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limitation. No doubt the execution of the original decree will be the result of allowing the application, but it is none the less an application for execution of the order of the appellate Court, that being its essential object and intention, and it should be so treated. We therefore dismiss the appeal with costs.

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December 15.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Tyrrell.

NAIT RAM (PLAINTIFF) *v.* SHIB DAT AND OTHERS (DEFENDANTS).*

Breach of contract—Liquidated damages—Penalty—Measure of damages—Act IX of 1872 (Contract Act), s. 74.

Under s. 74 of the Contract Act, 1872, the Courts are not bound, even in cases where the parties to a contract have, in anticipation of a breach, expressly determined by agreement what shall be the sum payable as damages for the breach, to award such sum for a breach, but may award for the same "reasonable compensation" not exceeding such sum.

As a general principle, compensation must be commensurate with the injury sustained. Acting upon this principle, when the injury consists of a breach of contract, the Court would assess damages with a view of restoring to the injured party such advantage as he might reasonably be expected to have derived from the contract, had the breach not occurred.

Held, therefore, where the parties to a contract to deliver a certain quantity of raw indigo on a certain day agreed that a certain sum should be paid as compensation in case such indigo was not delivered as agreed, that the method of assessing damages in case of a breach of the contract would be to ascertain the quantity of indigo which could have been pressed out of the stipulated amount of indigo plant, to ascertain the price at which the indigo might have been fairly sold in the market during the season to which the contract related, and to deduct from such price the ordinary charges of producing and selling the quantity of indigo in question; and that more than the amount so ascertained ought not equitably to be awarded, such amount being "reasonable compensation" for a breach of the contract.

ON the 5th January, 1878, the defendant Shib Dat and one Chedi Lal, represented in this suit by his heirs, gave the plaintiff a bond in which they agreed, as the consideration for an advance of Rs. 200, to deliver to the plaintiff on a certain day 1,334 maunds of indigo plant. They further agreed that, if they failed to deliver the indigo plant, they should pay as damages twice the amount of the sum advanced. They hypothecated as colla-

* Second Appeal No. 369 of 1882, from a decree of Maulvi Zain-ul-Abdin, Subordinate Judge of Shâhjahânpur, dated the 15th December, 1881, modifying a decree of Lala Ganga Prasad, Munsif of Bisauli, dated the 25th August, 1881.

teral security for the performance of the obligation certain immoveable property described in the bond. The plaintiff, alleging that the executants had wholly failed to perform their contract, sued Shib Dat and the heirs of Chedi Lal, and Sewaram, who had become the owner of the hypothecated property, to recover the sum advanced by him, *viz.* Rs. 200, and Rs. 400, as damages for the breach of contract. Upon the question whether the plaintiff should be allowed to recover Rs. 400 as damages the Court of first instance observed as follows:—"The damages claimed by the plaintiff are liquidated damages or such as have been amicably estimated by the parties to the bond in anticipation of the breach of contract. These damages, being double the principal, are verily excessive; especially as the plaintiff has not shown that they are the approximate damages he has incurred from non-delivery of the promised indigo plant. This he could have done, by comparing the rate at which he contracted to purchase the plant from the promisors or obligors of the bond, with the rate which prevailed for it in the market on the date specified for delivery. The failure on his part to prove the probable damages incurred by him raises the presumption that he has not had to lose so much as he claims. Accordingly, with regard to the provisions of s. 74 of the Contract Act, 1872, I consider it equitable and reasonable to award him damages at one rupee per cent. monthly by way of interest, and by this measure of damages he gets Rs. 83-5-8 as per memorandum prepared by the Munsarim at my advice." The Court accordingly gave the plaintiff a decree for Rs. 283-5-8 and dismissed the rest of his claim. On appeal by the plaintiff the lower appellate Court held that the plaintiff should recover the sum advanced by him and Rs. 100 by way of penalty for breach of contract, or in all Rs. 300, and modified the decree of the first Court accordingly. It observed as follows:—"The bond sued on provides for damages to the amount of twice the sum advanced in case of failure to supply the indigo plant; and it is lawful under Regulation VI of 1823 to award damages to that extent, but it is not necessary to do so in every case. In this case one of the obligors is dead, and it is not proved to the satisfaction of the Court that the obligors intentionally made default in delivering the indigo plant. Under these

