APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1921. *January* 21.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY MR. CHARLES BERRY, SECRETARY, PORT TRUST, ADEN (ORIGINAL PLAINTIFF), APPELLANT *v.* DILSIZIAN FRERES AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

Indian Contract Act (IX of 1872), section 74—Security Bond—Breach of condition—Court not bound to exact full amount—Nature of bond and terms broken should be considered.

Although the exception to section 74 of Indian Contract Act, 1872, says that a person entering into a bond shall be liable, upon the breach of the bond, to pay the whole sum mentioned therein, it does not mean that the Court is bound to exact the whole amount. The Court has discretion to consider the nature of the bond and the terms broken.

The defendants, being desirous of exporting 50 bales of piece goods from Aden to Dijbouti, entered into a bond for Rs. 45,600 with the Government the condition of the bond being that if the defendants should produce a certificate from a responsible officer at the port of destination as to the arrival of the goods, or in default of such certificate, should produce good and sufficient reason for the non-production thereof then the bond should be void. The defendants produced a certificate for 40 bales only, and could not give good and sufficient reasons for the non-production of a certificate with reference to the remaining ten bales. The Government having sued for the whole amount of the bond,

Held, that, considering the nature of the bond, it would be inequitable for the Court to pass a decree for the whole amount, but the defendants were certainly liable on their bond to the extent to which they had failed to perform its condition, and it would be reasonable, in the circumstances, to exact one fifth of the penalty.

CIVIL reference made by Major General J. M. Stewart, Political Resident at Aden, under section 8 of Bom. Act II of 1864.

Suit to recover money due on a bond.

On the 13th March 1918, the defendant No. 1 presented a pass note in the Revenue office of the Aden Port

* Civil Reference No. 6 of 1920.

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Trust for the export from Aden to Dijbouti of 50 bales of Japanese piece-goods by S. S. Cetriana. To ensure the arrival of the vessel and her cargo at the professed port of destination, the permission asked for was granted on condition of defendant No. 1 executing a bond with two sureties for the production of certificate from a proper and responsible officer of the Port of Dijbouti that the goods mentioned in the bond had been actually landed at Dijbouti.

Defendants Nos. 2 and 3 stood sureties for defendant No. 1 and under date the 15th March 1918 all the defendants executed a bond whereby they jointly and severally bound themselves to pay to the plaintiff, the Secretary of State for India in Council, the sum of Rs. 45,600 in the event of the certificate mentioned in the bond not being produced by defendant No. 1. The material terms of the bond were as follows :—

"That if the said Dilsizian Freres or his or some of his heirs, executors, administrators or legal representatives shall and do on or before the fifteenth day of May one thousand nine hundred and eighteen produce, or cause to be produced to the said Chairman or the person exercising the duties of the office of the Chairman, Port Trust at Aden, for the time being, a certificate from a proper and responsible officer of the said port of Dijbouti to which the said vessel has been declared to be bound as aforesaid, as to the arrival at such port of such vessel and as to the due landing of the said goods at such port and as to such goods not having been there reshipped or transhipped to some other port (other than to or for the said port of Dijbouti) or shall produce or show, or cause to be produced or shown to the said Chairman or other person exercising the duties of the office of the Chairman, Port Trust at Aden, for the time being good and sufficient reason to the satisfaction of the said chairman or such person as aforesaid for the non-production of such a certificate as to the said matters or any of them, then the above written bond shall be void, otherwise the same shall be and remain in full force and virtue."

Defendant No. 1 who possessed a duplicate of the bond, dated 15th March 1918, produced the same to plaintiff with a certificate endorsed thereon by the Chief of the Customs at Dijbouti showing that only

40 bales (of Japanese piece-goods) had been landed instead of 50 as mentioned therein.

Defendant No. 1 was thereupon called to show satisfactory reasons accounting for the 10 bales short landed at Dijbouti, and as he failed in this, the plaintiff sued to recover Rs. 45,600 the amount mentioned in the bond.

Defendants contended that defendant No. 1 had satisfactorily complied with the conditions of the bond; that 50 bales were shipped on board the S. S. Cetriana as per the mate's receipt against which defendant No. 1 obtained the Bill of Lading and that the shipowners who carried the goods to Dijbouti were responsible to him for the loss of 10 packages which he sustained through their default and negligence.

The Assistant Resident at Aden found that the defendant No. 1 had fully and satisfactorily complied with the conditions of the bond, that he had given satisfactory reasons accounting for the ten bales not being disembarked at Djibouti. He, therefore, dismissed the plaintiff's suit.

Against the decree the plaintiff appealed to the Court of the Resident at Aden, and prayed that the case be referred to the High Court, Bombay, under section 8 of Bom. Act II of 1864.

Sir Thomas Strangman, Advocate General, with Government Pleader, for the appellant.

Coltman with *Crawford Bayley & Co.*, attorneys for the respondents.

