De Sampayo, and although, in view of the importance of the point involved in the appeal, I should have desired to say something on the subject myself, I agree so entirely with them that I do not think it would be right to allow the case to stand over for that purpose till my return from circuit.

Appeal dismissed.