BOMBAY HIGH COURT

Abdul Gani

Vs.

Trustees of the Port Of Bombay

First Appeal No. 23 of 1951

(Chagla, C.J. and Tendolkar, J.)

26.09.1951

JUDGMENT

Chagla, C.J.

1. This appeal arises out of a suit filed by the plaintiffs for return of a deposit made by them of a sum of Rs. 3,000 under a contract which they entered into with the defendants, who are the Trustees of the Port of Bombay. The contract was for the supply of timber, bamboos and other miscellaneous articles during the year 1947. Under the contract, the plaintiffs had to supply materials of the value of about Rs. 30,000 and the deposit had to be made of 10 per cent. of that value. In fact, the plaintiffs supplied materials of the value of Rs. 56,000, and then they intimated to the defendants that they would not make any further supplies. Thereupon the defendants forfeited the deposit of Rs. 3,000. and the question that arose in the suit, and which arises in this appeal, is whether the plaintiffs are entitled to recover the deposit.

2. It is not disputed by the plaintiffs that they committed a breach of the contract in failing to supply materials to the defendants although called upon to do so. But the contention of the plaintiffs is that the deposit which they made, and which was forfeited by the defendants, was in the nature of a penalty, and that the plaintiffs are entitled to be relieved against the penal provision in the contract. Now, in order to appreciate the contentions of the parties, it may perhaps be necessary to look at the terms of the contract between the parties. The general conditions of tender provided that, on acceptance of a tender, a separate contract deposit would be required to be made. This was in centra-distinction to earnest money which had to be paid along with the tender. In the tender which the plaintiffs forwarded to the Controller of Stores, Bombay Port Trust, they undertook to give security in cash, or by Government or Public Securities, or by Banker's Guarantee Bond, to the extent of 10 per cent. of the total approximate value of the accepted items. Clause 8 of the agreement provided that if there was any default in supplying any of the articles covered by the contract, or if any of the articles were rejected by the

defendants, the Controller of Stores of the defendants could procure these articles as may be required, and the plaintiffs were liable to make good the difference between the price fixed under the contract and the price which the defendants would have to pay to buy these articles in the open market. and this difference in price was to be recovered from the amount of any bills which the defendants had to pay to the plaintiffs or from the amount deposited by the plaintiffs as security for the due performance of the contract. Therefore, the amount which was to be deposited, and which was described as a 'contract deposit', could be availed of both as a fund from which the defendants could draw in the event of proper articles not being supplied by the plaintiffs and the defendants being compelled to buy the articles at a higher price. and as security for the due performance of the contract. Under clause 14 of the agreement there was an obligation upon the plaintiffs to supply the quantity of the articles mentioned in the contract plus 25 per cent. and the right was given to the plaintiffs, after the articles were supplied and after a further 25 per cent, was also supplied, to intimate to the defendants their unwillingness to make any further supplies. If this was done, there was no further obligation upon the plaintiffs to make any further supplies; but if the plaintiffs did not indicate their unwillingness within seven days they were liable to supply such further quantity of articles or goods as might be ordered by the defendants at the price and upon the terms and conditions mentioned in the contract.
Now, in this case, the plaintiffs, having supplied 25 per cent. over the quantity specified in the contract, failed to intimate their unwillingness to make any further supplies and therefore they became liable to continue to supply goods during the period of the contract. The plaintiffs repudiated the contract by refusing to carry out their obligation to supply articles as required by Clause 14, and it was on this repudiation that the defendants forfeited the sum of Rs. 3,000 which had been deposited by the plaintiffs as a contract deposit.

3. Now, it is urged by Mr. Mistry that, on a construction of the contract, there is no provision which would entitle the defendants to forfeit the deposit. Mr. Mistry says that there should be an express stipulation to that effect which alone would entitle the defendants to forfeit the deposit. In this connection, the observations of Lord Justice Mellish in *'Ex Parte Barrell : In Re Parnell'*, are appropriate. Lord Justice Mellish says (p. 514) :

> "...even when there is no clause in the contract as to the forfeiture of the deposit, if the purchaser repudiates the contract he cannot have back the money, as the contract has gone off through his default."

