1926.

Present : Dalton and Lyall Grant JJ.

PERIS *v.* VIEYRA

172—D. C. Negombo, 623.

Agreement to by land—Part payment of purchase price—Deposit—Forfeiture—Conditions of agreement.

Where a person paid money in part payment of the purchase price of property he had agreed to buy, and then made default in carrying out the terms of the agreement.

Held, that he was entitled to recover the money so paid.

Money paid by way of deposit is forfeited on the repudiation of the contract by the payer.

The question whether the payment is on account of the purchase price or by way of deposit depends upon the terms of the agreement.

APPEAL from a judgment of the District Judge of Negombo.

The plaintiff sued the defendant to recover a sum of Rs. 1,200 paid by him as part payment of the purchase price of a property belonging to the defendant. The defendant admitted the receipt of the money, but pleaded that the transaction fell through owing to the fault of the plaintiff, and therefore the plaintiff was not entitled to claim back the advances. The learned District Judge held that as the plaintiff notified to the defendant that he could not complete the transaction before the date agreed upon, and as the defendant had sold the property to another for Rs. 3,750, there was no default by the plaintiff. As plaintiff conceded that the defendant was entitled to retain Rs. 250 out of the advances to bring the Rs. 3,750 up to the original sum of Rs. 4,000, which was the purchase price, the District Judge accordingly entered judgment for the plaintiff for the sum of Rs. 950.

Keuneman, for defendant, appellant.

H. V. Perera, for plaintiff, respondent.

December 21, 1926. DALTON J.—

Plaintiff in this action sought to recover from the defendant the sum of Rs. 1,200 paid by him to the defendant as part payment of the purchase price of a property belonging to the defendant, the purchase price being Rs. 4,000. Defendant admitted the receipt of the money and that the transaction fell through, but he pleaded

that it fell through owing to the fault and neglect of the plaintiff, and therefore the plaintiff was not entitled to claim back any advances made on account of the transaction. The plaintiff produced a receipt (P1) for Rs. 1,000, which was in the following terms:—

December 11, 1924.

Received from J. M. T. A. Peries of Kalleliya the sum of Rupees One thousand (Rs. 1,000) as a part payment in advance of the consideration due from the said J. M. T. A. Peries on the intended purchase of my land at Bingiriya in the District of Kurunegala, owned and possessed by me under deed No. 10,132, attested by B. N. J. Jayasekera, Notary Public.

The entire consideration on the intended deed of transfer of Bingiriya estate being Rupees Four thousand (Rs. 4,000). The intended deed of transfer to be executed on or before the 22nd day of December, One thousand Nine hundred and Twenty-four.

(Signed) VIEYRA.

Witnesses:
1. P. J. LOOS
2. F. FERNANDO.

It has been called, in the course of the argument before us, the "informal agreement." It is admitted that shortly prior to December 11 defendant also received Rs. 200.

The learned District Judge held that as plaintiff notified defendant he could not complete the transaction before December 22 as set out in the receipt, and as defendant thereupon sold the property at once to another party for Rs. 3,750, there was no default by the plaintiff, the latter conceding that defendant was entitled to retain Rs. 250 of the advances to bring the Rs. 3,750 up to the original Rs. 4,000. He accordingly entered judgment for the plaintiff for the sum of Rs. 950. From that decision defendant appeals urging the plaintiff is entitled to nothing.

There was no issue in the lower Court as to the nature of these payments made by the plaintiff, but it is now urged on appeal that they were merely a deposit or earnest money to bind the transaction, and as such irrecoverable and were not instalments of the purchase money.

The first question that arises is as to the nature of the agreement between the parties, and whether it was enforceable or of any effect whatsoever. On this point we have been referred to the decision of this Court in *Nagur Pitchi v. Usoof.*[1] In spite of the essential difference between the provisions of Ordinance No. 7 of 1840 and the Statute of Frauds, the Court held that so far as the point under consideration is concerned the Ordinance and the Statute are in

[1] 20 N. L. R. 1.

1926.

DALTON J.

Peris v. Vieyra

essence in line with one another, and that it may be said here, as in England, that the contract exists as a fact which the Court can take cognizance of for other purposes than those stated in the Ordinance. I must admit I have the greatest difficulty in agreeing with that conclusion, but under the circumstances as the decision of a Court of three judges it is binding upon this Court. The Court then went on to hold that 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 does not, however, appear from the report of that case whether the Court was prepared to draw any distinction between a deposit made on the transaction being completed in order to bind the contract, and a payment or instalment of the purchase money made in advance. The word used is "deposit," and incidentally it might be noted that the trial judge found as a fact that, according to the terms of the contract, it was agreed that if the plaintiff failed to carry out the contract on his part the deposit should be forfeited.