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circumstances justice does not warrant that the plaintiff should recover the full penalty of Rs. 400. No doubt the Munsif was not right in awarding damages to the amount of Rs. 83-5-8, being interest at one rupee per cent. per mensem, as this is contrary to the object of the indigo law, and the provisions of the bond. If the plaintiff is entitled to get anything, he should get it by way of damages and penalty and not by way of interest. Considering the peculiar circumstances of the case, the Court thinks that it is proper and just that the plaintiff should recover Rs. 200 as the principal and Rs. 100, total Rs. 300, as penalty from the defendant-obligor, from the heirs of the deceased obligor, and from the hypothecated property."

In second appeal the plaintiff contended that he should recover the damages stipulated for in the bond; that the decision of the lower appellate Court awarding Rs. 100 was based on conjecture; and that the measure of damages was the loss sustained by him in consequence of his inability to manufacture indigo.

Pandits *Ajudhia Nath* and *Nand Lal*, for the appellant.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the respondents.

The Court (STUART, C. J., and TYRRELL, J.,) delivered the following

JUDGMENT.—On the 5th January, 1878, Chedi Lal and Shib Dat executed a bond for Rs. 200, which they received from the plaintiff as an advance for cultivating indigo. Under the terms of the bond the obligors undertook to supply 1,334 maunds of indigo plant at a price of Rs. 15 per 100 maunds, and it was stipulated in the bond, that on failure of such delivery the obligors would be liable to payment of damages calculated at twice the sum advanced as consideration of the bond. As a collateral security for due performance of the obligation, the obligors hypothecated their immoveable property described in the bond. That property has since been purchased by Sewa Ram. On the allegation that the executants of the bond had wholly failed to perform the contract, the present suit was instituted by the plaintiff against Shib Dat and the heirs of Chedi Lal, who has since died.

Sewa Ram, the purchaser of the hypothecated property, has also been impleaded as a defendant in the suit. The object of the suit was the recovery of Rs. 200, the consideration of the bond, and Rs. 400 as liquidated damages for breach of contract, by enforcement of lien against the hypothecated property.

No evidence was produced by the plaintiff to prove any actual loss. The Munsif regarded the damages claimed as excessive, and, proceeding under s. 74 of the Contract Act, calculated damages at one rupee per cent. per mensem on the principal sum advanced, and decreed the claim to the extent of Rs. 283-5-8.

The lower appellate Court regarded the method of assessing damages adopted by the Munsif as erroneous, and, taking into consideration the provisions of the fourth clause of s. 5, Regulation VI. of 1823, held that, under the circumstaces of the case, Rs. 100 was the reasonable amount of damages to be awarded to the plaintiff, and modified the Munsif's decree accordingly.

The present second appeal has been preferred by the plaintiff, who contends that the defendants were bound to pay the whole amount of the stipulated damages; that the assessment of damages by the lower appellate Court at only Rs. 100 was conjectural and unsound; and that in any case damages should have been equal to the loss actually sustained by the plaintiff on account of the breach of contract committed by the defendants.

The learned pleader who appeared in support of the appeal admitted that his contention could receive no support from the provisions of the fourth clause of s. 5, Regulation VI. of 1823, and he confined his argument to the general principles of law relating to the assessment of damages. Whatever the distinction between liquidated damages and penalty may be, the terms of s. 74 of the Contract Act are broad enough to include both classes of cases, and the words of the section clearly give a wide discretion to the Courts in the assessment of damages, even in cases where the parties to the contract have in anticipation of the breach expressly determined by agreement what shall be the sum payable as damages for the breach. The section appears to have been introduced to obviate the difficulties which exist in distinguishing liquidated damages from penalty under the English Law, and the effect of it

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is, that the Courts are not bound to award the entire amount of damages agreed upon by the parties in anticipation of the breach of contract. The only restriction is that the Court cannot decree damages exceeding the amount previously agreed upon by the parties. The discretion of the Court in the matter of reducing the amount of damages agreed upon is left unqualified by any specific limitations, though of course the expression "reasonable compensation" used in the section necessarily implies that the discretion so vested must be exercised with care, caution, and on sound principles.

