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ship business is adjusted and settled. By the express terms of paragraph 10 of the partnership agreement, unless the debts due by the shop business carried on in the name of Ganesh Hari to local and up-country creditors are paid off, the interest-bearing amount belonging to Apaji Kashinath, mentioned in paragraph 3, is not to be drawn by him. It is quite clear that without taking an account it is impossible to ascertain whether there remain any outstanding claims.

We think, therefore, that the First Class Subordinate Judge was right in his view that the suit in its present form is not maintainable. We affirm his decree and dismiss this appeal with costs.

Decree confirmed.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.

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JUGMOHANDAS VURJIWANDAS (ORIGINAL DEFENDANT), APPELLANT, *v.* NUSSERWANJI JEHANGIR KHAMBATTA (ORIGINAL PLAINTIFF), RESPONDENT.*

Damages—Mode of assessing damages where no proof of market price—Contract—Breach of contract.

On 21st October, 1899, defendant contracted to deliver to the plaintiff at Bombay 1,000 tons of Powell Duffryn coal, January to May shipments, 200 tons to be supplied each month. The first shipment was due in middle of February. Defendant failed to deliver any of the coal, and the plaintiff did not purchase any coal against defendant's contract. The plaintiff now sued for damages for breach of the contract. The only question was as to the mode of assessing damages. There was practically no coal in Bombay of the description contracted for at the dates at which delivery should have been given and consequently no market rate could be proved. At the hearing plaintiff produced a statement showing the rates at which he had, during the contract period, settled certain contracts for Powell Duffryn coal which he had with the Bombay Company, Limited.

Held, that under the special circumstances of the case, and in the absence of any evidence as to a market rate, the figures given in this statement might properly be received in evidence for the purpose of fixing the actual value of the coal at the dates of breach, thus affording a measure of the damages suffered.

* Suit No. 897 of 1900; Appeal No. 1188.

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APPEAL from Crowe, J.

Suit for damages for non-delivery of coal.

On the 21st October, 1899, the defendant sold to plaintiff 1,000 tons of Powell Duffryn coal of January to May shipment (200 tons each month), delivery from alongside into purchaser's boats at 100 tons per diem for every 200 tons, usual office terms; cash before delivery. Price Rs. 19-8-0 per ton.

The contract also contained the following clause:

In case of riots, strikes, frosts, floods or other accidents beyond sellers' control interfering with the shipment to be made under this contract, sellers to have the option of shipping other good ordinary description of Welsh $\frac{\text{and}}{\text{or}}$ East Coast coal at the ordinary market difference. Should the sellers decline to ship another description, buyer may cancel the contract, or must allow the sellers as many additional days for shipment as the strike, riots, locks out, &c., may last, in which case sellers may, at their option, substitute another steamer.

The plaintiff alleged that the defendant had wholly failed to perform the contract and he claimed Rs. 8,542-8-0 as damages.

The defendant pleaded (*inter alia*) that it was impossible for him to supply the coal contracted for by reason of the Transvaal war and other accidents beyond the defendant's control, and he disputed the amount of damages claimed.

Plaintiff in his evidence said:

I sold 13,650 tons for the months from January to May. I had to pay nearly Rs. 40,000 to settle those contracts. I paid nearly Rs. 19,000 to the Bombay Company; Rs. 12,000 to the B. B. & C. I. Railway; Rs. 3,500 to the Currimbhoy Mills; Rs. 2,500 to the New Great Eastern Company. I still have to pay to the Rubattino Company. Of the 500 tons January shipment for the Bombay Company I settled 300 tons by setting off against it 300 tons bought by me from them through Wadia at Rs. 21-8-0, *i.e.*, at a loss of Rs. 2-4-0 per ton, Rs. 675. The balance of 200 tons of January shipment I settled in April at Rs. 23, *i.e.*, at a loss of Rs. 3-12-0 per ton, Rs. 750. I set up the excuse about the Transvaal war to the Great Eastern Company and the Currimbhoy Mills. It was in reference to the same matter regarding which they afterwards filed suits against me. Before the suit was filed a settlement was made on the basis of paying differences to each of them and on that settlement the suits were filed. The contract with the Great Eastern Company was for coal of November-December shipments.

I have had prepared the statement showing the settlement of all contracts for Cardiff coal from January to May. (Put in as Exhibit E.) It is quite correct. I had to pay Rs. 18,172-15-0 to the Bombay Company. I have paid Rs 13,661-4-6 on account.

