

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18 / 10 / 2016

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

C.S.NO.152 OF 2008

The Royal Bank of Scotland N.V.
No.18, Haddows Road,
Chennai - 600 006.

(Plaintiff cause title amended and
substituted as per order dated
21.06.2010 in Application No.
3158 of 2010)

... Plaintiff

Versus

1.Dr.N.Varadarajan

2.Preetha Kannan

3.Dr.Raghu Varadarajan

(2 and 3 represented by their
agent No.1 above)

4.V.Venkatesh

5.Vanitha Narayanan

(No.4 represented by her agent
no.5 above)

.. Defendants

PRAYER: Plaint filed under Order IV Rule 1 of the Original Side Rules, 1956 read with Order VII Rule 1 CPC praying for a judgment and decree against the defendants for the following:

a) directing the defendants to jointly and severally pay the plaintiff the sum of Rs.30,00,000/- together with interest at the rate of 18% per annum on Rs.30,00,000/- from the date of plaint till the date of

payment / recovery in full;

b) the costs of the suit.

For Plaintiff : Mr.M.S.Murali
for M/s.R & P Partners
For Defendants : Mr.M.S.Sundararajan

J U D G M E N T

The suit is filed by the plaintiff for recovery of Rs.30,00,000/- together with interest at the rate of 18% per annum on Rs.30,00,000/- from the date of plaint till the date of payment / recovery in full, from the defendants.

2. The plaintiff is a Banking company incorporated under the Laws of Netherlands. The defendants are the joint owners of the property of an extent of 5 grounds and 0701 sq.ft. bearing Door No.31, Dr. Radhakrishnan Salai, Mylapore, Chennai - 600 004. The plaintiff Bank was looking for office space in order to expand its banking operations in Chennai. As the defendants claimed that they jointly owned a multi-storied complex, which was under construction, at that point of time, offered to lease the premises to the plaintiff. Pursuant to the offer, the plaintiff and the defendants executed a Letter of Intent (LOI) dated 22.02.2007. As per the said LOI, the plaintiff had to pay a

sum of Rs.80,68,410/-, out of the total security deposit amount of Rs.1,61,36,820/- to the defendants on 1st March 2007.

3. According to the plaintiff, it was informed that the premises would have access through two public roads / streets abutting Dr.Radhakrishnan Road. Therefore, the plaintiff agreed in principle to take the premises on lease on the condition that (i) access being available to the premises through the alleged public roads/streets; (ii) construction of the premises should be in accordance with the sanctioned building plan; and (iii) the defendants shall make out a sound and marketable title to the premises, etc.

4. It is stated in the plaint the side roads / streets, claimed to be public ones by the defendants were in fact private roads and the public were being barred from using of the same as thoroughfare. When the plaintiff asked for explanation, the defendants could not give a valid explanation for the same. That apart, according to the plaintiff, there were deviations in the construction of the premises vis-a-vis the sanctioned building plan. Despite the several request made by the plaintiff to obtain

regularisation of the deviations in construction, the defendants did not heed to the request.

5. While so, the plaintiff received a letter dated 22.05.2007 from the defendants stating that the building was completed and was ready for occupation. In response, the plaintiff also sent a letter dated 24.05.2007 requesting the defendants to obtain regularisation of the deviations in the construction of the premises and in the alternative, the plaintiff requested the defendants to furnish indemnity against any loss that may be sustained by the plaintiff for not being able to use the premises due to the deviations. The defendants failed to provide any indemnity. The defendants also failed to furnish the Completion Certificate obtained from the authorities to the plaintiff.

6. As the defects pointed out by the plaintiff were not rectified, the plaintiff had terminated the LOI and requested the defendants not to present the five cheques given earlier as part payment of the security deposit for encashment. However, the defendants seem to have encashed the cheques between 26th and 28th of May 2007 to the tune of Rs.80,68,410/-. The defendants by letter dated 30.06.2007

had refunded a sum of Rs.50,68,420/- leaving a balance of Rs.30,00,000/- with them. When the LOI was terminated, the defendants have got no justification in retaining the part of the security deposit paid to them. As the defendants had committed breach of the terms and conditions of the LOI and without any legal basis, claimed damages against the plaintiff by retaining the sum of Rs.30,00,000/-.

7. The plaintiff also sent a notice on 05.07.2007 denying the allegations made by the defendants in their letter dated 30.06.2007. It is stated further by the plaintiff that the defendants, having voluntarily refunded a sum of Rs.50,68,420/-, being a major portion of the security deposit, is deemed to have admitted the defects/shortcomings pointed out by the plaintiff. Hence, the plaintiff has filed the suit for recovery of Rs.30,00,000/- with interest.

