[PRIVY COUNCIL.]

1911.

Present : Lord MacNaghten, Lord Atkinson, Lord Shaw, and Lord Robson.

PLESS POL *v.* LADY DE SOYSA *et al.*

D. C. Kandy, 17,549.

Contract made in one place—Performance at a different place—Where cause of action arises—Civil Procedure Code, ss. 5 and 9 (e).

Assignment of interest in pending action—Validity—Civil Procedure Code, s. 404.

Building agreement—Damages for delay in completion of works—Liquidated damages and penalty.

Right to assign lease—No express covenant not to assign.

The plaintiff and the defendants entered into a contract at Colombo, which was to be performed at Kandy. The plaintiff, alleging a breach of the contract by the defendants, sued them for damages in the District Court of Kandy.

Held, that the District Court of Kandy had jurisdiction to entertain the action. (*9 N. L. R. 316* affirmed.)

Even if as a matter of procedure the assignment of the rights of a party in a pending action after *litis contestatio* was prohibited by the Roman-Dutch law, such prohibition is removed by the provisions of section 404. (*10 N. L. R. 252; 3 Bal. 146* affirmed.)

Where the defendants agreed to grant to the plaintiff a lease of certain premises, and also undertook to effect and complete certain alterations and improvements to the premises before May 15, 1905, and in default to pay the plaintiff Rs. 150 a day, as liquidated damages, for each day after that date, and, where default having been made by the defendant, the plaintiff sued for the recovery of the damages stipulated—

Held, that the amount agreed upon must be considered as liquidated damages and not penalty, and that the plaintiff was entitled to recover the same. (*12 N. L. R. 45* affirmed.)

THE facts are set out in the judgment. The judgments appealed against are reported in *9 N. L. R. 316*, *10 N. L. R. 252* (*3 Bal. 146*), *12 N. L. R. 45*.

Lawrence, K.C., and *Atherley-Jones, K.C.* (with them *H. E. Miller* and *F. H. M. Corbet*), for appellants.

Atkin, K.C. (with him *E. G. Mears*), for respondent.

Atherley-Jones, in reply.

1911. July 19, 1911. Delivered by LORD ATKINSON:—

Pless Pol v. Lady de Soysa

This is an appeal from a final judgment in review of the Supreme Court of Ceylon dated October 12, 1909, affirming a final judgment of the same Court dated March 4, 1909. And also from two interlocutory judgments of the same Court, the first bearing date October 2, 1906, and the second April 24, 1907.

The action, in the different stages of which these several judgments were pronounced, was instituted by the respondent, De Pless Pol, in the District Court of Kandy, to recover damages for breach of a certain agreement, dated February 17, 1905, entered into between the plaintiff, De Pless Pol, and the appellants. The sum of Rs. 150 per day was claimed as liquidated damages from May 15, 1905, the date of the alleged breach, to the bringing of the action, amounting to Rs. 32,400, and a further sum, calculated at the same rate, from this latter date to the completion of the works with which the said agreement was conversant. The damages actually awarded by the District Judge of Kandy were Rs. 16,500 in respect of the continuing breach by the defendants of their contract up to December 19, 1905, and Rs. 60,000 in respect of the damages sustained from that date up to the date of the judgment. He further declared that the agreement between the parties in respect of the breaches of which the action was brought was determined as and from the latter date, and condemned the defendants in the costs of the action. This judgment was affirmed on appeal in the Supreme Court by the judgments already mentioned.

By the contract of February 17, 1905, so declared to be determined, the appellants agreed to grant to the said De Pless Pol a lease of the lands and premises known as "Haramby House," as soon as certain works, buildings, additions, and alterations should be executed thereon and effected therein, for a period of ten years from June 15, 1905, at the rent of Rs. 150 per month for the first two years of the term, Rs. 200 per month for the third and fourth years, and Rs. 300 per month for the residue of the term. It was admittedly the purpose of the contracting parties to convert the premises into a hotel, to be called the "Savoy Hotel." Glowing accounts were given of the beauty of the situation and of the palatial proportions of the intended structure, and extravagant hopes were apparently entertained of the ultimate success of the project.

