APPELLATE CIVIL.

Before Mr. Justice Campbell and Mr. Justice Zafar Ali.

MUHAMMAD ABDUL LATIF AHMAD KHAN (DEFENDANT) Appellant,

versus

LADHA RAM AND MAHLA RAM (PLAINTIFFS) Respondents.

1924 *July 21.*

Civil Appeal No. 1804 of 1921.

Indian Contract Act, IX of 1872, section 73—Party breaking contract, acting in good faith—Whether liable to pay damages for breach of contract—Difference between the law in India and that in England pointed out.

On the 9th of August 1919, A. L. executed a lease of certain land in favour of the plaintiffs for 3 years. A. L. stated in the lease that the land belonged to his brother N. S., but had been taken by him on lease from his brother. A. L. failed to give possession of the land, and consequently the plaintiffs lodged the present suit for damages for breach of contract. They alleged that the two brothers A. L. and N. S. had acted in collusion to cheat them and they joined both as defendants and claimed Rs. 5,400 as damages. A. L. pleaded that there was no collusion between him and his brother N. S. That N. S. had withdrawn from his agreement to lease the land to him, and that for that reason he was unable to give possession to the plaintiffs.

Held, that in India, under the terms of section 73 of the Indian Contract Act, if a person undertakes to sell or lease a property and breaks that contract through inability to convey the full title, he is liable to damages even if he has acted in perfectly good faith, and the damages must be assessed in the usual way. The difference in the law of England pointed out.

Adikesavan Naidu v. *Gurunatha Chetti* (1), and *Ranchhod* v. *Manmohandas* (2), followed.

(1) (1914) I. L. R. 40 Mad. 338 (F. B.). (2) (1907) I. L. R. 32 Bom. 165, 171

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Flureau v. *Thornhill* (1), and *Bain* v. *Fothergill* (2), referred to, and differentiated as not applicable to India.

Niaz Mohammad (with him Umar Bakhsh) for the appellant :—The appellant (defendant No. 1) has acted in good faith all along. He gave a lease of the land to the plaintiff under the belief that he was the lessee of it from his brother, defendant No. 2. It was the latter who made it impossible for appellant to fulfil his contract. The appellant has tried his best to give possession to the plaintiff, and his good faith is apparent. Plaintiff is therefore not entitled to claim damages from him, all that he can claim is the return of any money he may have paid under the contract. The respondent must prove fraud, collusion and misrepresentation before he can make appellant liable for damages for the breach of contract, *Clayton* v. *Leech* (3), Arnold on Damages (1913 Edition) page 53, and Mayne on Damages (6th Edition) page 203. As regards the measure of damages the plaintiff can only claim the actual loss he has suffered, and cannot claim damages for any loss of profits that he might have made by sub-letting the land in question. *In re National Coffee Place Company* (4), and *Chr. Salvesen and Co.* v. *Rederi Aktiebolaget Nordstjernan* (5). Both the appellant and respondent entered into this contract under a mistake of fact. The contract was therefore void under section 20 of the Contract Act, and no damages can be claimed for breach of such a contract. The contract was also void under section 65. At any rate, keeping in view the *bonâ fides* of the appellant only nominal damages ought to have been decreed.

(1) (1776) 2 W. Bl. 1078.
(2) (1874) L. R. 7 H. L. 158.
(3) (1889) 41 Ch. D. 103.
(4) (1883) 24 Ch. D. 367, 371.
(5) 1905 L. R. A. C. 302.