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The following was the statement (Exhibit E) referred to:

The Bombay Company, Limited.

Tons.	Shipment.	Date of contract.	Contract rate.	Settled rate.	Difference per ton.		
			Rs. a.	Rs. a.	Rs. a. p.	Rs. a. p.	Total in Rs. a. p.
700	January	7th August, 1899.	18 2 & off.	21 8 & off.	3 6 0	...	3,052 11 0
300	January	22nd Sept., 1899.	19 4 & off.	21 8 & off.	2 4 0	...	
700	February... ...	7th August, 1899.	18 2 & off.	23 0 & off.	4 14 0	3,412 8 0	6,037 8 0
700	200 January ,, / 500 February ,,	22nd Sept., 1899.	19 4 & off.	23 0 & off.	3 12 0	2,625 0	
700	March	7th August, 1899.	18 2 & off.	23 0 & off.	4 14 0	...	3,429 9 0
500	March ... ,,	22nd Sept., 1899.	19 4 & off.	23 0 & off.	3 12 0	...	5,653 2 0
500	April	Do. ...					
500	May	Do. ...				Total ...	18,172 11 0

The Judge of the lower Court (Crowe, J.) found for the plaintiff and awarded him the amount of damages claimed, viz., Rs. 8,542-8-0.

The defendant appealed. The main question argued in appeal was as to the amount, and mode of estimating, the damages.

Lowndes (with *Davar*) for the appellant (defendant). He cited *Brown* v. *Muller*,[1] *Roper* v. *Johnson*,[2] *France* v. *Gaudet*.[3]

Jardine (with *Raikes*) for the respondent (plaintiff), *contra*.

JENKINS, C.J.:—On the 21st October, 1899, the defendant sold to the plaintiff 1,000 tons or thereabouts of Powell Duffryn coal on the following terms: shipment January to May (200 tons each month): rate Rs. 19½ per ton: delivery from alongside into purchaser's boats at 100 tons per diem for every 200 tons. The coals were not delivered and the plaintiff has sued for damages. Crowe, J., has awarded him Rs. 8,542-8-0: the defendant has appealed.

(1) (1872) L. R. 7 Ex. 319. (2) (1873) L. R. 8 C. P. 167.
(3) (1871) L. R. 6 Q. B. 199 at p. 201.

Before us three points have been urged: first, that having regard to the difficulty of getting Powell Duffryn coal here in consequence of the Transvaal war the defendant was protected by the accident clause in the contract; secondly, that delivery from alongside was not an essential condition; and, thirdly, that the learned Judge had wrongly estimated the damages.

In my opinion the two first points are, on the facts of the case, untenable: they were not seriously pressed before us, and I do not propose to deal further with them. The objection as to damages is in my opinion, well founded.

Now, in the first place, it has to be noted that the contract was for delivery in monthly shipments, and it is not disputed that the coal would ordinarily take about four weeks to arrive here after shipment. The dates for delivery, therefore, under the contract would be February to June, both inclusive. No postponement of the time for delivery is pleaded, or suggested in the issues, and though there may have been an omission to insist on monthly deliveries according to the contract, I think forbearance is not established (*Ex parte Llansamlet Tin Plate Co.*[1]). We must therefore ascertain the damages on the basis of the stipulated instalments; in other words, we must assess the damages actually suffered in respect of each default.

When a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew when they made the contract to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account. This is how the law is expounded in section 73 of the Contract Act (IX of 1872).

In the sale of goods the ordinary measure of damages is the difference between the contract and market rates at the due

(1) (1878) 16 Eq. 155.

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date. This, however, is but one method of estimating the damage suffered, and manifestly cannot apply where no market rate is proved. Now admittedly in this case there is no evidence of anything that could be treated as a market rate except for the month of May, and when regard is had to the transactions on which it is sought to establish a market rate in that month, the endeavour, in my opinion, completely fails. The fact is that there was no alongside Powell Duffryn coal during the period covered by the contract and there was no ready market rate. We, therefore, must have recourse to some other test.