8. The suit was resisted by the defendants contending that the said LOI contained terms and conditions on either side to be fulfilled before the lease was executed. The claim of the plaintiff to have ingress and egress to two public streets abutting Dr.Radhakrishnan Road, is totally denied by the defendants. According to the defendants, the final Letter of Intent did not contain any precondition regarding providing two access. Regarding the

question of deviations as alleged by the plaintiff, the Corporation of Chennai had evaluated the compliance of the building as per the sanctioned plan and Completion Certificate was also issued by the CMDA. As per the LOI, there was no condition for producing the Completion Certificate from CMDA prior to the execution of the lease deed.

9. Under Clause 5 of the LOI, the defendants were to provide a Completion Certificate that the construction was in conformity with the sanctioned plan. Therefore, the plaintiff had no right to withdraw from entering into lease after signing the LOI and payment of 50% of security deposit. The plaintiff ought to have executed the lease deed within 15 working days of signing the LOI, as per Clause 10 of the LOI.

10. The plaintiff having withdrawn from the contract of taking the premises on lease, had committed serious breach of contract, causing irreparable loss and mental agony to the defendants. As the construction was completed, the defendants had called upon the plaintiff to take possession of the premises for commencement of fit out as per the LOI. Only after informing the plaintiff about the completion of construction, the defendants had presented the

cheques on 24.05.2007 to their Bankers.

11. According to the defendants, they had incurred loss on account of the withdrawal of the plaintiff from executing the lease deed. They had borrowed money for construction from the State Bank of India and projected the payment of interest and repayment of loan was only on the basis of the lease executed by the plaintiff. The plaintiff having terminated the agreement by committing breach of trust, put the defendants in great financial risk. On account of the termination, the defendants had to look for alternate tenants to make good the loss. Hence, prayed for dismissal of the suit.

12. Based on the pleadings, the following issues have been framed by this Court on 13.07.2010:-

"1. Whether the defendants breached the terms and conditions of the Letter of Intent dated dated 22.02.2007?

2. Is the plaintiff entitled to terminate the Letter of Intent on the ground that the defendant had not provided access to the premises to be leased through two "Public Roads" abutting Dr. Radhakrishnan Road, Chennai when the sanctioned plan or the Letter of Intent did not provide such a

provision?

3. Was the plaintiff entitled to withdraw from entering into the lease deed complaining that the construction was not according to the sanctioned plan and requiring regularisation when the CMDA and Corporation had not done so at any time?

4. Whether the plaintiff is entitled to the sum of Rs.30,00,000/- together with interest at the rate of 18% per annum on Rs.30,00,000/- from the date of plaint till the date of payment / recovery in full?

5. Whether the defendants have any right to claim damages against the plaintiff?

6. Whether the defendants have the right to retain to Rs.30,00,000/- as damages? "

ISSUE NOS.1 AND 2

13. The suit claim is based on the Letter Of Intent dated 22.02.2007 which is marked as Ex.P2. As per the terms of the same, 50% of the security deposit was paid by cheques in favour of the defendants. The defendants, who are the co-owners of the property, being a multi-storied complex, offered the premises on lease to the plaintiff. Accordingly, when the premises was ready for handing over

possession, by letter dated 22.05.2007, which is marked as Ex.P3, the defendants called upon the plaintiff to take possession of the premises and asked them to execute the lease deed on 01.06.2007, in consonance with the terms of Ex.P2. In fact, it is stated that the lease was finalised by the parties and was ready by 20.05.2007 for execution and registration. Cheques given by the plaintiff towards security deposit were also deposited by the defendants in their respective bank accounts and got the same credited.

14. While so, it is contended that the plaintiff Bank had by letter dated 24.05.2007, which is marked as Ex.P4, unilaterally terminated the Letter of Intent and asked the defendants to hold on the cheques and not to present the same for collection. As stated earlier, the said termination letter, marked as Ex.P4, was delivered to the defendants only on 28.05.2007, before which time, the cheques were deposited and credited to the accounts of the defendants. Ex.P4- termination was on several allegations.

15. It is the case of the defendants that the original Letter Of Intent did not contain a provision for termination of the agreement. The main allegation of the plaintiff is that though the defendants had agreed to provide access to the premises to be leased thorough two

public roads, abutting Dr.Radhakrishnan Road, the same was not provided by them. Another major reason is that the construction of the entire building was not rule compliant as there were deviations from the plan sanctioned. The plaintiff also, after termination of the contract, had instructed their bankers to stop payment of the cheques given towards security deposit. However, the cheques were realised, by the defendants, even before the termination letter could reach them.

