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titled would be to ascertain and determine what would be a fair rent for the land, if it had been let to an ordinary tenant and had not been cultivated by the respondents themselves. The rent recorded in the rent-roll is probably that paid by sir-lands, and if so the plaintiff seems to be entitled to the rent which the respondents could have obtained from a tenant, if they had not kept the lands in their own hands. We remand the case to the Judge to enable him to ascertain and determine what the rent should be. On receipt of his finding one week might be allowed for objections, and at the end thereof the appeal as regards appellant will be disposed of.

With regard to the objections put in by the respondents, they cannot be admitted. These objections are in fact an appeal from the decree passed against respondents in this case, on the appeal brought by themselves against the original decree of the first Court. Under s. 561 of Act X of 1877 a respondent, though he may not have appealed against any part of the decree, may, upon the hearing, not only support the decree on any of the grounds decided against him in the Court below, but take any objection to the decree which he could have taken by way of appeal. But in the case now before us the appellant lost his appeal, and there was no objection which respondents could have taken by way of appeal to this Court against the decree of the lower appellate Court. They might have appealed from the decree on their own separate case of appeal, but in the particular case before us the decree of the lower appellate Court was one dismissing the appeal of the present appellant. We may add that if the objections by way of appeal in their own case could be received, they would fail as they impugn the finding of the Court in that case on a matter of fact, and there are no legal grounds for a second appeal.

FULL BENCH.

1880 January 31.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

REFERENCE BY BOARD OF REVENUE, N.-W. P., UNDER ACT I OF 1879.

Stamp—Bond—Agreement—Act I of 1879 (Stamp Act) ss. 3, cl. (4), 7, and sch. i, No. 5, (c).

One of the clauses of an instrument by which one party to the instrument bound himself, in the event of a breach on his part of any of the conditions of

the instrument, to pay the other party thereto a penalty of Rs. 5,000, being regarded as a "bond," within the meaning of Act I of 1879, such instrument, if that clause were not so regarded, being an agreement chargeable under that Act with a stamp-duty of eight annas, *held* (STUART C. J. dissenting) that the instrument was chargeable, under s. 7 of that Act, with the stamp-duty leviable on a bond for Rs. 5,000.

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REFERENCE BY BOARD REVENUE, W. P., UNDER ACT I OF 1879.

Per STUART, C. J.—That for the purposes of that Act the penal clause in the instrument should not be regarded separately, as a bond, but simply as one of the several clauses making up the entire agreement, and the instrument was only chargeable with a stamp-duty of eight annas.

THIS was a reference by the Board of Revenue, North-Western Provinces, under s. 46 of Act I of 1879, as to the amount of stamp-duty chargeable upon an instrument, the terms of which, so far as they are material, were as follows: "Articles of agreement made this —— day of —— in the year of our Lord one thousand eight hundred and seventy-nine, between the Collector of Allahabad on behalf of Government of the one part, and Nilcomal Mittra and Charu Chandra Mittra, both of Allahabad, carrying on business under the name and firm of Nilcomal Mittra and Son, and so hereinafter designated, of the other part. Whereas the aforesaid Nilcomal Mittra and Son hereto of the second part, being desirous of obtaining for themselves the monopoly of the right of manufacture and vend of rum and native or country spirits in and for the city and cantonments of Allahabad, and for the manufacture and sale of country spirits according to the farming system in pargana Chail and the Trans-Jumna parganas, *viz.*, Khairagarh, Bara, and Arail, all of the Allahabad District, for the period of three years certain, commencing from the first day of October, 1879, have applied to the Collector aforesaid for the same, and whereas the said Collector of Allahabad has been authorised by and with the sanction of the Board of Revenue for the North-Western Provinces to grant the same: It is hereby agreed between the said parties hereto as follows:—

"(i). That in consideration of the payment of Rs. 20,000 per annum as still-head duty for 5,000 gallons of rum, and Rs. 1,200 per annum for license fees on rum, and Rs. 3,000 per annum on account of license fees on native spirits, for the city and cantonments of Allahabad, agreed to be paid by the said Nilcomal Mittra and Son unto the Collector of Allahabad aforesaid in the manner hereinafter specified, the said Nilcomal Mittra and Son shall have the