Therefore, it is not necessary in a contract to have an express provision with regard to forfeiture of a deposit. If the deposit is for the due performance of the contract, then on the failure to perform the contract and on the contract being repudiated by a party to the contract, the other party becomes entitled to forfeit the deposit. Indeed, it is this very purpose that the deposit fulfils. It is a guarantee for the performance of the contract, and, as it has been said, it supplies a motive to the parties to fulfil their obligations under the contract. It acts 'in terrorem' and by reason of the fear that the deposit might be forfeited if the contract is not performed, the parties are induced to

carry out their obligations under the contract. See in this connection the following remarks of Lord Justice Fry in *'Howe v. Smith*[2]*'*. (p. 101):

> "...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."

[1](1875) 10 Ch A 512,

[2](1884) 27 Ch D 89

4. The first question that arises is whether Section 74 of the Indian Contract Act is applicable to a deposit made for the due performance of a contract. It is well known that Section 74 was enacted to do away with the difference that existed and exists in English law between liquidated damages and penalty. The rules were so arbitrary and so complicated, and the decisions were so conflicting, that the Legislature here thought fit to eliminate the distinction between liquidated damages and penalty altogether and to provide a simple clear rule in Section 74 to deal with both cases of penalty and liquidated damages. and Section 74 embodies the principle that, where a penalty or liquidated damages is fixed under a contract to be paid in case of its breach, the Court is given the discretion to give reasonable compensation not exceeding the amount mentioned in the contract either as liquidated damages or as penalty. What is urged before us by Mr. Mistry is that, in fixing the sum of Rs. 3,000 as the amount which should be forfeited to the defendants in the event of the plaintiffs failing to perform the contract, what the parties were doing was to fix a penal sum, and under Section 74 the defendants are not entitled to the penal sum fixed but are only entitled to reasonable compensation which the Court may determine under that section. Now, the question that we have to consider is whether on a true construction of Section 74, a case of a deposit or of any amount paid at the time the contract is entered into for the due performance of the contract comes within the ambit of Section 74 and whether the rights of parties in relation to this deposit or sum can be adjudicated upon under Section 74. It will be noticed that the sum which is named in the contract either as penalty or as liquidated damages is a sum which has not already been paid but is to be paid in case of a breach of the contract. With regard to the stipulation by way of penalty, the Legislature has chosen to qualify "stipulation" as "any other stipulation", indicating that the stipulation must be of the nature of an amount to be paid and not an amount already paid prior to the entering into of the contract. The section further provides that a party complaining of a breach is entitled to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or the penalty stipulated for. Therefore, the section clearly contemplates that the party aggrieved has to receive from the party in default some amount or something in the nature of a penalty : it clearly rules out the possibility of the amount which has already been received or the penalty which has already been provided for. Looking at the section as a whole, it therefore seems to me that it does not contemplate cases of deposits made for the due performance of the contract. Such deposits cannot be considered to be amounts to be paid in case of a breach, nor can it be considered to be "any other stipulation by way of penalty." I may point out that a view has also been taken that under Section 74 only an aggrieved party can claim the benefit conferred under that section, but that a party who is in default can never claim relief against penalty or against the payment of liquidated damages as

provided in that section. As in this case we are dealing only with a case of a deposit which, according to me clearly does not fall under Section 74, it is unnecessary to consider the other aspect of the case as to whether, even though an amount had to be paid after the contract was broken, a party who has committed a breach could go to Court and ask for relief under Section 74.

5. This view of the law has been taken by this Court in a judgment of a Divisional Bench in *'Dinanath V. Malvi and Co*[3]*.',* In that case, the purchaser of an immovable property made a default in the payment of the purchase price within the time fixed under the

[3]32 Bom LR 272

contract, and the vendors forfeited the deposit money. The plaintiff sued for relief against forfeiture and relied upon Section 74 of the Contract Act; and Sir Norman Kemp, Acting Chief Justice and Mr. Justice Murphy took the view that Section 74 of the Indian Contract Act did not apply to a deposit made under the contract. In doing so, the Court followed a decision of the Allahabad High Court in *'Bishan Chand v. Radha Kishan Das*[4]*',* and, according to the learned Acting Chief Justice, both Sections 73 and 74

