Privy Council Appeal No. 56 of 1940

Muralidhar Chatterjee - - - - - - *Appellant*

v.

The International Film Company, Limited - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH DECEMBER, 1942

Present at the Hearing:

LORD RUSSELL OF KILLOWEN
LORD MACMILLAN
LORD ROMER
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* SIR GEORGE RANKIN]

This appeal raises an important question of commercial law under the Indian Contract Act. It is brought by the plaintiff, who carries on business from Calcutta as a distributor of cinema films. The defendants are a limited company who import such films into India. The contract between the parties was expressed in a letter dated 8th May, 1936, sent by the defendants to the plaintiff, under which the plaintiff was to maintain at his own cost the defendants' office in Calcutta and handle their films in Bengal, Bihar, Orissa, Assam and Burma in conjunction with the defendants' head office at Cawnpore. The main stipulation was in the following terms:

> That we shall deliver you a brand new positive print of each picture approximately at the average of 1 picture a month and we shall pay for all the royalties to the producers for the exploitation of the pictures and in consideration of this, you will pay us a sum of Rs.1,750/- towards the cost of each print supplied to you. Such payments to be made to us on demands and the prints to be delivered to you within four to five weeks from the date of the payment. The exact price of the print to be adjusted on the delivery of the print and to be reckoned by adding the actual duty as would be payable on the footage together with the costs of the positive print and other incidental charges (shippers, freights, etc.).

This was followed by a provision whereby the plaintiff was to retain 25 per cent. of the revenue received on the exhibition of the film until he had recovered half of his " investment on the prints " or " print cost," the balance being divided between the parties equally: thereafter the whole revenue was to be divided equally. The prints were to be returned to the defendants after the " exploitation " was over.

The correspondence between the parties which followed upon the contract and continued until January, 1937, need not here be described in detail, but it shows that two films only—*Shipmates o' Mine* and *Annie Laurie*—were offered to and accepted by the plaintiff. On 2nd July, 1936, the plaintiff paid the defendants Rs.2,000 on account of the sum due or to become due under the contract. From a bill dated 30th September,

1936, it appears that the full sum due for *Shipmates o' Mine* the first picture delivered was Rs.2,043 4 0—which included the cost of making the positive print, customs duty, shipping charges, clearing charges, censor's fee, etc. The film was delivered by the defendants to the plaintiff on 5th October; but it would seem that the plaintiff had difficulty in getting it booked by cinema exhibitors, and on or about 4th December, 1936, at the defendants' suggestion, he returned it to the defendants for a time so that the defendants might try to get it exhibited.

Meanwhile on 7th November, 1936, the plaintiff had likewise paid Rs.2,000 on account of the sum due or to become due for *Annie Laurie* under the contract; but this film had not been delivered by the defendants when on the 1st December, 1936, the plaintiff wrote to the defendants making various complaints of delay and breach of contract; and saying that " in the circumstances which have happened we find you have no bona fide intention of carrying out the contract and we decline to have any business dealings with you." This letter intimated a claim by the plaintiff for refund of the sum of Rs.4,000 already paid, for Rs.908 13 0 expenses incurred, and for Rs.5,000 damages. The defendants by letter of 3rd December denied that they had committed any breach. The plaintiff on 12th December, by letter and telegram, adhered to his letter of 1st December and refused to act as defendants' agent any further. The defendants on 14th December denied the plaintiff's allegations of breach of contract and refused his claims for refund and damages; finally, by letter of 21st January, 1937, they accepted the plaintiff's repudiation of the contract and said that they were taking the organisation of the contract territories under their own control and would claim against the plaintiff for all losses.

The present suit was brought in the High Court at Calcutta on 25th January, 1937. The plaint alleged that the defendants had failed and neglected to perform their part of the contract and to make over positive prints of a number of films therein specified by name. On this basis it claimed Rs.3,000 as general damages for loss of profit, refund of the Rs.4,000 paid on account, and Rs.913 13 0 expenses incurred. The defendants by their written statement of 22nd April, 1937, denied that they had committed any breach of contract, and averred that they had all along been ready and willing to perform their part. They alleged that the plaintiff had broken the contract and that they had suffered damages for which they were advised to bring a separate suit. As the plaintiff's whole case was that the defendants had broken the contract in essential particulars, the defendants could hardly be expected to plead by way of equitable set-off that they were entitled to recover damages by reason that they had rightly rescinded the contract on account of the plaintiff's breaches.