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exclusive right of manufacturing rum, *i. e.*, spirits manufactured according to the English method, and shall have the exclusive right of sale of the rum so manufactured by them and of country spirits manufactured by them after the native method in and for the city and cantonments of Allahabad, the abkári jurisdiction of which extends to a radius of four miles round the official cantonment limits. It is also understood that no shops other than those of the said Nilcomal Mittra and Son for sale of country spirits shall exist or be opened, and that no country spirits other than their manufacture shall be permitted to be imported for sale or use within the said area. Also in consideration of Rs. 15,000 agreed to be paid annually in the manner hereinafter specified by the said Nilcomal Mittra and Son to the said Collector of Allahabad on account of the farm of pargana Chail, the said Nilcomal Mittra and Son shall have the exclusive right of manufacturing and selling country spirits after the farming system in the said pargana Chail. Also in consideration of Rs. 15,740 agreed to be paid annually in the manner hereinafter to be specified by the said Nilcomal Mittra and Son to the said Collector of Allahabad on account of the farm of the aforesaid Trans-Jumna parganas, the said Nilcomal Mittra and Son shall have the exclusive right of manufacturing and selling country spirits after the farming system in the said Trans-Jumna parganas, *viz.*, Khairagarh, Bara, and Arail, all such farms or monopolies to extend and subsist for a period of three years certain, commencing from the first day of October, 1879. (ii). That the said Nilcomal Mittra and Son of the second part shall not open or cause to be opened any shops for the purposes of the above farms other than those now open and existing, without the previous consent of the said Collector of Allahabad of the first part in writing had and obtained. (iii). That as yearly license fees for the sale of rum and country spirits within the abkári limits of the city and cantonments of Allahabad, as above described, the aforesaid Nilcomal Mittra and Son of the second part shall pay or cause to be paid unto the Collector of Allahabad the sum of Rs. 1,200 and Rs. 3,000, respectively, in all Rs. 4,200. (iv). That besides the aforesaid license fees of Rs. 1,200 and Rs. 3,000 the said Nilcomal Mittra and Son shall pay to the Collector of Allahabad aforesaid a still-head duty on all the rum and country spirits issued to them from the distillery at

Karailabagh at the rate of Rs. 4 per imperial gallon of rum, and Re. 1 per imperial gallon of country spirits. Provided always that for every year during the aforesaid three years no less quantity than 5,000 gallons of rum shall be drawn out by the said Nilcomal Mittra and Son, so as to yield to Government a minimum sum of Rs. 20,000 per annum on account of still-head duty on rum: and it is hereby distinctly understood by and between the parties to these presents that for no cause, such as bad seasons, dearness of material, labour, or provisions, shall the aforesaid Nilcomal Mittra and Son be excused from paying to the said Collector of Allahabad the said minimum sum of Rs. 20,000 per annum as still-head duty on rum. (v). That besides the license fees and still-head duty aforesaid the said Nilcomal Mittra and Son shall pay to the said Collector of Allahabad, during the said period of three years, the sum of Rs. 1,250 for each month, before the 15th day of the month, on account of the farm of Chail, and Rs. 1,311-10-8 for each month, before the 15th day of the month, for the farm of the Trans-Jumna parganas aforesaid, for the exclusive right of manufacture and vend of country spirits after the farming system in the aforesaid parganas Chail, Khairagarh, Bara, and Arail in the district of Allahabad aforesaid. (vi). That in the event of any breach on the part of the said Nilcomal Mittra and Son in the observation or performance of any of the conditions hereof the aforesaid Nilcomal Mittra and Son hereby bind themselves to pay the said Collector of Allahabad a penalty of Rs. 5,000."

The opinion of the Board as regards the stamp-duty chargeable on this instrument was as follows:

"The Board considers that the instrument, although it is in the form of a lease is not a 'lease' as defined in s. 3, cl. (12), of the Stamp Act. It cannot be said to lease immoveable property; nor is it an agricultural lease known as a 'patta,' nor is it a lease of 'tolls.'

"The definition of a 'bond' as given in s. 3, cl. (4), (*a*), of the Stamp Act appears to cover the main provisions of the document. A bond is defined to be 'any instrument whereby a person obliges himself to pay money to another, on condition that the obligation

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shall be void if a specified act is performed, or is not performed, as the case may be.' By the instrument in question the excise contractor binds himself to pay certain sums annually to the Collector of Allahabad on condition that the obligation shall be void if a specified act be not performed, *viz.*, if the Collector do not make over to him the monopoly of the right of vend of spirituous liquors within certain parts of the Allahabad district. The Board, however, are inclined to think that the concluding words of the definition refer to the obligor of a bond and not to the obligee, and that it is the obligor not the obligee on whom the performance or the non-performance of the 'specified act' is incumbent. If the definition be limited to this construction, it is impossible to class the instrument in question as a 'bond' with reference to its principal provisions.

"There is little doubt, however, that the penal clause in the instrument whereby the contractor binds himself to pay a penalty of Rs. 5,000 on failure to comply with the conditions of the contract is a bond for Rs. 5,000. But the Board believe that such penal clauses have been held to be auxiliary to the main provisions of the contract, and, therefore, do not relate to a 'distinct matter' in the meaning of s. 7 of the Stamp Act. If this view be correct and the instrument be held by the Court to be also a 'bond' in respect to its principal clauses, the duty will be calculated on the amount secured by the latter, and no additional duty will be leviable on account of the subsidiary bond of the penal clause. As the contractor binds himself to pay Rs. 54,940 per annum for three years, the duty will be calculated on a bond for Rs. 1,64,820, and will amount under sch. i, No. 13, of the Act, to Rs. 825.