> "show what is the compensation to the seller, who is not responsible for the breach. They contemplate a case in which he is seeking to recover compensation for the breach. They do not contemplate a case in which a sum of money has been paid by way of earnest." Now, turning to the judgment of the Allahabad High Court in ***'Bishan Chand v. Radha Kishan Das'***, on which this decision was based, that judgment held that if a contract for sale goes off by default of the purchaser, the purchaser cannot recover any deposit which may have been paid by him to the vendor in pursuance of the contract. But, with respect to Mr. Justice Kemp, I do not see in this judgment of the Allahabad High Court any discussion as to Section 74 of the Contract Act: the decision is based more on equitable principles, to which I shall presently come than on a construction of Section 74 of the Contract Act. There is also another error with regard to the reference to this case, and it is that Mr. Justice Kemp refers to this judgment as a decision by a majority of the Bench. But, as far as I can see, from the report, it is a judgment of Mr. Justice Burkitt in which Mr. Justice Knox concurred.

We have another decision of a Divisional Bench of this Court in *'Pallonjee Eduljee and Sons v. Lonavala Municipality*[5]*',* The Bench consisted of Mr. Justice Barlee and Mr. Justice Tyabji, and the main question that arose for the decision of the Bench was whether Section 70 of the Contract Act applied notwithstanding the fact that the contract between the parties was not binding. In that case, it was found that the Lonavala City Municipality had entered into a contract with a contractor which was not an enforceable contract, and notwithstanding that, the Court gave relief to the contractor under Section 70 of the Contract Act. The contractor had deposited a sum of Rs. 1,000 on terms that if the work was not completed within three months the Municipality was entitled to forfeit that amount. The contractor failed to complete the work

within the time stipulated. But what is rather important to note is that in fact he did carry out the work. Mr. Justice Tyabji, at page 843, dealt with this question of deposit, and held that the deposit fell within the expression "stipulation by way of penalty" used in Section 74 of the Contract Act, and he further held that the Municipality was not entitled to enforce the penalty in terms of the contract but was only entitled to receive from the plaintiffs. who had broken the contract, reasonable compensation not exceeding the amount of the penalty stipulated for. Now, with respect to the learned Judges, their attention does not seem to have been drawn to the earlier decision to which I just referred, namely, in *'Dinanath v. Malvi and Co[6].',* nor does the matter seem to have been argued, nor any other authorities cited before the Bench. As a matter of fact, Mr. Justice Barlee, in a concurring judgment, does not deal with this question at all. As I said before, the main question that was agitated before that Bench was the question of the applicability of Section 70 of the Indian Contract Act. If two Benches of this Court had come to contrary conclusions as to the applicability of Section

[4]19 All 489, [6]32 Bom LR 272

[5]39 Bom LR 835

74, we might have seriously considered whether the matter should not be referred to a Full Bench for settlement of any doubt as to the true position in law. But when we find that ***'Dinanath v. Malvi and Co.'*** has come to a considered conclusion, and when we also find that a later judgment has come to a contrary conclusion without taking into consideration the earlier decision by which it was bound and without hearing full arguments on the matter, we do not think that it is necessary to appoint a Full Bench, but that it would be sufficient if we follow the earlier Divissional Bench judgment in ***'Dinanath v. Malvi and Co'.*** We are fortified in this conclusion by the fact that other High Courts have followed the decision in ***'Dinanath v. Malvi and Co.'***, and have taken the same view of the correct interpretation of Section 74 of the Contract Act. The Madras High Court, the Nagpur High Court and the Calcutta High Court have taken the view that deposits made for the due performance of a contract do not fall within the ambit of Section 74: see *'Natesa Aiyar v. Appavu Padayachi[7]', 'Bhalchandra v. Mahadeo[8]',* and *'W. J. Younie v. Tulsiram Jankiram[9]',* There is also a recent decision of the Nagpur High Court in *'Jamai Majri Coal Co. Ltd., Chhindwara v. S. N. Lokras[10]',* which takes the same view of the law. Mr. Vivian Bose, Chief Justice, and Mr. Justice Mangalmurti took the view that Section 74 limits the right conferred by it to the party complaining of the breach, and in all the three sections, namely, Sections 73, 74 and 75, no privilege is conferred on the party at fault. This is the other view of the interpretation of Section 74, to which I have referred earlier in this judgment which places a greater restriction upon the rights of parties who are in default to avail themselves of the benefits conferred under Section 74.