At the trial before Panckridge J. in January, 1939, it was found by the learned judge—and rightly found, as the plaintiff by his learned counsel, Mr. Bagram, now admits—that the plaintiff failed to prove any breaches by the defendants entitling him to repudiate the contract as he had done by his letter of 1st December, 1936. But at the end of the trial Mr. P. C. Ghose, learned counsel for the plaintiff, contended that even if the plaintiff had broken the contract and the defendants were justified in rescinding it, the plaintiff had, under section 64 of the Indian Contract Act, a good claim for refund of the sum of Rs.4,000 paid on account. The learned judge accepted this contention and gave the plaintiff a decree for Rs.4,000 and costs without requiring the plaintiff to make any amendment of his pleading, or putting him on any terms; without considering, so far as appears, whether the defendants should have an opportunity to amend their written statement by pleading their damages by way of equitable set-off; or should have a stay of execution pending the determination of a separate suit for damages to be brought by them.

On the defendants' appeal to a Division Bench, Lort-Williams J., who dissented from his colleagues, held that the defendants had committed breaches which entitled the plaintiff to rescind the contract—a view which the plaintiff has now abandoned before the Board. He appears to have considered that the course taken by the learned judge in decreeing the

suit on a ground not pleaded was justified by consent of the defendants' counsel at the trial; and he agreed that if the defendants rightly rescinded the contract under section 39 by reason of the plaintiff's default, the plaintiff was entitled under section 64 to refund of the Rs.4,000. Derbyshire C.J. and Nasim Ali J. thought that the trial Judge was wrong in giving a decree upon a case which the plaintiff had not made on the pleadings; but they too entertained the new ground of claim without taking steps to have it pleaded. They decided that it was unsustainable since section 64 of the Act did not apply to a case of rescission under section 39.

Upon this appeal the only matter raised by the appellant is his right to recover the sum of Rs.4,000 paid on account under the contract. This right is claimed upon the basis that the plaintiff wrongfully refused to perform his part of the contract by his letter of 1st December, 1936, and that the defendants rightfully rescinded the contract on 21st January, 1937—matters of which there is no mention whatever either in the plaint or written statement or in any formal minute or petition. In mercy to the parties and in the public interest their Lordships think that they can hardly refuse now to entertain the important question of commercial law upon which there was a difference of opinion in the High Court. But they cannot omit to take strong objection to the informality with which it has in this case been raised. While a rigid practice of refusing leave to amend pleadings is far from commendable, to entertain a case of which the pleadings contain no suggestion is another matter altogether. It is unfortunate that a proper application for leave to amend was not insisted on by the High Court and a formal order made thereon duly safeguarding the rights of the defendants, and ensuring that the basis in fact of the new case made should be set forth with particularity and exactness by the plaintiff. The desirability of a direction as to pleading will be referred to later in this judgment.

The first question is whether under the Indian Contract Act a party who has " put an end to " a contract under section 39 is liable to restore any benefit received by him under the contract from another party? Relevant sections are as follows:—

> 2. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—
>
> . . . . . .
>
> (*g*) An agreement not enforceable by law is said to be void;
>
> (*h*) An agreement enforceable by law is a contract;
>
> (*i*) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract;
>
> (*j*) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.
>
> 39. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.
>
> *Illustration.*
>
> (*a*) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and A engages to pay her 100 rupees for each night's performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to put an end to the contract.
>
> 53. When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.
>
> *Illustration.*
>
> A and B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

55. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract. . . . .

64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. 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.

65. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Illustration.

(*c*) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

66. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

75. A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

Illustration.

A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B in consequence rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

The language employed by the Act presents certain problems of construction. When one party to a contract has refused to perform his obligation thereunder so as to give rise to a right in the other party to put an end to the contract, is the latter a person at whose option the contract is voidable, and if he does put an end to the contract, does he rescind a voidable contract? When he has so rescinded, has the contract become void? Or is the language of section 64 as to a person at whose option a contract is voidable restricted to cases where fraud, undue influence, mistake or other element vitiates the original consensus so that the party who has an option to refuse to be bound by the contract must either accept it as a whole or take no advantage from it whatsoever, treating it as void *ab initio*? Or are sections 64 and 65 restricted to cases to which the terms " void " or " voidable " have been expressly applied by the Act?

In a case within section 39 the party who rightly " puts an end to " or " rescinds " (section 75) the contract is entitled to damages for the defaulting party's breach. In this sense the contract has not ceased to be " enforceable by law ". On the other hand, neither party is any longer bound to perform his promise—indeed an offer to do so, if made by either party, could properly be rejected by the other. The election of the party rescinding, as Cotton L.J. once put it, " relieves the other party from any further obligation under the contract and enables both parties to make arrangements for the future on the footing that the contract has been once for all broken and is at an end ". (*Johnstone* v. *Milling* (1886), L.R. 16 Q B.D. 460, 470.)