When an emergency, such as we have here, arises, it is open to the buyer to procure the nearest substitute that he reasonably can, and to charge the seller with the difference. But that has not been done here, and so all that is left to us is to ascertain as nearly as we can the value of the coal at the several times at which the contract was broken, and to give the plaintiff as damages the sum of the difference between the contract price and the value at the several dates of breach. If we have not the materials to arrive at the value necessary for this estimate, then we can do no more than give nominal damages. It is conceded that we must, if possible, give more than nominal damages (*Elbinger Actien-Gesellschaft* v. *Armstrong*[1]), but I see no escape from nominal damages unless we accept Mr. Lowndes' suggestion, and take as the basis of our estimate the figures at which the plaintiff during the contract period was able to settle his contracts with his customers for Powell Duffryn coal. The materials for this estimate are to be found in Exhibit E, a statement prepared by the plaintiff himself, and showing the rates at which he settled with the Bombay Company, Limited. The plaintiff has objected to the use of this statement for the purpose of arriving at the value of the goods, but on the ground that he may have been able to settle with his customers on more favourable terms than the state of the market justified in consequence of their generous impulses towards him. Nothing in the evidence to support this has been brought to our notice. Moreover, in the course of the hearing, we gave the plaintiff (who was in Court) an

(1) (1874) L. R. 9 Q. B. 473.

opportunity of informing us whether he had settled any contract for Powell Duffryn coal at a rate higher than those specified in Exhibit E, but he was unable to point to any such settlement, or even suggest that any such was made. At the same time if we were to give effect to the objection, it would only act to the detriment of the plaintiff; for there is no other evidence on which we could award damages. Even if the rate of settlement be not the most satisfactory evidence of value, I think, having regard to the poverty of the materials before us, we are entitled to take it into consideration.

The price obtained on a re-sale may, in the absence of a market rate, be accepted as evidence of actual value. I should hesitate to apply that test to a suit on breach of contract on the authority of *France* v. *Gaudet*,[1] the case cited to us in argument, as that was an action for conversion or in tort, and on that ground considered by the Court, rightly or wrongly, to be governed by peculiar considerations: but support for the proposition is to be found in the judgment of Brett, M.R., in *Grebert-Borgnis* v. *Nugent*,[2] where he says: "If there be no market for the goods, then the sub-contract by the plaintiff, although not brought to the knowledge of the defendant, the original vendor, may be put in evidence in order to show what was the real value of the goods, and so enable the plaintiff to recover the difference between the contract price and the real value."

The settlement made by the plaintiff with the Bombay Company was not, of course, a re-sale, but it bears some analogy to re-purchase, and I think, under the special circumstances of this case, it may properly be received in evidence for the purpose of enabling us to fix the actual value. I do not say that as matter of law those figures must be adopted; but in the absence of all other materials they are an indication of the actual loss which the plaintiff, acting as a reasonable man in the ordinary course of business, in fact sustained by the sellers' default, and thus afford a measure of the damage suffered (*Dunkirk Colliery Co.* v. *Lever*[3]). From the peculiar circumstances of the case no

[1] (1871) L. R. 6 Q. B. 199. [2] (1885) 15 Q. B. D. 85 at pp. 89-90.
[3] (1878) 9 Ch. D. 20 at p. 25.

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exact measure can be applied, but as a substantial matter of business the adoption of the settlement rates enables us to give the plaintiff fair compensation for the loss he has suffered. Therefore I would vary the decree of Crowe, J., by suqstituting for Rs. 8,542-8-0 a sum to be ascertained on the footing of the actual value in February being Rs. 21-8-0 and other months Rs. 23.

We do not disturb the order of costs in the lower Court. Each party to bear his own costs of the appeal.

CHANDAVARKAR, J. :—I concur.

Decree varied.

Attorneys for the appellant (defendant)—*Messrs. Ardesir, Hormasji and Dinsha.*

Attorneys for the respondent (plaintiff)—*Messrs. Crawford, Brown & Co.*

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Aston.

1902. *August* 4.

TULSIRAM AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* MURLIDHAR CHATURBHUJ MARWADI (ORIGINAL PLAINTIFF), RESPONDENT.*

Vendor and purchaser—Sale of property—No title in vendor to part of property sold—Suit by purchaser for damages—Failure of consideration—Cause of action—Limitation Act (XV of 1877), schedule II, articles 83 and 97—Covenant for quiet enjoyment.

On the 22nd November, 1880, the first and second defendants for themselves and for the third defendant sold a certain house to the plaintiff's father. The sale deed, which was duly registered, contained the following clause: "We (vendors) are in enjoyment of the house as its owners, and if any one were to obstruct you in the enjoyment of the house we would remove the obstruction so as to put you to no trouble." In the year 1892 the plaintiff brought a suit to recover possession of the house. Both the lower Courts awarded the claim, but

* Second Appeal No. 24 of 1902.