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NANDA LAL RAI v. BONOMALI LAHIRI.

District Judge, having dismissed the appeal on the ground of non-joinder of parties, was wrong in entering into the question of the construction of the will.

Baboo *Srinath Das* and Baboo *Kishori Lal Sarkar* for the appellant.

The respondent did not appear.

The judgment of the Court was delivered by

CUNNINGHAM, J.—An appeal has been filed in this case, notwithstanding its dismissal, by one of the defendants on the ground that the judgment and decree of the lower Court contain findings which, though immaterial to the decision of the case and unnecessary for the Judge to decide, yet, as they form part of the judgment and decree, might give rise to the application of the doctrine of *res-judicata* hereafter.

We think that the appellant is entitled to ask this Court to have the judgment and decree of the lower Court so amended, as to remove from them all the findings of the Judge, except that upon which the decision turned, namely, that the suit as framed could not be brought.

The appeal will be decreed, and the judgment and decree of the lower Court will be modified with a view to these remarks. The appellant will get his costs in this Court.

Appeal allowed.

Before Mr. Justice McDonell and Mr. Justice Macpherson.

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THE BRAHMAPUTRA TEA CO., LD. (PLAINTIFFS) *v.* E. SCARTH (DEFENDANT.)*

Restraint of trade—Contract Act—Act IX of 1872, *ss.* 27, 74—*Breach of contract—Damages.*

A contract under which a person is partially restrained from competing, after the term of his engagement is over, with his former employer, is bad under s. 27 of the Contract Act.

Quære, as to the effect of an agreement of service by which a person binds himself, *during the term of his agreement*, not, directly or indirectly, to compete with his employer.

* Appeal from Original Decree No. 247 of 1883, against the decree of A. E. Campbell, Esq., Subordinate Judge of Sibsagar, dated the 22nd of August 1883.

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THIS was a suit brought to recover Rs. 3,109 as damages for breach of contract of service, and also for an injunction to restrain the defendant from serving within forty miles of the plaintiff's premises, or in the alternative for further damages amounting to Rs. 12,437.

The plaintiffs, who were the members of the Brahmaputra Tea Company, Limited, stated that they had entered into an agreement, dated 4th November 1877, with the defendant, under which they had agreed to engage the defendant as an assistant tea-planter for the purpose of working their gardens in Assam for a term of four years; that on the 3rd October 1880 they had entered into a further agreement with the defendant to serve in the same capacity, which subsequent agreement was to become operative at the termination of the fourth year of service under the first agreement; that by the terms of the subsequent agreement the defendant bound himself to serve the Company for three years from the 5th November 1881, and also by clause 8 of the agreement bound himself to pay to the Company by way of liquidated damages the sum of £250 sterling, if he should cease to be in the service of the plaintiffs by voluntarily quitting or discharging himself from such service without the consent of the Company at any time during the fifth year of such service; and further bound himself to pay by way of liquidated damages the sum of £20 sterling per month, for every month of the said term of three years then remaining unexpired, in the event of his so ceasing to be in the Company's service at any time during the sixth or seventh years of the term of service under the said two agreements; that under the 10th clause of the subsequent agreement the defendant further agreed that he would not, at any time, during the said agreement, or during a period of five years from the date of the determination thereof, either alone, as a member of any Joint Stock Company, or partnership, or as agent, assistant traveller, or servant for, to, or of any Joint Stock Company or partnership, or as owner or one of the owners of any plantation or garden for the cultivation of tea, or of any factory for its manufacture or sale, or by advancing money by way of loan or otherwise to any person or persons, Joint Stock Company, or partnership engaged in the cultivation, manufacture or sale of tea, directly or indirectly