That the word " voidable " does not appear in section 39 may well be significant—indeed, to say that " the promisee may put an end to the contract " is to use language often employed by English judges, but very often qualified by words to show that the contract is only brought to an end *sub modo*. The judgments in *Johnstone* v. *Milling* (*supra*)

contain careful qualification to this effect. " The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation " (per Lord Esher, p. 467). " The rights of the parties under the contract must be regarded as culminating at the time of the wrongful renunciation of the contract, which must then be regarded as ceasing to exist except for the purpose of the promisee's maintaining his action upon it " (per Bowen L.J., p. 473).

Though the Indian Act is to be interpreted according to the meaning of the words used in it, such passages help to show that section 39 and section 64 cannot be read together as a matter of course if they do not appear by the mere force of their own language to link up. The question must therefore be whether there is elsewhere in the Act sufficient to show that the contract which may be " put an end to " is " voidable "?

To this question their Lordships think the answer must be Yes. The presence of illustration (*c*) to section 65 cannot be made consistent with any other view. The effect of section 39 is explained by the example there given of a singer who wilfully absents herself from the theatre. The same example serves also under section 65 as illustration (*c*) and under section 75. It is a prominent feature of this portion of the Act.

The right of one party upon refusal by the other to perform the contract is described indifferently by the Act as a right to " put an end to " or " rescind " it; and illustration (*c*) plainly imports that this right is either that of " a person at whose option the contract is voidable " (section 64) or is such that by the exercise of it the contract " becomes void " (section 65). Of these two propositions it is to be observed that they are not mutually exclusive, whether or not each involves the other.

It has been suggested that the illustrations given under section 65 are intended to refer to sections 64 and 65 taken together, or at least that illustration (*c*) is to be read as referable to section 64. Another view is that the sections overlap. It is difficult to suppose that the singer's contract has become " void " under section 65 without being " voidable " under section 64. But no view which can be taken upon these matters can provide an escape from the conclusion that a liability to make restitution attaches to the party putting an end to a contract under section 39. Nor can the illustration be ignored or brushed aside because it is not part of the body of the section. (*Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (1916), L.R. 43, I.A. 256.)

Further, under section 53, if one party prevents the other from performing his promise, " the contract becomes voidable at the option of the party so prevented," and the latter may " elect to rescind it ": this section, like section 75, expressly confers a right to recover damages. Again, under section 55, where time is of the essence and one party has made default, " the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee ": the last paragraph of the section deals with the right to damages. And section 66 describes how " the rescission of a voidable contract " may be communicated.

From these sections it must be conceded that, as language is used in this Act, the right to treat a contract as voidable and to rescind it may be accompanied by a right to recover damages for the wrongful act which grounds the right of rescission. The ordinary notion of an English lawyer that the right to recover damages must be based upon a valid and subsisting contract, and that a plaintiff could not declare upon a contract as being void, cannot be taken as a guide to the use of the words " void " and " voidable " in the Indian statute. Nor can the clauses of section 2, which would seem intended to explain those words by use of the phrase " enforceable by law ", be taken as showing that a contract which one party is entitled by reason of the other's default to rescind is not " voidable ".

It may be suggested that a case under section 39 or under the first paragraph of section 55 comes readily under the phrase " voidable contract " as explained by clause (*i*) of section 2, but that even after rescission

it never becomes void in the sense of clause (j). It is, it may be said, enforceable at the option of the party not in default, but it never " ceases to be enforceable " even if " put an end to ", because the right to damages remains. But this account of the matter has its own difficulties. The option which characterises a voidable contract is an option either to say " it shall not be enforceable at all " or to leave it as a good contract enforceable by any party on the usual conditions. This is certainly so in any case under section 19: it is enforceable at the option of one party only in the sense that that party may elect to treat it as not binding upon any party. The voidable contract in a case of undue influence is either going to be good or wholly void. After rescission it will not be enforceable at all. It is by no means plain, therefore, that clause (*i*) of section 2 affords room for the opinion that in a case under section 39, the agreement, notwithstanding rescission, is enforceable at the option of one party. The terms of clauses (*g*) and (*i*) do not of themselves necessitate any departure from the ordinary implications of the words " voidable " and " void ", nor have they been so construed hitherto. As the learned editors of a well-known work on the Act have put it, " Whenever one party to a contract has the option of annulling it, the contract is voidable; and when he makes use of that option the agreement becomes void." (Pollock and Mulla: Indian Contract Act, 6th ed., p. 365.) Again, there are difficulties in the way of holding that illustration (*c*) to section 65 does not apply to that section at all, though doubtless it illustrates section 64. Their Lordships prefer to confine themselves to a reason which is apparent on the face of the Act—that the right to recover damages has been dealt with by the draftsman as a right expressly conferred by the statute in cases where the contract has been rendered " voidable " by the wrongful act of a party thereto and has been " rescinded " by the other party accordingly. The right to damages presents no insuperable objection to the application of section 64 to cases of rescission under section 39, and section 64 applies in their Lordships' judgment to the present case.