Our attention has also been drawn to the judgment of Mr. Justice Blagden in *'Sankalchand v. J. Prakash[11]',* at p. 634, What Mr. Justice Blagden was considering in that case was the provisions of Section 10 of the Civil Procedure Code and whether the issues in two suits which he had to consider were substantially the same; and it was in connection with this matter that, dealing with the pleadings in one of the suits, he pointed out that the defendants before him had filed a suit in the Chief Court of Sind claiming the return of a certain deposit. He noticed the fact that the contract in question did not contain a clause of forfeiture, and he expressed the following opinion

(p. 634) :

> "...therefore the mere fact, if fact it be, that the present defendants broke their contract would not in itself entitle the present plaintiffs to retain the deposit. They would have to show that in fact they suffered damages which equalled or exceeded Rs. 4,000."

This observation is relied upon in support of the argument that Mr. Justice Blagden took the view that cases of deposit fell within Section 74 of the Contract Act. With respect to the learned Judge, we cannot look upon this observation as anything more than a passing reference to a subject which was not strictly before Mr. Justice Blagden, as the observation was not based upon any consideration of law or authorities bearing on the subject.

6. It is then urged that, even assuming that the matter does not fall under Section 74, we should give relief to the plaintiffs in the exercise of our equitable jurisdiction. Mr. Mistry says that there can be no doubt that a deposit made for the due performance of a contract

[7]38 Mad 178 [9] AIR 1942 Cal 382 [11]48 Bom LR 633
[8] AIR 1947 Nag 193 [10] ILR (1950) Nag 625

is in the nature of a penalty, and that a Court of equity will always give relief against a penalty and against forfeiture. The observations of Lord Justice Mellish in 'IN RE DAGENHAM (THAMES) DOCK CO.; EX PARTE. HULSE', (1873) 8 Ch A 1022, with regard to the nature of a deposit are rather striking. The judgment is at page 1025, and the observations of Lord Justice Mellish are as follows:

> "...I have always understood that where there is a stipulation that if, on a certain day, an agreement remains either wholly or in any part unperformed - in which case the real damage may be either very large or very trifling - there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty."

But the difficulty that Mr. Mistry has to get over is that the equitable jurisdiction of the Court to give relief against forfeiture and to relieve a party against penalty is conditioned by this very important fact, that ordinarily the Court will not help a wrong-doer or a party in default in obtaining a deposit which he had made for the due performance of a contract when he himself broke the contract or repudiated the contract. I think it may be considered - as I shall presently point out - well settled in England that, when a party repudiates a contract or puts an end to the contract if any deposit that he has made for the due performance of the contract has been forfeited, he cannot sue for the refund of that deposit. The principle was clearly enunciated in the case to which I have already referred: 'Ex Parte Barrell'. '*In Re Parnell*[12] The principle has also been subsequently enunciated in the case which has come to be looked upon as the leading case on the subject, namely, *'Howe v. Smith*[13]*',* Lord Justice Cotton says (p. 95) :

> "...What is the deposit? The deposit as I understand it, and using the words of Lord Justice James, is a guarantee that the contract shall be performed. If the sale goes on, of course,

not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, 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, then, according to Lord Justice James, he can have no right to recover the deposit."

On the same page, Lord Justice Cotton qualifies these remarks by saying that there may be cases where a Court of Equity might give relief in respect of the forfeiture of the deposit even to a party in default, and this is what the learned Lord Justice says (p. 95) :

"I do not say that in all cases where this Court would refuse specific performance, the vendor ought to be entitled to retain the deposit. It may well be that there may be circumstances which would justify this Court in declining, and which would require the Court, according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract or that he had entirely put an end to it so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would
make his conduct amount to a repudiation on his part of the contract....."

[12](1875) 10 Ch A 512 [13](1884) 27 Ch D 89

And on the facts of that particular case, at page 96, Lord Justice Cotton came to the following conclusion :

"...It (the contract) was not performed within a reasonable time, and from the conduct of the purchaser, as I read the letters and understand what took place, I come to the conclusion that he never was up to, and even at, the time when he brought this action, ready with the money to perform the contract....."

