HIGH COURT OF MADRAS

P NAGARAJAN
V/S
SOUTHERN STRUCTURALS LIMITED

Date of Decision: 28 March 1995

Citation: 1995 LawSuit(Mad) 267

Hon'ble Judges: Abdul Hadi

Case Type: Second Appeal

Case No: 355 and 1995

Subject: Contract

Acts Referred:
Contract Act, 1872 Sec 74

Final Decision: Appeal dismissed

Eq. Citations: 1996 (1) LLJ 364, 1995 (2) MadLJ 337, 1995 LabIC 1948

Advocates: S Natana Rajan

Reference Cases:
Cases Referred in (+): **3**

Judgement Text:-

Abdul Hadi, J

[1] The 1st defendant, who failed in both the courts below, has preferred this second

appeal against his employer, the plaintiff 1st respondent herein. Respondents 2 and 3 are defendants 2 and 3 in the suit.

[2] The suit by the above said employer is for a sum of Rs. 15,000 with interest, claimed as damages stipulated in Ex. A-2 dated September 4, 1985 the agreement entered into between the 1st respondent and the appellant after Ex. A-1 (July 30, 1985) the appointment order of the plaintiff appointing the first defendant as its employee. Under the said agreement the appellant should have served the 1st respondent for five years and if there is any breach committed by the appellant, he should pay Rs. 15,000 to the employer- 1st respondent. The appellant resigned in about two years and hence on the ground that breach has been committed, the 1st respondent laid the above said suit, claiming the above said sum of Rs. 15,000 stipulated in the agreement with interest. The courts below, on the ground that despite the above said claim for Rs. 15,000 the 1st respondent agreed to receive Rs. 10,000 have concurrently decreed the suit for a sum of Rs. 10,000 with interest, holding that the appellant has committed breach of the contract, he having resigned from service, as stated above.

[3] Before adverting to the arguments of learned counsel for the appellant, it must also be sated that under Ex.A-4 dated March 31, 1988, the letter written by the appellant to the 1st respondent, the appellant agreed to pay Rs. 7,500 instead of the above said sum of Rs. 15,000 stipulated in the agreement on the ground that he had already served for about two years. In Ex.A-4 the appellant prayed for only a concession to be shown towards him and requested the 1st respondent to waive its right to claim the above-said sum of Rs. 15,000 partly. While so, even at the outset I posed the question to learned counsel for the appellant, that when in Ex.A-4, the appellant has recognised the right of the 1 st respondent to claim damages for breach of the contract committed by the appellant and only sought for a concession being shown to him to reduce the amount stipulated in Ex.A-2, how can the appellant have any case in the second appeal. To this learned counsel for the appellant submitted that de hors what is contained in Ex.A-4 since in law, the amount stipulated in Ex.A-2, is only a penalty, spoken to in Section 74 of the Indian Contract Act it cannot be claimed at all. To this contention, I must first of all point out that no such ground at all has been taken in the second appeal. It is also not disputed that no such defence was taken in the court below. Further even Section 74 of the Contract Act only runs as follows:

> "74. Compensation for breach of contract where penalty stipulated for,- When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if 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."

Even assuming it is penalty, Section 74 does not say that nothing need be paid for the breach of contract committed. Even the decision relied on by learned counsel for the appellant, viz, Savamalai Estates Limited v. Kannayan, 1978 I M.L.J. 424, only says, while drawing distinction between penalty and liquidated damages that if the amount is penalty, the rule is that the plaintiff who brings the action for enforcement of the penalty, can recover compensation only for the damage that he has in fact suffered. At any rate, when no such ground even has been taken in the second appeal, I cannot entertain this argument of learned counsel.