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engage or be concerned, or interested in, or promote cultivation, manufacture or sale of tea or any other similar description of business for the time being carried on by the plaintiff-Company within forty miles of any of the Company's premises in Assam; that by the 11th clause of the subsequent agreement it was stipulated and provided that, in the event of any breach by the defendant of all or any of the stipulations on his part contained in the said 10th clause, the plaintiff-Company should be at liberty to restrain the defendant by the injunction of a Court of competent jurisdiction from such breach, or to sue the defendant for, and recover from him the sum of £1,000 by way of liquidated damages; that by the said agreement it was provided that the stipulation therein contained should be construed, and the rights of all parties thereto governed in all respects in accordance with the principles of English law; that the defendant voluntarily quitted the plaintiff-Company's service without their consent on the 4th November 1882, and took service in the Moabund Tea Estate within two miles of the plaintiff-Company's premises in Assam. For the breach of these agreements the plaintiff-Company brought the suit above mentioned. The defendant, whilst not denying the fact that he had left the service of the Company prior to the expiry of the contract of the 3rd October 1880, urged that that agreement should be read with a letter written to him by the general manager for the Company in India, dated the 4th September 1879, which contained amongst other things the following words: "This new agreement is subject to termination by six months' notice on either side;" and he stated that, when entering into the new agreement of the 3rd October 1880, he had fully understood, and was given to understand by the general manager that the notice alluded to would apply to the new agreement, and that, being of such opinion, he had on the 17th May 1882 duly given a notice to quit to the Company; and further contended that the 10th clause of the agreement was void under s. 27 of the Contract Act.

It appeared from the evidence that the letter of the 4th September 1879 above referred to contained the terms of a fresh agreement between the defendant and the Company, and that these

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terms were accepted by the defendant; and that at the time that the agreement of the 3rd October 1880 was entered into, the defendant was serving the Company under the agreement proposed in the letter of the 4th September 1879. The plaintiffs adduced no evidence, showing that they have suffered damage from the act of the defendant.

The Subordinate Judge found (1) that at the time the defendant had entered into the agreement of the 3rd October 1880 he was serving under the agreement, the terms of which were set out in the letter of the 4th September 1879; (2) that the defendant had failed to prove any oral agreement, showing that the agreement could be terminated on a six months' notice; (3) that clause 10 of the agreement was void under s. 27 of the Contract Act; but that as the defendant had broken the terms of the agreement he awarded the plaintiff a sum of Rs. 900 as damages, having regard to the increased pay which the defendant had drawn subsequent to the time when the agreement came into operation.

The plaintiff appealed to the High Court on the grounds that clause 10 of the agreement was not void; and that the damages awarded were too small.

Mr. *Pugh* (with him Mr. *Adkin*) for the appellant.

Mr. *Sale* (with him Mr. *Dignam* and Baboo *Pran Nath Pundit*) for the respondents.

The judgment of the Court (McDONNEL and MACPHERSON, JJ.) was as follows:—

This appeal raises questions under ss. 27 and 74 of the Contract Act. On the 3rd of October 1880, the defendant, the respondent in this appeal, entered into an agreement with the Brahmaputra Tea Company, by which he undertook to serve the Company as assistant tea-planter for a term of three years, to be computed from the date of the termination of his fourth year's service under a prior agreement. The Company agreed to pay him a salary of Rs. 300 a month for the fifth year. Rs. 350 for the sixth year, and Rs. 400 for the seventh year. It is admitted that this agreement took effect from the 5th of November 1881. On the 17th of May 1882, the defendant gave notice of his intention to

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leave, and on the 27th of November following, he actually did leave the Company's service without their consent, and became manager of the Moabund Tea Estate, which is about two miles distant from one of the Company's gardens. It is alleged that he has, by so doing, infringed the 8th, 10th and 11th clauses of the agreement.

[Here followed the 8th, 10th, 11th clauses which are set out above.]

The Company on the 30th of June 1883 brought this suit to recover Rs. 3,109-6, the equivalent of £250, for the infringement of the 8th clause; and for an injunction to restrain the defendant from serving on the Moabund Tea Estate; or, in the alternative, to recover Rs. 12,437, the equivalent of £1,000 as damages for the infringement of the 10th clause. The lower Court held that the agreement in clause 10, being in restraint of trade, was void under s. 27 of the Contract Act. For the infringement of the agreement in the 8th clause it awarded a sum of Rs. 900 as compensation.

The plaintiff-Company appealed against that decision on the grounds that the contract contained in the 10th clause is not void, and that the compensation awarded is unreasonably small.