Now, it is suggested that the English Courts have, in other cases, taken a different view from the view enunciated in *'Howe v. Smith'*. But when we look at the cases on which reliance is placed, it is clear that these cases come within the principle laid down in *'Howe v. Smith'*. The first case on which strong reliance is placed is 'IN . RE DAGENHAM (THAMES) DOCK CO., EX PARTE HULSE'. (1873) 8 Ch A 1022, to which I have already made a reference. In that case, a joint stock company agreed with a landlord to purchase a piece of land for Rs.4000, of which Rs.2000 was to be paid at once and the remaining Rs.2000 on a future day named in the agreement. There was a provision that if the whole of the Rs.2000 and interest were not paid off by that day, in which respect time was to be of the essence of the contract, the vendors might re-possess the land as of their former estate, without any obligation to repay any part of the purchase-money. The company failed to pay the balance of the purchase-price, and subsequently the company was wound up. The vendors applied for an order against the liquidator that the company might

deliver up to the vendors possession of the lands free from all claims by the company. The Master of the Rolls offered to the vendors an order for sale and payment, as in the ordinary case of a vendor's lien. This offer was refused, and thereupon the learned Judge refused to make the order, and held that the company was entitled to be relieved on payment of the balance of the purchase money. Therefore this was not a case where the company was suing for the refund of Rs.2000; the company was already in possession and the vendor wanted to retain the Rs.2000 which had already been paid and also to get from the company possession of the land. The Master of the Rolls suggested that the vendor should sell the land and reimburse himself from the price realised by the sale of the land on the footing of a vendor's lien. It was when that offer was refused that the English Court felt that it was a gross case where equity should come to the relief of the purchaser. But, as I said before, this is not an authority for the proposition that a party in default can sue for refund of the deposit made by him. The other case relied upon is *'Kilmer v. British Columbia Orchard Lands Limited[14]',* In this case, the purchase price had to be paid in instalments at specified dates, and there was a provision in the agreement for forfeiture of all payments of past installments of purchase-money in case of default of punctual payment of any one installment. Default was made by the purchaser, and the vendor sued to enforce the forfeiture. The purchaser paid into Court the installments due and counter-claimed for specific performance, and the Court relieved the purchaser from forfeiture. Now, it will be noticed that this case clearly shows that there was no repudiation on the part of the purchaser. Far from there being any repudiation, the purchaser paid the purchase-price, although not on the due date, and actually counter-claimed for specific performance. and what was really held in the case was that a purchaser is entitled to be relieved from forfeiture, which was in the nature of a penalty, on his paying off the purchase-money due. It will also be noticed that, in this case, it was not a case of forfeiture of a deposit; it was a case of forfeiture of installments actually

[14](1913) AC 319

paid which formed part of the purchase price. The third case is *'Steedman v. Drinkle[15]'.* Here also the purchase-price was to be paid by certain instalments, and there was a provision that, on failure to pay any instalment, the vendor was at liberty to cancel the agreement and to retain as liquidated damages the payments already made. The purchaser made default in paying the first instalment, and the assignee of the purchaser sued for specific performance. The Court declined specific performance, but granted relief against forfeiture of payment. Now, here again it is clear that the party in default had not repudiated the contract or put an end to the contract. The purchaser had failed to make the payment at the due date, but the very fact that he filed a suit for specific performance clearly shows that, far from repudiating the contract, he wanted the contract to be carried out. Here also what was attempted to be forfeited was not a deposit but part payments actually made against the purchase-price. Therefore, in my opinion, none of these three cases affect or impair the principle enunciated in ***'Howe v. Smith'***, namely that a party repudiating a contract or putting an end to the contract cannot claim a refund of the deposit which he himself has made for the due performance of the contract. In equity he would be a wrong-doer, and equity would not permit a wrong-doer to benefit by his own wrong.