Reference to *Halsbury's Laws* (*Vol. 25, p. 402*) upon which Ennis J. relied and *Leake on Contract* (*5th Ed., p. 67*) which De Sampayo J. cited with approval, shows that the quotations made in the respective judgments are based upon the decision in *Gosbell v. Archer.*[1] Reference to that case shows that the money was paid "as a deposit and in part payment" of the purchase price. The meaning of those words will appear from an authority I cite below. It is further laid down in *Leake*, with numerous authorities to support the conclusion, that the fact of the payment of money "as a deposit" impliedly means that it is a security for completion by the purchaser, which is forfeited if he repudiates the contract, but which goes towards payment of the purchase money if the contract is completed. That implication is of course subject to any special terms of the contract.

In the case before us, however, it is impossible on the verbal evidence to come to any other conclusion than that the two payments were instalments on account of the purchase price. What then is the plaintiff's position as regards recovery of them? According to the evidence he paid the sum of Rs. 1,000 on December 11, and the Rs. 200 about two days before. He agreed to pay the balance of the Rs. 4,000 on or before December 22. Before that date arrived he informed the defendant he could not complete the transaction; there can be no doubt as to the plaintiff's default, and the defendant appears to have accepted this position, and he at once sold, as he was entitled to do, the property to another party for Rs. 3,750. That latter transaction itself was completed before December 22.

[1] *2 A. & E. 500.*

In *Howe v. Smith* [1] also a case of a purchaser's failure to complete an agreement, the words used are that the payment was made as "a deposit and in part payment of the purchase money," and on the facts of the case the conclusion come to was that the payment made was in the nature of an earnest or *arrha*. The question as to the right of the purchaser to recover it must in each case be a question of the conditions of the agreement. Fry L.J. puts it in the following way:—

> "Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but it 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."

Although, apart from the express evidence here of both plaintiff and defendant, it might have been possible to argue that the first payment of Rs. 200 appeared on the face of it to be a payment to bind the contract, it is quite impossible to say the same of the second payment of Rs. 1,000. In fact I am satisfied neither payment was meant to be a deposit, and therefore there is here, in the absence of express terms, no such implication as would exist in the payment of a deposit by the purchaser as a guarantee to bind the contract. *Howe v. Smith* (*supra*) was approved and applied in *Mayson v. Clouet*,[2] an appeal from the Straits Settlements to the Privy Council.

In *Mayson v. Clouet* (*supra*) the purchaser paid a deposit and two instalments of the purchase price, but failed to pay the balance within the stipulated time. He was therefore in default and the vendor rescinded the contract. The purchaser thereupon sued to recover the instalments paid. The Privy Council held, reversing the decision of the Colonial Courts, that he was entitled to succeed. The contract between the parties provided that the deposit was to be forfeited if the purchaser was in default. It did not include the instalments. One must turn to the contract to ascertain what is the solution in a question of this kind.

As pointed out by Lord Dunedin, who delivered the judgment of the Board, all the elaborate argument in *Howe v. Smith* (*supra*) was quite unnecessary if the case could have been solved by the simple proposition sought to be applied in *Mayson v. Clouet* (*supra*) (which simple proposition was put forward in this case by the defendant in the lower Court), namely, "you are in default as to the contract,

[1] *27 Ch. Div. 89.*

[2] *(1924) A. C. 980.*

1926.

DALTON J.

Peris v. Vieyra

and the party not in default may keep anything he has got from the partial fulfilment of the contract." He also points out that in *Howe v. Smith* (*supra*) it is clear that if the learned judges had held that the deposit was only part payment and not a deposit proper, they would have ordered its return.

On the footing, as laid down in *Nagur Pitchi v. Usoof* (*supra*), that one can take cognizance of the terms of the contract in such a case as this, I can find nothing therein to debar the plaintiff from succeeding in his claim. No doubt on his default, the defendant had his remedy, but he is not necessarily entitled to retain the instalments of purchase money paid. As in *Mayson v. Clouet* (*supra*) so here there has been some suggestion for the defendant that inasmuch as he had suffered damage as a result of plaintiff's default he was entitled to retain the instalments on account of the damages suffered, as liquidated damages. That he is not entitled to do. In any event plaintiff has conceded to him the sum of Rs. 250, the difference between Rs. 4,000 and Rs. 3,750, which would seem to be the measure of the damages he suffered, had he sought and had he been entitled to damages.

For the reasons I have given the decision of the lower Court must be affirmed, and the appeal be dismissed with costs.

LYALL GRANT J.—

I agree that there is nothing here to show that either the Rs. 200 or the Rs. 1,000 was paid with the intention that the money should be forfeited in the event of the purchaser failing to complete his contract.

On the failure which took place the vendor had the option of treating the contract as still existing and suing for the balance of the price, or of treating the contract as at an end and selling to some one else, and claiming damages for breach. He chose the latter alternative and sold before the time allowed to the original vendee for payment had expired.

The plaintiff has agreed to pay as damages the difference between the price actually obtained and the price he had agreed to pay. That seems to me to be a fair measure of the damages suffered by the defendant. He cannot claim more except by proving an express agreement that moneys paid should be retained by him, and this, in my opinion, he had failed to do.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.