MACLEOD, C. J.:—The plaintiff, the Secretary of State for India in Council, filed this suit in the Resident's Court at Aden against the three defendants to recover Rs. 45,600 alleged to be due on a bond signed by the

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defendants, Exhibit P1, on the 15th of March 1918. The defendants were anxious to export from Aden fifty bales of piece-goods to Dijbouti on the African Coast. The Government were anxious that goods exported from Aden, should not be diverted from the port of destination and smuggled into enemies' territory. Therefore they exacted bonds from exporters, the condition of the bond being that if the exporter should produce a certificate from a proper and responsible officer at the port of destination as to the arrival at such port of the vessel and as to the due landing of the goods in question and as to such goods not having been there reshipped or transhipped to some other port, or should give, in default of such certificate, good and sufficient reason to the satisfaction of the Port Trust in whose name the bond was taken for the non-production of such certificate, then the bond should be void. It was claimed that the defendants became liable on their bond to the extent of Rs. 45,600, because they were unable to produce a certificate that the fifty cases were landed at Dijbouti. They produced a certificate for forty cases only. Therefore they became liable on their bond unless they could give a good and sufficient reason for the non-production of the certificate for the remaining ten cases.

In the first Court the suit was dismissed, but on appeal to the Court of the Political Resident it was held that the onus of proving satisfactory reasons for the non-production of the certificate lay on the defendants, and the defendants had not discharged the burden of proof. The case was then referred to this Court under section 8 of the Aden Courts' Act.

The plaintiff in the plaint claimed that he was entitled to succeed, because no certificate had been produced with regard to the ten cases, and clearly the Political Resident was right in saying that the onus

lay on the defendants to give good and sufficient reasons why the certificate was not produced. They might have shown that the goods were actually shipped on board complete as to their number and that it was absolutely inexplicable why they were not landed out of the ship at Dijbouti, and it may very well have been if they had proved to the satisfaction of the Court that all the fifty cases had been shipped, the Court would have taken a different view. The trial Court as a matter of fact thought that the evidence of the shipment of fifty cases was sufficient to prove what the defendants were required to prove. But I think that the Political Resident was perfectly correct in holding that there is no evidence at all that these ten cases actually arrived on board the ss. Cetriana. There was no direct evidence, such as the evidence of the wharfinger or the lighterman who actually put the goods on board, or the Ship's Officer who received the goods on board. There was only the presumption arising from the fact that the bill of lading produced was for fifty bales, but it must be noted that the bill of lading was made out without the mate's receipt. The defendants' evidence does not exclude by any means the possibility that these ten cases had been diverted to some other destination. I think, therefore, that the defendants have become liable on their bond. But the defendants' counsel argued that although under the Exception to section 74 of the Indian Contract Act they are liable to pay the whole amount mentioned in the bond, it is clearly open to the Court to pass a decree for a lesser amount. I think it is clear that this bond comes under the Exception to section 74 as the bond was given under the orders of the Government of India for the performance of an act in which the public were interested. It is not likely that when the Indian Contract Act was passed, the Legislature contemplated circumstances arising such as those in which this bond

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was exacted in this form from exporters. But clearly the defendants gave the bond for their producing a certificate that these goods had arrived at their proper destination, and that certainly was an act in which the public were interested, considering the state of War which existed when the bond was passed. But although the Exception says that the person entering into the bond shall be liable upon breach of the bond to pay the whole sum mentioned therein, that in ordinary legal language does not mean that the Court is bound to exact the whole of the liability to the extent of the amount mentioned in the bond and to pass a decree for the whole amount. Considering the nature of this bond it certainly would be most inequitable for the Court to pass a decree for the whole amount whatever the circumstances might be, leaving the defendant to the mercy of the plaintiff to relax what he was entitled to under the decree. Here in this case the whole of the terms of the bond have not been broken, but from the Advocate General's argument it would follow that even if one bale had been missing and a certificate had been issued for forty-nine bales, still the Court would have been bound to pass a decree for the plaintiff for the whole amount of the bond. There is no direct authority on the construction of the Exception. But generally when it is said that a person renders himself liable to a particular penalty in the case of his having broken any condition or committed any breach of what he was obliged to do, then the meaning is that the sum of the penalty is the total of the amount of his liability beyond which his liability cannot be stretched. It does not mean generally that all discretion is taken out of the hands of the Court so that it cannot reduce the amount of the penalty according to the circumstances of the case.

We think, therefore, that in this case as the plaintiff has shown that the certificate for ten cases was not produced, and the defendants have not shown why it was not produced, they are certainly liable on their bond to the extent to which they failed to perform its condition, and therefore it would be reasonable to exact one-fifth of the penalty.

The papers therefore will be returned to the Political Resident with this expression of our opinion.

Costs will be costs in the appeal.

SHAH, J. :—I agree.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

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January 28.

SARDAR T. G. GOKHALE (ORIGINAL DEFENDANT No. 2), APPELLANT *v.* RAMCHANDRA TRIMBAK KIRTANE AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS*.

Set off—Suit by liquidators on joint promissory note—Claim to set off separate debt—Indian Companies Act (VII of 1913), section 229—Provincial Insolvency Act (III of 1907), section 30—Mutual dealings—Indian Contract Act (IX of 1872), section 43.

One of two defendants, sued on a joint promissory note by the liquidators of a bank, sought to set off an amount admittedly due to him from the bank on his own separate deposit account :

Held, that, under the Indian Companies Act (VII of 1913), section 229, the provisions of the Provincial Insolvency Act (III of 1907), section 30 applied, and, the dealings in question not being "mutual dealings" within the meaning of that section, the amount claimed could not be set off.

As to the effect of section 43 of the Indian Contract Act,

Per MACLEOD, C. J. :—"I do not think that the mere fact that a suit could lie against one of two joint promissors could alter the fact that the

* Second Appeal No. 475 of 1920.