We entertain no doubt that the contract in the 10th clause is void, so far as it restrains the defendant from taking service, or from engaging in, or promoting, directly or indirectly, the cultivation of tea for a period of five years from the date of the termination of his agreement, although the restriction only extended to a distance of forty miles from any of the Company's gardens. *Couch*, C.J., and *Pontifex*, J., held in the case of *Madhub Chunder Poramanick* v. *Rajcoomar Das* (1) that the words "restrained from exercising a lawful profession, trade or business," do not mean an absolute restriction, and are intended to apply to a partial restriction. It is quite clear that such a contract would not come within any of the exceptions to s. 27, and it is impossible to suppose that the Legislature, while making certain exceptions to the general rule, would omit to provide for a contract of this kind, if it was intended to be an exception. Contracts by which persons are restrained

(1) 14 B. L. R., 76.

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from competing, after the term of their engagement is over, with their former employers within reasonable limits, are well known in English law, and the omission to make any such contract an exception to the general prohibition contained in s. 27 clearly indicates that it was not intended to give them legal effect in this country. *Kindersley*, J., in *Oakes* v. *Jackson* (1) refused to give effect to such a contract as contrary to the law in India; but there the restriction was also considered unreasonable under the English law. It is unnecessary to refer to the English cases which have been cited as the case must be governed by the Contract Act. An agreement of service by which a person binds himself *during the term of the agreement* not to take service with any one else, or directly or indirectly take part in, promote or aid any business in direct competition with that of his employer, is, we think, different. An agreement to serve a person exclusively for a definite term is a lawful agreement, and it is difficult to see how that can be unlawful which is essential to its fulfilment, and to the due protection of the interests of the employer, while the agreement is in force. It is unnecessary to consider all the conditions in the 10th clause. It is sufficient to say that we are not disposed to agree with the Judge that it is wholly void. As, however, the agreement has long since expired, no injunction can now issue. We need not consider the question of damages, as we should not, under any circumstances, have awarded any without giving the respondent an opportunity of complying with an injunction.

The remaining contention is that the sum awarded as compensation for the breach of the condition in the 8th clause is unreasonably small. The case clearly falls within s. 74 of the Contract Act, the effect of which was to do away with the distinction between liquidated damages and a penalty, and to leave it to the Court in all cases in which a sum is named in the contract as the amount to be paid, to award against the party who has broken the contract reasonable compensation not exceeding the sum named. It is clear that the Court might have awarded the full sum stipulated without any proof of damages or loss. The plaintiff gave no proof of actual damage or loss, and the Court assessed the damages with

(2) I. L. R., 1 Mad., 134.

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reference wholly to the increased emoluments which the defendant had drawn subsequent to the time when the agreement came into operation. Though averse to interfere with the decision of the Judge on this point, we think he has not exercised his powers rightly or discreetly in this matter. The agreement was deliberately entered into and as deliberately broken. The Company refused to assent to the defendant's leaving before his time. He not only went, but took service as manager of a neighbouring factory. The sum of £250 was entered in the agreement by the defendant himself, so he knew full well what he was doing and what risk he was incurring, and, so far as we can see, there was no reasonable or sufficient ground for his act. No doubt the Court has a discretion to fix what it considers reasonable compensation; but when the parties have already agreed among themselves as to what the penalty should be, we think the Court should not, in fixing the compensation, wholly ignore the amount agreed on, unless this is, on its face, wholly unreasonable with reference to the position of the parties and the breach provided against. In this instance the sum though large, cannot be considered wholly unreasonable; and it was, we must take it, fixed after due consideration with reference, not only to any actual expense to which the plaintiff might be put in supplying the defendant's place, but to all the circumstances attending the loss of his services which the agreement was intended to secure. These circumstances the Judge has not at all taken into consideration. He has merely made the defendant pay as compensation the amount of the increased salary which he obtained under the agreement. We have had great doubt whether we ought not, under the circumstances, and in the absence of any proof to the contrary, to consider as reasonable the sum which the parties themselves agreed on. We are clearly of opinion that the amount awarded by the Judge was unreasonably small; and having a discretion in the matter, which we exercise in favor of the defendant, we think a sum of Rs. 2,000 would be a proper sum to allow. The appeal is decreed to that extent, but as it only partially succeeds, we think each party should bear his own costs in this Court. The order of the Court below as to costs will stand.

Appeal decreed in part.