[4] Further, even according to learned counsel, not even such a plea was taken by the appellant in his written statement that the abovesaid amount of Rs. 15,000 stipulated in Ex.A-2 is only penalty. In fact from even ground No. 3 of the second appeal, it could be informed that appellant only proceeds on the footing that the suit claim is for damages. The said ground runs as follows:

"Both the trial court and appellate court failed to note that whenever the suit is based on claim for damages, the plaintiff is obligated under Section 74 of the Contract Act and in order to maintain a suit under Section 74 of the Contract Act, the plaintiff is obligated to prove the actual damages suffered by the plaintiff because of the alleged breach of the terms and conditions of the agreement."

[5] However, learned counsel for the appellant even went to the extent of contending that no such plea need by raised in the written statement and even without such plea, the abovesaid Rs. 15,000 should in law, be treated as "penalty". If it is a pure question of law, what the learned counsel submits may be accepted. But, this is not a pure question of law. The decision relied on by learned counsel, viz., Annapoorani v. Janaki, 1995 1 L.W. 141, will have no application to the present case. There, the court found that there was no error in applying the provisions of Hindu Succession Act. Only in that

context, this Court observed that even if there is no relevant plea by the defendant, the court is bound to respect the provisions of law and apply the same correctly. But, in the present case, if really the appellant wanted to plead that the abbvesaid sum was only "penalty" and not liquidated damages, he should have pleaded so. Whether a particular sum stipulated in the contract as the amount payable on breach of contract, is penalty or liquidated damages, cannot be taken to be a pure question of law. If it is liquidated damages as also held in Savamalai Estates Limited v. Kannayan, (supra) it is a genuine pre-estimate of the loss that may be caused to one party if the contract is broken by the other. In such a case, the party aggrieved is entitled to receive the sum stipulated not more and not less, in the event of the breach without being required to prove the actual damages. In other words, in such a case, the parties themselves have assessed the damages at a particular figure. The present case certainly would only fall under this category.

[6] No doubt, as held in Savamalai Estates Limited v. Kannayan, (supra) itself, if the amount is "penalty" it is in the nature of a threat held over the other party 'in terrorem', a security to the promises that the contract will be performed. It has also been held further therein that in such a case, the courts, of equity have taken the view that since a penalty, is designed as more security for the performance of the contract, the promisee is sufficiently compensated by being indemnified for his actual loss, and that he acts unconscionably if he demands a sum which though certainly fixed by agreement, may well be disproportionate to the injury. The rule, therefore, is that the plaintiff who brings an action for the enforcement of a penalty can recover compensation only for the damage that he has in fact suffered. It is clear to me that the present case will not at all fall under the latter category of penalty.

[7] No doubt, learned counsel for the appellant, also relies on the decision in Prithvichand Ramchand Sablok v. S.I.Shinde, . But, that decision only stated the same principals laid down in Savamalai Estates Limited v. Kannayan, (supra). The learned counsel no doubt relies on the following passage found there and contends that likewise in the present case also, the abovesaid sum of Rs. 15,000 must be treated as penalty:

> "The defendant shall pay to the plaintiff a sum of Rs. 15,000 and costs on or before December 31, 1993. If. however he fails to pay the said amount of Rs. 1 5,000 with costs within the time stipulated, the plaintiff will he at liberty to recover the entire sum of Rs. 20,000 with interest and costs from the defendant by executing decree. The latter clause of such a decree will clearly be 'in terrorem' and, therefore, penal in character. No court will

execute the same."

The present case is entirely a different one and there is no comparison between the above-said passage extracted from the Supreme Court decision and the present facts.

[8] No doubt, learned counsel also contends that in the present case, actual damages has not been proved. But, as already stated, if the above-said sum stipulated in Ex.A-2 is only liquidated damages, the plaintiff can recover the same even without actually proving the damages. That apart, as already mentioned, though the sum stipulated is Rs. 15.000 under Ex.A-5, the appellant even sought for a concession for himself paying a sum of Rs. 7,500 instead. Further, the plaintiff also has agreed to receive a sum of Rs. 10,000 instead and a decree has been granted only for Rs. 10,000.

[9] In such a situation, there is absolutely no merit in the second appeal and hence it is not admitted, but dismissed.