7. The same view of the law has been taken by the Madras High Court in the Full Bench decision in *'Natesa Aiyar v. Appavu Padayachi*[16]*',* to which I have already made a reference. But it is rather important to note that one of the considerations that weighed with the Full Bench was that the deposit which was forfeited was 10 per cent. of the consideration, and the Court took the view that 10 per cent. under the circumstances of the case was neither unreasonable nor extraordinary. Therefore, the Full Bench seems to have taken the view that a Court may intervene, even though the party suing for the return of the deposit was in default, if it felt that the deposit which the party was asked to make and which the other party was forfeiting was an unreasonable deposit or an unconscionable deposit which the Court as a Court of equity would not countenance. That question fortunately does not arise in this case, because the deposit that has been made by the plaintiffs is 10 per cent. of the amount of the articles which they had to supply to the defendants. Whether a deposit is reasonable or otherwise has got to be judged from the nature of the contract which has got to be performed, and from the nature of the obligations undertaken by the parties to the contract. The nature of the deposit is not to be judged from the nature of the breach committed by one of the contracting parties. Mr. Mistry says that, in this case, the plaintiffs carried out the whole of the contract, and that the breach that was made was because they failed to give timely intimation of their unwillingness to continue with the contract. But, as I said before, the reasonableness or otherwise of the deposit must be judged from the point of view of the nature of the contract and the time at which the deposit was made. Can it be said that, when the Port Trust demanded from the plaintiffs a deposit of 10 per cent., they were asking the plaintiffs to deposit an unreasonable or unconscionable amount? I think it is clear that any such contention is entirely unsustainable. Therefore, it is not necessary to decide in this case whether, if the Court came across a case where it took the view that the deposit was unreasonable or unconscionable it would not have the jurisdiction to interfere on equitable principles and relieve the party, even though at fault, against the forfeiture of an amount which the Court would consider to be entirely unreasonable and unconscionable.

[15](1916) 1 AC 275

[16]38 Mad 178 (FB)

The Privy Council also, in *'Sprague v. Booth*[17]*',* which was not a case of sale of land, has laid down the same principle. That was a case of a contract for sale of railway stock and a deposit of $250,000 was received by the vendor as security for and to be credited towards the payment of the price or to be forfeited on default. The assignee of the purchaser sued to recover that deposit without tendering the price. The Privy Council, on the finding that the purchaser or his assignee was in default, dismissed the action. Mr. Mistry contends that most of these cases to which reference has been made are cases dealing with sale of land, and Mr. Mistry says that special technical considerations may apply to a case dealing with a sale of land; but that, when we are dealing with a case of a contract which is not a contract for sale of land, different considerations will apply. I fail to see why different considerations should apply to cases of contracts other than contracts for sale of land. In a contract for sale of land as well as in other contracts, if a deposit is made as a guarantee for the performance of the contract, the same principle would apply. If the contract is not performed and the deposit is forfeited, the question that the Court will ask itself will be: Is the person suing for the refund of the deposit a person in default? The Court will also

ask itself the question : What is the nature of the default? Has the person repudiated the contract or has he put an end to the contract? If he has done either, then the Court will refuse to give him relief because he is the wrong-doer and he cannot benefit by his own wrong. These are general equitable principles which apply not to one class of contracts but to all contracts.

8. I may point out that, when Sir Norman Kemp decided *'Dinanth v. Malvi and CO*[18]*.',* he was told that in Bombay it was understood as established law that a person in default could not sue for the return of his deposit, and Sir Norman Kemp decided the case really on three grounds: (1) on the ground that a deposit does not fall within the purview of Section 74 of the Contract Act; (2) on the ground that a party in default cannot sue for the refund of the deposit; and (3) on the ground of 'stare decisis'. and in support of the doctrine of 'stare decisis', Sir Norman Kemp has referred to two decisions of this Court in *'Burjorji v. Jamshed*[19]*'* and *'Balvanta v. Bira*[20]*',* where this Court has held that a defaulting party is not entitled to return of deposit-money.

9. The result, therefore, is that the plaintiffs are not entitled to the benefit conferred by Section 74 of the Contract Act, because they are suing for the refund of a deposit to which that section does not apply. They are not entitled to relief against forfeiture on equitable grounds, because they repudiated the contract, and being in default they are not entitled to the refund of a deposit which was intended as a guarantee for the performance of the contract. The learned Judge below took the same view of the law and dismissed the plaintiff's suit. In our opinion, the learned Judge was right.

10. The appeal, therefore, fails and must be dismissed with costs.
Appeal dismissed.

[17](1909) AC 576
[18]32 Bom LR 272
[19]15 Bom LR 405
[20]23 Bom 56