16. On 30.06.2007, under Ex.P6, the defendants had intimated to the plaintiff that the premises was ready for occupation, as the same was made ready to the specific use of the plaintiff and also had annexed the expenses and the loss incurred by them in getting the premises ready for them. Thereafter, the defendants also had refunded a sum of Rs.50,68,420/- out of Rs.80,68,410/- which was given as security deposit. Accordingly, a sum of Rs.30,00,000/- was retained by the defendants on account of the unilateral termination by the plaintiff, without notice which amounted to breach of contract.

17. The plaintiff also had issued legal notice on 02.08.2007, under Ex.P9. As per Ex.P9, the plaintiff had intimated as follows:-

"During the discussion you had with our client we were informed by our client the existing demised premises would be thorough two public roads / streets abutting Dr.Radhakrishnan Road. However, during the enquiries made as part of our due - diligence, the neighbor of the adjacent property informed our client that the said public roads / streets were in fact private roads with the public being barred usage of the same as thoroughfare or otherwise. When you were asked to explain this discrepancy no answer or explanation was given by you. This is a clear breach of the understanding between you and our client. During the due diligence exercise it was found that there are deviations in the construction of the said premises vis-a-vis the sanctioned building plan such as Floor to Floor height, thereby exceeding the overall prescribed height of the building, setbacks on the right side etc.

Our client therefore requested you obtain regularization of the deviations."

18. The defendants also had suitably replied to the same on 08.08.2007 under Ex.P10. In the reply notice,

the defendants had stated that the plaintiff had taken the role of CMDA complaining about the deviations in the floor to floor, height and setbacks on the right side. It is further stated by the defendants that even the CMDA had not pointed out till that date about any such deviation, though they have been inspecting the premises periodically and they are the authority to point out any such deviation. In fact, the CMDA also had not pointed out any deviation, for which, any regularisation was required. While that being so, the plaintiff had asked the defendants to obtain regularisation of the deviations, which is uncalled for.

19. The next allegation of the plaintiff that the Completion Certificate of the building was not furnished by the defendants, was also suitably answered by the defendants, in their reply. As the defendants themselves are not sure when the Completion Certificate would be issued to them, as the same is to be given only by the CMDA, any delay caused on their side, is inevitable and the defendants cannot be blamed for the same. However, obtaining a Completion Certificate cannot be a precondition for executing the lease deed. According to the defendants, these are all the reasons invented by the plaintiff for terminating the contract.

20. In the aforementioned circumstances, whether there was a breach of contract by the plaintiff, by terminating the agreement to take the suit property on lease, has to be considered.

21. Clause 5 of the Letter Of Intent dated 22.02.2007 speaks about the ownership and title of the lessor / defendants. The lessor only indemnified the lessee against any loss or damage suffered by the lessee on account of any defect in the lessor's title, with regard to their share of the building. In addition, it is also stated that the lessor will also provide a certificate that the building has been constructed in conformity of the sanctioned plan.

22. The learned counsel for the defendants contended that building permit is given by the CMDA, who alone has authority to decide, whether the building is in conformity with the sanctioned plan or not. Admittedly, the Completion Certificate had not yet been provided. That being so, the plaintiff, even before entering into the lease agreement, had come to the conclusion that the building was constructed with violations and the Completion Certificate was not produced to them at that point itself. The plaintiff was also furnished with the copies of the documents of title, sanctioned plan, building plan approvals, as stated

in Clause 5 of Ex.P2 and which fact was also admitted by P.W.1 in his evidence. Admittedly, there was no doubt raised by the plaintiff, with respect to the ownership and title of the defendants of the property, agreed to be leased.

23. It is not the case of the plaintiff that the basic amenities / facilities, like water, electricity, drainage connection, parking facilities and other facilities, in the location as required by the plaintiff, were not provided. After making the building fit for occupation, for the required purpose, the defendants had called upon the plaintiff to take possession of the same vide Ex.P3. Only after sending the said letter on 22.05.2007, the cheques were presented for collection on 24.05.2007. The plaintiff had given only 50% of the security deposit on the date of Ex.P2. However, it was a rude shock and surprise to the defendants to have received the letter of termination, without notice, which is sent unilaterally and arbitrarily by the plaintiff.

