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SHIVSHANKAR GOVINDRA'M v. JUSTICES OF PEACE, BOMBAY.

SARGENT, J. :—It is just possible that the Justices might render themselves liable for a tort committed by the Commissioner by interfering personally in the collection of the rate; but there is nothing in this case to show that they did so, and the Commissioner is clearly not their agent so as to fix them with liability for torts committed by him in the general course of his business. The plaintiff must pay the costs of reserving this question.

Sept. 1.

Referred Case.

MEHERVA'NJI MANCHARJI .....*Plaintiff.*
PUNJA' VELJI .....*Defendant.*

Jurisdiction—Small Cause Court—Liquidated Damages—Earnest-money.

Where a contract for the sale and delivery of two thousand *barás* of stone contained a provision that in case of breach by the purchaser, damages (liquidated) were to be paid by him at the rate of one rupee per *barás*, and the purchaser paid Rs. 1,000 earnest-money, but made default in accepting the stone :—

Held that, though in default of acceptance, the earnest-money, Rs. 1,000, was forfeited, the vendor could not retain the earnest-money and sue for the whole amount of the liquidated damages (Rs. 2,000), but that his proper course was to sue the purchaser for the difference only, and, such difference amounting to Rs. 1,000, that the suit was properly brought in the Small Cause Court.

CASE stated for the opinion of the High Court, under Sec. 55 of Act IX. of 1850 and Sec. 7 of Act XXVI. of 1864, by John O'Leary, First Judge of the Bombay Court of Small Causes :—

"In this action, which was tried before me on the 6th day of May 1868, the plaintiffs sought to recover from the defendant the sum of Rs. 1,000, being the balance of a sum of Rs. 2,000 alleged to be due by the defendant to the plaintiff as liquidated damages for breach of a certain agreement (translated copy of agreement marked A annexed), after giving credit to the defendant for the sum of Rs. 1,000, deposited with the plaintiff by the defendant on account of the said agreement.

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"The defendant pleaded—1*st*, want of jurisdiction in this court to try the case; and, 2*nd*, a denial of the breach of the agreement on his part.

"On the evidence I found that the defendant had broken the agreement, and was liable to pay to the plaintiff Rs. 2,000, being the liquidated damages as in the said agreement provided.

"As to the plea to the jurisdiction, I held that the plaintiff was entitled to sue for the liquidated damages due to him, and to give credit to the defendant in the summons for the amount of Rs. 1,000, which, it was admitted, was deposited with the plaintiff by the defendant on account of the said agreement, and thus bring his claim within the jurisdiction of this court; and I found a verdict for the plaintiff for Rs. 1,000 and costs, subject to the opinion of the High Court on the following question:—

"Had the court of Small Causes jurisdiction to try the above case, on the ground that the claim was brought within the pecuniary jurisdiction of that court by the credit given to the defendant of the sum of Rs. 1,000 deposited with the plaintiff by the defendant on account of the said agreement?

"And whereas the defendant has deposited in this court the said several sums so decreed to be paid to the plaintiff, together with the sum of Rs. 50 for the costs of taking out such order as may hereafter be made herein,

"The High Court will make such order in the premises as to it shall seem meet."

The following is a translation of the agreement above referred to:—

"To Pársi Mehervánji Mancharji. Written by Thakar Punjá Válji & Co. To wit: I do give in writing unto you as follows:—I have agreed to purchase from you 2,000, namely, two thousand, *barás* of rubble stone. The same is agreed to by me and you. Rubble stone is to be duly measured at the rate of feet (100) one hundred per one *baras*; the price

of that one *barás* is at the rate of Rs. 4-6-0, namely, four rupees and a quarter and two annas, at which rate I have agreed to take (or purchase) the same; it is duly agreed to by, and binding on, me and you. As to the time fixed in respect of the abovementioned two thousand *barás*, I will duly take delivery (of the same) in full from the first day of November of the year 1867 up to the first day of February of the year 1868; and in the event of your not delivering the goods to me at the fixed time, I will duly receive from you damages at the rate of one rupee per one *barás*; and the abovementioned number of *barás* you have agreed to deliver; (and) as to the balance (or remainder) of the *barás* or rubble stone relating to you, as long as I shall keep (or purchase) the same, you cannot sell to any other person. In the event of your selling (the same) to any one else, I will duly receive from you damages in respect of as much goods as you shall have sold. You are to prefer to me a bill for the money in respect of these your goods in 10, namely, ten, days. On deducting from that bill 5 per cent., namely five per cent., whatever balance of account there may be, I will duly pay the same in full.

"In the event of my not taking (delivery) of the abovementioned number of *barás*, I will duly pay damages at the rate of one rupee per one *barás*.

"I have agreed to purchase from you these abovementioned *barás* 2,000, namely, two thousand: on account thereof Rs. 1,000, namely, one thousand, have been duly paid in cash; and hereafter, when my work shall commence, from the first day of November, and your goods shall come, on deducting Rupees one thousand from the amount of the goods, I will duly pay in full the bill which you shall prefer in respect of the balance remaining (unpaid). Now as to five per cent. of your money, which shall continue to remain with me, I will duly pay that amount to you in full. Lastly, and I am to pay to you money in full, clear (or without deduction). I will not deduct anything therefrom (and receive) from you. I have given this writing in writing of my own will and accord, and in sound sense and understanding; the English

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date is the 19th of August of the year 1867. The handwriting is that of Rámji Rúpji."

There was no appearance for the plaintiff.

Farran for the defendant.