Abdul Rashid (with him Norman Edmunds, for Oertel), for the respondents:—The law of damages with regard to breach of contract concerning immoveable property is different in India from that prevailing in England. In India we are governed by the terms of section 73 of the Contract Act. This distinction has been pointed out in *Nabin Chandra Saha Paramaneck* v. *Krishna Barana Dasi* (1), and *Ranchhod* v. *Manmohandas* (2). The question of good faith does not arise in this case at all. The appellant granted a lease for 3 years to the respondent. He was bound to give possession of the property leased. He failed to give possession and his brother leased the property to a third party. It is not necessary for the plaintiff-respondent to prove fraud of defendant No. 1 or collusion between the two brothers. *Adikesavan Naidu* v. *Gurunatha Chetti* (3), Gour's Law of Transfer, Volume III, paragraphs 2584, 2585, IVth Edition. As regards the measure of damages the criterion is the difference between the contract price of the lease, and the market price of the lease when the breach took place, *Nagardas Saubhagyadas* v. *Ahmed Khan* (4), and *Muhammad Ismail* v. *Gulab Rai* (5). The appellant having himself granted the lease by means of a registered deed cannot now turn round and say that he was not competent to grant the lease, *Knatchbull* v. *Hallett* (6).

Niaz Mohammad, in reply—All the cases quoted for the respondent are distinguishable, because in all of them defendant was guilty of *mala fides*, and therefore made himself liable for damages for breach of contract.

(1) (1911) I. L. R. 38 Cal. 458, 465.
(2) (1907) I. L. R. 32 Bom. 165, 171.
(3) (1914) I. L. R. 40 Mad. 338 (F. B.).
(4) (1895) I. L.R. 21 Bom.175.
(5) 160 P. R. 1882.
(6) (1879) 13 Ch. D. 696, 727.

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First appeal from the decree of Lala *Kundan Lal, Senior Subordinate Judge, Lyallpur, dated the 21st April 1921, ordering that defendant No. 1 do pay to the plaintiff the sum of Rs. 3,316 and dismissing the plaintiffs' suit as against defendant No. 2.*

The judgment of the Court was delivered by—

CAMPBELL J.—The admitted facts of this case are that on the 9th of August 1919 the defendant Abdul Latif by a written deed agreed to lease to the plaintiffs four squares of land, which he stated had been taken by him on lease from his brother Niaz Rasul Khan, and 33 *kanals* 7 *marlas* of other land. The lease was for three years, and the rent was Rs. 2,200 *per annum* for the squares and Rs. 100 for the other land. We are not concerned with the other land, but Abdul Latif failed to give possession of the four squares, and consequently the plaintiffs lodged the present suit for damages for breach of contract. They alleged that the two brothers Abdul Latif and Niaz Rasul Khan acted in collusion to cheat them and they joined them both as defendants and claimed Rs. 5,400 as damages.

It is admitted that the four squares in question were separately leased by Niaz Rasul Khan for three years at Rs. 3,500 to one Phiraya Ram on the 29th of January 1920.

Abdul Latif pleaded that there was no collusion between him and his brother, that the latter had withdrawn from his agreement to lease the squares to him (Abdul Latif) and that for that reason he was unable to give possession to the plaintiffs. He said that he never did anything to resile from his undertakings in the written agreement and that he was not liable for damages.

Niaz Rasul Khan denied that he had ever leased the squares to his brother and admitted that he had leased them to Phiraya Ram. In order to prove the alleged lease to him by Niaz Rasul Khan, Abdul Latif produced a letter, dated the 28th June 1919. It was held by the trial Court that this letter, which purported to be a lease for three years, was inadmissible in evidence for want of registration and that the alleged lease could not be proved otherwise. This decision is not contested before us, and it disposes of the main issues in the case. For the rest the Lower Court held that whether or not Abdul Latif acted in collusion with his brother and whether or not his plea was correct that he himself offered no obstruction to the plaintiffs taking possession he had clearly committed a breach of contract and was liable to pay damages for his failure to fulfil his absolute obligation to deliver possession to his lessee. Damages were assessed on the amount by which the same squares were leased to Phiraya Ram, and the Court held that the present value of the difference between Phiraya Ram's rent and that which the plaintiffs were to pay to Abdul Latif was a fair measure and gave the plaintiffs a decree for Rs. 3,316.

Against this decision Abdul Latif has appealed. In his memorandum of appeal he entered his brother Niaz Rasul Khan as co-appellant, but it is admitted that this was a mistake. We have struck out Niaz Rasul Khan's name as appellant and since there has been no attempt at any stage to make him a respondent he is not a party to the appeal.