"If, however, the main clauses of the instrument do not constitute it a 'bond', it might possibly be held to be a 'conveyance,' as defined by s. 3, cl. (9), being an instrument by which the right of vend is transferred on sale to the excise contractor. Otherwise it must be classed as an 'agreement not otherwise provided for by the Stamp Act' (sch. i, No. 5. (c)), and as such is only liable to a duty of eight annas. In this case, however, the duty on the bond in the penal clause would exceed the duty chargeable on the instrument in respect to the principal matter treated of, and under s. 7 the higher duty of the two is leviable."

The Board was not represented.

The following judgments were delivered by the High Court:

STUART, C. J.—The result of the very anxious consideration I have given to this reference is a conclusion altogether different from that arrived at by my colleagues and by the Board of Revenue. A very careful examination of the Stamp Act I of 1879 has satisfied me that there is nothing in its provisions or its schedules that applies to the penalty of Rs. 5,000 agreed to be paid in the event or events therein expressed, and the legal character of that penalty must be determined solely on legal principle. I agree with the Board that the document is not a lease as defined by the Stamp Act, but a mere agreement or memorandum of an agreement, the proper stamp-duty on which is eight annas, and the several clauses and articles which constitute this agreement constitute the primary obligation undertaken by the parties, the Rs. 5,000 being a mere penalty contingent on the non-performance cannot be anticipated or presumed. On the contrary the presumption, according to all recognised legal principle, is that the contract or agreement will be performed, and that the circumstances under which this penalty may be sought to be enforced will never arise. That I say is the legal presumption applicable to this part of the case, the right to recover the penalty may or may not happen and which we are not to assume will happen. That being so, this penalty of Rs. 5,000 does not come into consideration at present as matter for stamp duty. Should the contingency provided against by this penalty occur, it will then be in the power of the Collector to recover it in a proper suit and under an appropriate court-fee. But at present we have, in my opinion, nothing to do with the penalty, what we have to do with is the true character of the instrument with which, in the manner and to the effect I have pointed out, it is incorporated.

A careful examination of the instrument, which I say is an agreement chargeable with a duty of eight annas, ought I think to lead to this conclusion. It recites that Nilcomal Mittra and Son, being desirous of obtaining from the Government the monopoly of the right of manufacture and sale of English and native spirits for

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the period of three years certain commencing from the 1st day of October, 1879, had applied to the Collector for the privilege, and that the Collector, by and with the sanction of the Board of Revenue, had agreed to grant the monopoly asked for, and in consideration of which monopoly payment shall be made of Rs. 20,000 per annum as still-head duty for 5,000 gallons of rum, and other large payments including payments for license fees are stipulated for; and then comes, as article 6 of the instrument, the condition respecting the penalty, and which is in these terms:—"In the event of any breach on the part of the said Nilcomal Mittra and Son in the observation or performance of any of the conditions hereof, the aforesaid Nilcomal Mittra and Son hereby bind themselves to pay the said Collector of Allahabad a penalty of Rs. 5,000." There can be no doubt about this penalty being a *bonâ fide* condition of the agreement on the contingency which it contemplates happening, but that it was *that* and nothing more is to my mind very evident, for the clauses that follow include this penalty as among the considerations moving the parties.

Both the Board and my colleagues describe the covenant for a penalty of Rs. 5,000 as a "bond" for that amount within the meaning of the term as given in s. 3, cl. (4), of the Stamp Act for 1879. That section provides that "unless there is something repugnant in the subject or context 'Bond' means any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or not performed, as the case may be." But this definition only applies inversely to the case before us in which, besides, there is no condition of nullity or voidance, the penalty being applied, without discrimination or specification, to the entire contract and the whole of its provisions, and which are exclusively of a pecuniary character, and the violation of which could be adequately measured in damages. It is also to be observed that the penalty in an English bond can never be enforced excepting for the purpose of covering interest and costs. In the case of the penalty now under consideration, it was probably intended to be enforced, and is no doubt capable of being enforced, to cover damages as well as interest and costs, but in either case the penalty

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is not such a unit or entity as that to which a precise stamp-duty can *a priori* be applied.