COUCH, C.J. :—In this case, which was stated for the opinion of this court by the Chief Judge of the Small Cause Court, and was an action to recover Rs. 1,000, alleged balance of liquidated damages due from the defendant to the plaintiff on account of a breach of contract by the former, in which the defendant pleaded to the jurisdiction of the Small Cause Court, the question is, whether or not that court had jurisdiction to entertain the suit.

The agreement on which the action was founded was one between the plaintiff and the defendant by which the parties agreed, the one to sell and the other to purchase, a quantity of rubble stone, amounting to two thousand *barás*, at the rate of Rs. 4-6-0 per *barás*. Then, after providing for the delivery of the stone, the agreement proceeds to state what is to be done in case of a breach of the contract. The material portion is—"In the event of my not taking (delivery) of the abovementioned number of *barás*, I will duly pay damages at the rate of one rupee per one *barás*. I have agreed to purchase from you these abovementioned *barás* 2,000, namely, two thousand, on account thereof Rs. 1,000, namely, one thousand, have been duly paid in cash, and hereafter, when my work shall commence, from the first day of November, and your goods shall come, on deducting Rupees one thousand from the amount of the goods, I will duly pay in full the bill which you shall prefer in respect of the balance remaining (unpaid)."

What was done was, that the defendant, the purchaser, paid to the plaintiff, the seller, a deposit amounting to Rs. 1,000. The plaintiff now complains that the purchaser has broken the contract, and is bound to pay him Rs. 2,000, and has given credit to the defendant for Rs. 1,000, and seeks to recover only the remaining Rs. 1,000. It is objected on the part of the defendant that the plaintiff is not bound

to do that, nor is he right in doing so, but that he is bound to sue for the whole Rs. 2,000 or abandon the difference, leaving the question as to the deposit-money untouched); and the real question is whether he has properly sued for Rs. 1,000 only. The position of the parties was this: the defendant could not recover back the deposit from the plaintiff, as the plaintiff had not broken his contract; the deposit was forfeited by the defendant: *Spratt* v. *Jeffery* (*a*), *Beavan* v. *M'Donnell* (*b*). But then, though the defendant, there having been a default, could not recover back his deposit, yet the intention of the parties appears to have been that the plaintiff was not to be entitled to have Rs. 2,000 and the deposit also; and this is in accordance with what is the law on the subject: *Palmer* v. *Temple* (*c*).

Independently of authority, however, any one reading the agreement would say that the deposit should be considered as paid on account of the damages. The rights of the parties were these. The plaintiff was entitled to Rs. 2,000 only, as liquidated damages. The defendant could not get back his Rs. 1,000 deposit, as the plaintiff was entitled to retain that sum. The proper course, therefore, for the plaintiff was to apply the Rs. 1,000 in reduction of the liquidated damages, and to sue for the balance only, which is what he has done.

Under these circumstances, the suit was rightly brought in the Court of Small Causes. The case is very like one* which came before this Court not long since, from the Small Cause Court, and the principle then laid down applies. I am of opinion that the Judge was right in holding that he had jurisdiction; and that the defendant should pay the costs of reserving this question.

SARGENT, J.:—I concur. It would not be at variance with any of the decisions to hold that a deposit is paid on account of whatever may happen in respect of the contract, if the contract be performed as on account of the purchase-money, and if it be broken on account of the damages.

(*a*) 10 B. & C. 249. (*b*) 9 Exch. 309. (*c*) 9 Ad. & E. 508.

* *Hásam Kásam* v. *Gomá Jádavji*, *suprà*, p. 140.

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Assuming that to be the right principle, the plaintiff could only recover what is the real amount of damage (which in this case is ascertained), *minus* the amount already paid.

Aug. 30.

Original Suit No. 461 *of* 1867.

BEATTIE *et al.* .....*Plaintiffs.*

JETHA' DUNGARSI..... *Defendant.*

Mortgage—Right of Mortgagee to withhold production of Mortgage Deed or Title-deeds—Declaratory Decree—Consequential Relief—Civ. Proc. Code, Sec. 15.

B. mortgaged by deed certain premises to J. D., and at the same time delivered to him title-deeds comprising the said premises, and also other immoveable property of B. B. subsequently became embarrassed, and assigned all his immoveable estate to trustees for his creditors.

The trustees sued J. D., and, alleging that he had refused to permit the sale by them of the said immoveable property, including the mortgaged premises (they offering to apply the proceeds of the latter in satisfaction of J. D.'s claim) and to hand over to them the said title-deeds, prayed for a declaration that the said immoveable property other than the mortgaged premises was vested in them free from any lien of the defendant.

J. D., in his written statement claimed a lien on all the title-deeds, and submitted that he was not bound (until his claim was satisfied) to hand them over to the plaintiffs, or to produce the same or his deed of mortgage.

Semble, that, on the authorities, J. D. was not bound to produce the title-deeds before satisfaction of his claim.

Quære whether before such satisfaction he was bound to produce even his deed of mortgage?

Held that J. D. not having made any attempt or taken any active measures to enforce his lien, and no foundation having been laid by the plaintiffs upon which consequential relief could be granted by the Court, the latter were not, under Sec. 15 of the Civil Procedure Code, entitled to a declaratory decree.

THIS case, the facts of which appear from the judgment of the Court, was tried before WESTROPP, J., in a Division Court, June 25 and 27, 1867.

Howard, for the plaintiffs, insisted that the defendant ought to be now ordered to produce his deed of mortgage and title-deeds; that his written statement was evasive; and that, under Sec. 15 of Act VIII. of 1859, the plaintiffs were entitled to the declaratory decree prayed by the plaint.

White, for the defendant: The Court will not compel the production of documents: 2 Spence Eq. Jur. 670, *Addison*