The argument of the learned counsel for the appellant is based mainly on certain passages in English text books on the law of damages, derived from the rule laid down in *Flureau* v. *Thornhill* (1) which was

(1) (1776) 2 W. Bl. 1078.

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later affirmed by the House of Lords in *Bain* v. *Fothergill* (1). That rule was to the effect that if a person enters into a contract for the sale of real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages, beyond the expenses he has incurred, by an action for the breach of the contract; he can only obtain other damages by an action for deceit. It is argued that in the present case, since Abdul Latif acted in perfect good faith and genuinely believed that his brother had leased the squares to him, *a fortiori* the plaintiff could not recover damages against him but could only claim a refund of any money advanced on the transaction and interest thereon. No such advance having been made in the present instance, it was submitted that the suit should have been dismissed. It has been held, however, that the above rule is peculiar to English law and is an anomaly due to the complexities of English titles and this has been made quite clear in a Full Bench decision of the Madras High Court reported as *Adikesavan Naidu* v. *Gurunatha Chetti* (2). The finding there was that a manager of a joint Hindu family, who has sold immoveable property belonging to himself and the minor members of the family, is personally liable under section 73 of the Indian Contract Act for damages for failure to perform the contract when it is found that it is not binding on the minors. It was held that both parties had acted in perfectly good faith, but it was laid down that the law of India as set forth in the Indian Contract Act as to the right to damages for breach of contract to sell immoveable property is different from that in England. One of the learned Judges pointed out that section 73 of the Indian Contract Act

(1) (1874) L. R. 7 H. L. 158. (2) (1914) I. L. R. 40 Mad. 338 (F. B.).

was very wide in its terms as regards the right to compensation for breach of any kind of contract, and that if A chooses to contract to sell to B full ownership rights in a property and breaks that contract through inability (not attributable to act of God, etc.) to convey the full title, he is legally bound to make compensation to B under section 73. In *Ranchhod* v. *Manmohandas* (1) Mr. Justice Macleod held that the rule in *Flureau* v. *Thornhill* (2) is not law in this country, and he pointed out that when the Contract Act was passed *Bain* v. *Fothergill* (3) had not been decided, and that the rule in *Flureau* v. *Thornhill* (2), which was subsequently restored by *Bain* v. *Fothergill* (3), had already been limited by subsequent decisions, and he observed that since section 73 imposes no exception on the ordinary law as to damages, whatever the subject-matter of the contract, in cases of breach of contract for sale of immoveable property through inability on the vendor's part to make a good title the damages must be assessed in the usual way, unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages.

These pronouncements in our judgment are sound and apply to the present case. It is true that there is no mention of damages in the event of breach in the record of the contract with which we are dealing, but this does not mean that section 73 of the Indian Contract Act is not to be applied, and we consider that the Lower Court was perfectly right in applying it.

So far as the actual sum decreed is concerned the learned counsel for the appellant has attempted to reduce it by relying upon the statement of a certain wit-

(1) (1907) L. L. R. 32 Bom. 165. (2) (1776) 2 W. Bl. 1078.
(3) (1874) L. R. 7 H. L. 158.

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ness named Chhajju Ram. We are not, however, impressed with Chhajju Ram, and in any case if the whole of his statement be read the difference in the loss to be assumed as suffered by the plaintiffs would merely amount to Rs. 45 *per annum* in comparison with the sum assessed. It is not quite clear exactly how the figure of Rs. 3,316 has been arrived at by the Lower Court and there appears to be a slight miscalculation to the detriment of the plaintiffs; but since there is no evidence on the printed record of the terms of Phiraya Ram's lease we are not disposed to increase the amount of the decree on the plaintiffs' cross-objections.

These cross-objections assert that the Lower Court should have decreed the whole amount sued for, *viz.*, Rs. 5,400, a claim which is not seriously pressed. It is however contended that the Lower Court should not have discounted the difference between the two annual rents for three years and decreed damages only at the present value. In our opinion the sum allowed is fair and reasonable and we decline to increase it.

The appeal is dismissed with costs and the cross-objections are also dismissed.

A. R.

Appeal and cross-objections dismissed.