24. The first reason for termination was the access to the premises through the two public roads. A reading of Ex.P2 would make it clear that the said document did not contain any side road access, nor was there any obligation committed by the defendants. So far as the

alleged second and third streets on Dr.Radhakrishnan Road, abutting the suit premises are concerned, they are private streets and the plaintiff got mislead by themselves, by concluding that those roads were public roads, to which they could also have access. In fact, at any point of time, the defendants had not given the plaintiff about the access through the above said streets to the premises taken on lease. Any controversy, with respect to the said private or public streets, has got no relevance, as the sanctioned plan did not contain such provision of access to the suit building for the plaintiff to terminate the contract.

25. The second ground on which the plaintiff had terminated the contract was that there were deviations in the floor to floor height and the setback space. Though the plaintiff had made such allegations, it is worthwhile to point out that no evidence, either orally or any document was placed before this Court. The plaintiff was only taking the premises on lease and was not purchasing the same. Therefore, the violations or deviations, presuming if any, also cannot be the reason for terminating the contract unilaterally. The plaintiff at the most can ask for any indemnity, against any such damages caused, due to the said reason.

26. The learned counsel appearing for the plaintiff contended that there was a direction by the Reserve Bank of India regarding the provision of the Completion Certificate before execution of lease. Hence, in the absence of the Completion Certificate being provided by the defendants, the contract could not be completed.

27. Ironically, in the Letter Of Intent - Ex.P2, there was no such clause mentioned, nor did the plaintiff produced any circular or rule in that regard, issued by the Reserve Bank of India. Even in the plaint, there is no whisper about such a regulation by the Reserve Bank of India to obtain Completion Certificate before execution of the lease.

28. The defendants also submitted that they could not have committed to such a condition, as they themselves could not know, as to when the Completion Certification would be issued by the statutory authority, namely CMDA. The plaintiff, being a Bank, is also aware of such facts. Therefore, the defendants cannot be held responsible for not disclosing a date. The defendants, having provided for all the facilities, including water, power supply, drainage connection, parking and other facilities, which are required for immediate occupation, the plaintiff has got no reason to

go back on the same and terminate the contract, resulting in serious loss to the defendants.

29. In fact, the defendants had applied for Completion Certificate on 01.06.2007, the date on which the plaintiff should have executed the lease deed. The defendants also received the Completion Certificate from CMDA on 19.09.2007. However, before that date, the plaintiff had terminated the contract. The Compliance Certificate from the Corporation of Chennai was also obtained in Ex.D3 by the defendants on 06.08.2007. The above two Certificates would go to prove that there were no deviations as pointed out by the plaintiff and the Completion Certificate as issued to the defendants, is without any issue.

30. In the light of the above findings, there is no breach of contract committed by the defendants as alleged by the plaintiff and the issue nos.1 and 2 are answered against the plaintiff.

ISSUE NO.3:-

31. Though Ex.P2 was stated to be a Letter Of Intent, the same was acted upon by the defendants, by fulfilling their obligations. The plaintiff also had acted upon the same, as they had advanced 50% of the security deposit mentioned therein. As the agreement to lease is a

concluded contract and acted upon, the plaintiff had got no right to terminate the same.

32. In fact, Clause 10 of Ex.P2, specifically mentions that 50% of the deposit in advance to the Lessor within a week's time of signing the Letter Of Intent, subject to the Lessor's rights to make deductions from the security deposit, the Lessor shall refund the security deposit to the Lessee upon the handing over of the keys to the demised premises and handing over back vacant possession on the expiry or early termination of the lease deed subject to the lessor's right to make deductions from the security deposit.

33. The defendants had spent substantial sum in getting 250 KVA power supply for the premises as required by the plaintiff. That apart, continuous supply of metro-water and bore-well supply to suit the requirement of the plaintiff, was also arranged by the defendants. The other amenities, like toilet facilities and parking facilities etc., were also made to suit the convenience of the plaintiff as occupant. As the plaintiff had unilaterally cancelled the agreement of lease, the defendants were deprived of the rent from the premises between the period of May 2007 and October 2007. As stated earlier, the defendants

seem to have performed all the obligations under Ex.P2 as required by the plaintiff, the plaintiff should have some justifiable reason to terminate the contract.

34. As found in issue nos.1 and 2, the defendants had completed the construction, as per the sanctioned plan and building permit and provided all the amenities and facilities required under the agreement, as requested by the plaintiff's representatives. The plaintiff also paid 50% security deposit after verifying the documents of title, sanctioned plan and building permit. The defendants also had called upon the plaintiff to take possession of the premises on 22.05.2007. However, the lease was terminated on 24.05.2007, on unreasonable grounds, which was not contemplated under the terms of the agreement of lease. Therefore, when it is a concluded contract, which is being acted upon by both the parties, the defendants is entitled for the damages caused by the plaintiff, for non-occupation of the premises. The defendants had retained the security deposit on account of unilateral and invalid termination of the agreement.