From these considerations it results that the adoption of the penalty as the measure of the stamp-duty on this agreement would involve the injustice of applying it indiscriminately and without regard to the nature and extent of the breach. On this subject I find it laid down in Broom's Commentaries on the Common Law of England (1864), p. 618 :—"Where, however, parties agree that a specific sum shall be payable by way of *penalty* for breach of contract, our Courts will apply equitable principles in the assessment of damages, not indeed allowing them to exceed the sum thus stipulated, but requiring evidence to be given for the purpose of fixing their precise amount, and enabling the jury to award it accordingly." And as an illustration of the law so laid down the learned author refers to the case of *Kemble* v. *Farren* (1) which appears to be a much stronger case in favour of the principle that I would apply than the present. It was an action of assumpsit for the breach of an engagement by the defendant to perform as an actor at the plaintiff's theatre during several consecutive seasons. "This agreement," continues Mr. Broom, "contained various clauses and stipulations between the parties, *inter alia*, that the defendant should perform, and the plaintiff should pay him so much on every night that the theatre should be open for theatrical performances during the time in question, and that, if either of the parties should neglect or refuse to fulfil the said agreement or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of £1,000, which sum was declared to be *liquidated and ascertained damages*, and *not a penalty* or in the nature thereof. Notwithstanding, however, this expression of the intention of the parties, the Court of Common Pleas held that the amount specified was to be regarded *as a penalty merely*, and not as liquidated damages, for they observed that, if an agreement contains clauses, some sounding in uncertain damages and others relating to certain pecuniary payments, as happened in the case *sub judice*, and the action is brought for the breach of a clause of an

(1) 6 Bing. 141.

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uncertain nature, *it would be absurd to construe the sum specified in the agreement as liquidated damages: because, if so, a very large sum might become immediately payable in consequence of the non-payment of a very small one*, such case being precisely that in which Courts of Equity have always relieved, and against which Courts of Law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by the breach of contract." The fairness of the rule so expounded is obvious, and in the present case would, if applied, prevent the injustice of the full penalty being enforced without reference to the nature and extent of the breach of contract. In the case before us the breaches might involve the violation of the whole contract, in which case the full penalty of Rs. 5,000 would be enforceable. In the present case the penalty is to be paid "in the event of *any* breach on the part of the said Nilcomal Mittra in the observation or performance of any of the conditions hereof." But the actual breach might be something comparatively small, and it would therefore be unjust to exact the whole penalty and not such a portion of it as in such a case might be applied.

But this is a state of things which cannot be anticipated at the commencement of a contract, and can therefore afford no measure for a present calculation of stamp-duty.

For these reasons it appears to me impossible to regard this penalty as a bond within the meaning of that term as defined by the Stamp Act I of 1879, but that it ought to be looked at simply as one of several clauses of the entire agreement, and which, should it ever come to be enforced on the equitable principle I have explained, would involve the levying of a court-fee according to the amount claimed in a suit to be brought for that purpose.

This is my answer to the reference by the Board of Revenue, and I regret it should be given in disagreement with the opinion of my colleagues.

OLDFIELD, J.—As I understand the terms of this instrument it is an instrument by the first five clauses of which it is agreed

between the parties to it, namely, Nilcomal Mittra and Son on the one side, and the Collector of Allahabad on the other side, that in consideration of Nilcomal Mittra and Son making certain annual payments to the Collector he shall receive from the Collector the exclusive right of manufacture and sale of certain spirits within certain territorial limits for a period of three years, and conditions are specified in respect of shops to be opened for the sale of the spirits and of the instalments by which the payments are to be made: and by the sixth clause Nilcomal Mittra and Son bind themselves, in the event of any breach on their part in observation or performance of any part of the conditions of the instrument, to pay to the Collector a penalty of Rs. 5,000: and by the eighth clause the Collector covenants, in consideration of the above conditions being duly observed by Nilcomal Mittra and Son, not to take away or withhold the exclusive license to manufacture or sell spirits for three years, or to do anything whereby the performance of the conditions of the agreement by Nilcomal Mittra and Son shall become practically impossible. No part of this instrument except clause six comes within the meaning of a bond as defined in the Stamp Act. I look on the main clauses as only evidence of a contract between contracting parties in respect of the lease or sale of a right of manufacture and vend of spirits, and so far the instrument is subject to stamp-duty as an agreement under sch. i, No. 5, (c). I agree with the Board that the words in the definition of bond in the Act "on condition that the obligation shall be void if a specified act is performed, or not performed, as the case may be," refer to the obligor, and it is the obligor and not the obligee on whom the performance or non-performance of the specified act is incumbent. Clause six, however, meets the requirements of the definition of "bond," the obligors therein binding themselves to pay a penalty of Rs. 5,000 on failure by them to comply with the conditions of the contract, and the instrument will be subject to duty accordingly under the provisions of s. 7 of the Act.

PEARSON, J.—I am of the same opinion.

SPANKIE, J.—I also agree.

STRAIGHT, J.—I am of the same opinion.