Their Lordships are not concerned to make the Act agree in its results with the English law. It may be that in such a case as the present the defendants could not in England be made liable to refund any portion of the Rs.4,000 paid on account, even upon proof that they had sustained no damage by the plaintiff's breaches. That the matter is not quite clear may be inferred from *dicta* in *Mayson* v. *Clouet* [1924] A.C. 980, 987, and *Dies* v. *British and International Mining and Finance Corporation, Ltd.* [1939], 1 K.B. 724. It is at least certain that if the party who rightfully rescinds a contract can recover damages from the party in default and is afforded proper facilities of set-off, the Indian legislature may well have thought that his just claims have been met. The fact that a party to a contract is in default affords good reason why he should pay damages, but further exaction is not justified by his default. Where a payment has been made under a contract which has—for whatever reason—become void the duty of restitution would seem to emerge. A cross claim for damages stands upon an independent footing, though it arises out of the same contract and can be set off.

It was contended for the defendants that even if section 64 of the Act applied to the case, restitution could not properly consist in the return of the Rs.4,000. The contract was referred to as showing that what the plaintiff had to pay to the defendants was intended to reimburse the defendants for the expense of producing the print which they had to deliver, the import duties, port charges, censor's fee, etc. Hence it was contended that the defendants had received no benefit or advantage, or at least that the Rs.4,000 represents no benefit or advantage in the defendants' hands. The learned Chief Justice gave some countenance to this argument, saying that if the rescission had been an issue at the trial the defendants would have called witnesses to show that they had paid Rs.4,000 or thereabouts in order to import the films. This defence, however, either misinterprets the contract or the law. The sum to be paid by the plaintiff as consideration for the defendants delivering the print was to be reckoned with reference to sundry items of cost, e.g., cost of the positive print, shipping

charges and other items mentioned in the bill of 30th September, 1936. But when the plaintiff on each of two occasions paid Rs.2,000 on account he was not handing money to the defendants wherewith they were as his agents to discharge a debt of his. He was paying the money to the defendants in part discharge of the consideration due or to become due to them from him under the contract now rescinded. It was a benefit or advantage, it was received, and it was received under the contract. Sections 64 and 65 do not refer by the words " benefit " and " advantage " to any question of " profit " or " clear profit ", nor does it matter what the party receiving the money may have done with it. To say that it has been spent for the purposes of the contract is wholly immaterial in such a case as the present. It means only that it has been spent to enable the party receiving it to perform his part of the contract—in other words, for his own purposes. If on the footing that all sums received have to be returned, the defendants can show that after paying for the positive print, the shipping charges and so forth they have made a loss owing to the refusal of the plaintiff to carry out the contract, then these charges will be reflected in their claim for damages. If on the other hand the defendants have been so fortunate as to get another person to take the plaintiff's place on terms equally remunerative to them, these payments will not even mean that the defendants have suffered more than nominal damages. On general principles they may set off such damage as they have sustained, but the Act requires that they give back whatever they received under the contract.

To give effect to the defendants' right to claim damages and to have an equitable set-off they must be given leave to file a further written statement in the High Court. This pleading should contain particulars of the defendants' claim for damages for the plaintiff's wrongful refusal to carry out the contract, and should set forth that these are claimed by way of set-off against the plaintiff's claim to recover Rs.4,000 which has been allowed upon the footing that he wrongfully repudiated the contract and that the defendants lawfully put an end to the contract by their letter of 21st January, 1937.

Their Lordships think that this appeal should be allowed; that the decrees of the High Court dated 10th January and 14th July, 1939, should be set aside; that it should be declared that the plaintiff is entitled to recover from the defendants Rs.4,000 paid under the contract of 8th May, 1936, subject to the right of the defendants to set off the amount due to them as damages for the plaintiff's repudiation and breaches of the said contract; that the defendants should have leave within two months of the receipt by the High Court of the Order in Council to be made on this appeal or within such further time as may be allowed by the High Court to file in the High Court particulars of their claim for damages as aforesaid; and that this case should be remitted to the High Court in its Original Jurisdiction to assess such damages and thereafter to pass a decree for such sum as may be due on balance to either party, and to make such order as to the costs of the proceedings for the assessment of damages as it shall think fit.

Their Lordships will humbly advise His Majesty accordingly. The plaintiff will pay the defendants' costs in the High Court both at the trial and on appeal. The defendants will pay the plaintiff his costs of this appeal.

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In the Privy Council

MURALIDHAR CHATTERJEE

v.

THE INTERNATIONAL FILM COMPANY, LIMITED

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Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS.
DRURY LANE, W.C.2.

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