35. The learned counsel appearing for the defendants placed his reliance on the judgment of the Bombay High Court in **ABDUL GANI AND CO. VS. TRUSTEES OF THE PORT OF**

BOMBAY [AIR 1952 BOMBAY 310] following **HOWE VS. SMITH [1884 (27) Ch D 89]** wherein it was held that the purchaser was not entitled to a return of the deposit. There was no express agreement that the deposit should be forfeited. Lord Justice Cotton in the above judgment says:

"..... the judgment of Lord Justice James gives us the principle on which we should deal with the case. 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."

36. As per the above judgment, the plaintiff in the instant case has forfeited its deposit by its own default. The security deposit is not merely an advance

payment for the lease agreement. It is a guarantee that the contract should be performed. Admittedly, the plaintiff had terminated the agreement to lease on its own. It is certainly outside the terms of Ex.P2 and cannot purge the default of the plaintiff. Though the default of the plaintiff had placed them only in the same position, the defendants suffered a loss due to the refusal of the plaintiff's performance of its part of contract. Therefore, it is stated that the plaintiff cannot now ask for the refund, without deducting the damages suffered by the defendants.

37. Similar view was taken in the judgment of the Bombay High Court in **ABDUL GANI AND CO. VS. TRUSTEES OF THE PORT OF BOMBAY [AIR 1952 BOMBAY 310]** which reads as follows:

"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', (1875) 10 Ch A 512, 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 '**HO'WE v. SMITH**', (1884) 27 Ch D 89 (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."

38. In view of the above principle, the plaintiff cannot be allowed to take advantage of its own default. Though the plaintiff had paid 50% of the security deposit to the tune of Rs.80,68,410/-, a sum of Rs.50,68,420/ has been returned to the plaintiff on termination of agreement. However, a sum of Rs.30,00,000/-, which is now sought to be recovered from the defendants, is forfeited by the defendants, for the loss caused by the plaintiff, in terms of loss of rent for a few months and also the ordeal of finding another tenant in the place of plaintiff. Thus, issue no.3 also does not find favour with the plaintiff.

ISSUE NOS.4, AND 6:-

39. In view of the findings in issue nos.1 to 3,

the plaintiff is not entitled to the sum of Rs.30,00,000/- with interest. As the plaintiff is not entitled for the suit claim, issue nos. 4 and 6 are unnecessary.

ISSUE NO.5:-

40. As there is no counter-claim for damages claimed by the defendants, issue no.5 is unnecessary.

41. In the result, the civil suit is dismissed.
No costs.

LIST OF DOCUMENTS MARKED ON THE SIDE OF THE PLAINTIFF

Sl. No.	Exhibits	Description of documents	Date
1	P-1	Xerox copy of Power of Attorney "B"	02.01.2007
2	P-2	The original Letter Of Intent	22.02.2007
3	P-3	The original letter from defendants to plaintiff	22.05.2007
4	P-4	The office copy of the letter from plaintiff to defendants	24.05.2007
5	P-5	The original letter from the defendants to plaintiff	12.06.2007
6	P-6	The original letter from defendants to plaintiff with xerox copies of 5 cheques	30.06.2007
7	P-7	The office copy of the letter from plaintiff to defendants	05.07.2007
8	P-8	The xerox copy of the letter from defendants to plaintiff	16.07.2007
9	P-9	The notice issued by plaintiff's counsel to defendants	02.08.2007
10	P-10	The original reply notice from defendants' counsel to plaintiff's counsel	08.08.2007

LIST OF DOCUMENTS MARKED ON THE SIDE OF THE DEFENDANTS

Sl.No.	Exhibits	Description of documents	Date
1	D-1 (Series)	The receipts issued by TNEB	-
2	D-2	The plan approved and sanctioned by CMDA	-
3	D-3	The compliance certificate issued by Corporation of Chennai	-
4	D-4	The Completion Certificate issued by the CMDA	19.09.2007
5	D-5	The letter issued by Indian Overseas Bank	16.11.2010
6	D-6	The certificate issued by the IDBI Bank	-
7	D-7	The statement of accounts issued by State Bank of India	-

sd/.P.S.N.J
18.10.2016

//Certified to be a true copy//

Dated this the day of 2016.

R.s/26.12.2016

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

WEB COPY