With reference to the particular circumstances of this case the question is, what amount should be regarded as "reasonable compensation" for the breach of contract complained of? The fundamental ground of law, on which damages are awarded, is to place the injured party in the same position in which he would have been had he not sustained the injury of which he complains. As a general principle, therefore, the damages decreed must be commensurate with the injury sustained. When the injury consists of the breach of a contract, the Court, acting upon the principle above enunciated, would assess damages with a view of restoring to the plaintiff such advantage as he might reasonably be expected to have derived from the contract had the breach never occurred.

There are of course cases in which, *ex necessitate rei*, it is impossible to fix the exact amount of damages actually resulting from a breach of contract, and it is principally, if not exclusively, in such cases that the Courts of Equity do not interfere with the contract of the parties, who, in anticipation of the breach of contract, have stipulated that a fixed sum shall be regarded as the measure of compensation to be paid by the person who violates the contract. But the present is not a case in which it would be impracticable or impossible to ascertain the actual damages sustained by the plaintiff. It is easy to determine the amount of pecuniary advantage which the plaintiff might have derived if the defendant had performed his contract and supplied 1,334 maunds of indigo plant at the stipulated period. It is consequently practicable to fix the extent of the loss which the plaintiff has sustained, and this in our opinion must be the measure of damages in this

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case, so long as the amount so ascertained does not exceed the sum agreed upon.

The method of assessing damages would be to ascertain the quantity of indigo which would have been pressed out of the stipulated amount of indigo plant, to ascertain the price at which indigo might have been fairly sold in the market during the season to which the contract relates, and to deduct from such price the ordinary charges of producing and selling the quantity of indigo in question. More than the amount so ascertained the plaintiff in our opinion is not entitled in equity to recover, and if that amount is decreed to him it would be a "reasonable compensation" for the breach of contract on which the suit is based.

With reference to these observations we decree this appeal, and setting aside the decree of the lower appellate Court remand the case to that Court under s. 562, Civil Procedure Code, the costs of this appeal to abide the result.

Cause remanded.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

1882 *December* 20.

RAGHUBANS GIR (JUDGMENT-DEBTOR) v. SHEOSARAN GIR (DECREE-HOLDER.)*

Execution of decree—Application for execution—Intermediate suit—Fresh application—Revival of application—Act XV of 1877 *(Limitation Act), sch. ii, Nos.* 178, 179.

On the 27th March, 1878, the holder of a decree applied for execution. On the 27th May, 1878, the Court made an order directing that the application should be struck off, as the record of the former execution-proceedings was in the appellate Court, and that the decree-holder should make a fresh application when such record was returned. On the 28th May, 1881, the decree-holder renewed the application in accordance with such order.

Held, on the question whether this application was barred by limitation, that it was not an application within the meaning of No. 179, sch. ii of Act XV of 1877, but one to which No. 178 would apply; that limitation began to run when the record was returned; and that therefore, (three years not having elapsed from that time), the application in question was within time.

Kalyanbhai Dipchand v. *Ghanashamlal Jadunathji (1)* and *Paras Ram* v. *Gardner (2)* referred to.

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* Second Appeal No. 18 of 1882, from an order of R. J. Leeds, Esq., Judge of Gorakhpur, dated the 9th January, 1882, affirming an order of Rai Izzat Rai, Munsif of Bansi, dated the 20th August, 1881.

(1) I. L. R., 5 Bom., 29. (2) I. L. R., 1 All., 355.