The agreement contained further provisions both as to execution of the contemplated works and the contents of the promised lease necessary to be considered. The works to be executed are specified in Schedule B attached to the agreement. They are described in some instances in vague and general language, such as "building and increasing the size of some rooms," and "the construction of six additional bedrooms (as being constructed at present)." In several instances no dimensions or details are given, and by the

provisions of paragraph 5 of the agreement the appellants bound themselves to execute these works at their own expense in a good, substantial, and workmanlike manner, and to complete the house so as to be fit for habitation on or before May 15, 1905. This period was subsequently extended by consent till September 1, 1905.

By the 2nd paragraph of the agreement it was stipulated that the contemplated lease should contain covenants by the lessee to pay the rent reserved, all rates and impositions, and interest at 10 per cent. per annum on the actual value of the works mentioned in Schedule B, keep and leave the premises in good repair, and not to use them for any purpose other than that of a dwelling-house, boarding-house, or properly conducted hotel. It was by paragraph 3 provided that the lease should contain in addition all covenants and conditions usually inserted in leases of such nature, and a proviso for re-entry by the lessor upon non-payment of the rent or interest for thirty days after same became due, or on breach by the lessee of any of the covenants by him contained in the lease. Though it is provided that the lease is to be made to the " lessee," that term is defined to include his heirs, executors, administrators, or assigns, and there is no express covenant not to assign, either with or without the lessors' consent. And it is not disputed that such a covenant would not be covered by the words " usual covenants."

There is a provision, however, in paragraph 4 of the agreement that the lessor shall amongst other things covenant " not to withhold, except for exceptionaly strong and good reasons, his consent to the lessee, at any time during the said term, assigning all his interest in the said lease to any other party or parties, or his subleasing the said premises." Mr. Lawrence, on behalf of the appellants, contended forcibly that this provision would be meaningless, unless the contemplated lease should contain a covenant by the lessee not to assign or sub-let without the previous consent of the lessor, and insisted that the parties must be taken to have intended that the contemplated lease should contain such a covenant, and also a reciprocal covenant by the lessor not, when asked, to withhold unreasonably his consent to such an assignment or sub-lease, and that the rights and obligations of the contracting parties should accordingly be determined as if these two covenants had been introduced, by implication, into the agreement. The point was of considerable importance in the case, because the lessee had on July 3, 1906, after action brought, sold and by deed of that date assigned to Mr. R. P. L. Perianen Chetty all his right, title, and interest in the agreement of February 17, 1905, and also his right, title, and interest in and to the pending action. And Perianen Chetty subsequently assigned by deed to one E. M. Shattock all the right and interest in the said agreement and pending action so purported to have been assigned to him by the deed of July 3, 1906. This point will be considered hereafter. The

1911.

LORD ATKINSON

Pless Pol v. Lady de Soysa

agreement contained a further provision to the effect that furniture, plate, linen, wines, stock-in-trade, and general equipment to the value of Rs. 7,000 should be brought into the premises by the lessee, for the purpose of running the contemplated hotel, and should be kept at that level, and that contemporaneously with the execution of the lease the lessee should mortgage these chattels to the lessors as a further security for the payment of the rent reserved, and for the performance of the lessee's covenants to be contained in the lease. It is now admitted that the works specified in the agreement were never carried out by the lessors, and it is clear upon the evidence that the plaintiff, De Pless Pol, was a heavy loser in the transaction. In the answer to the plaintiff's plaint filed in the District Court of Kandy on February 7, 1906, by the appellants, they pleaded amongst other things that the District Court at Kandy had no jurisdiction to entertain the suit. They raised the question that the sum of Rs. 150 per day claimed to be payable in respect of the omission was a penalty, not liquidated damages; alleged that the plaintiff, De Pless Pol, had refused to enter into a lease with the appellants as required by the agreement, and in respect of this last-mentioned averment claimed relief in "reconvention that the plaintiff be decreed to enter into a lease as aforesaid."

This answer was subsequently amended by the addition of a paragraph 1A setting forth the assignment above mentioned by De Pless Pol to Perianen Chetty, and averring that, as a matter of law, De Pless Pol, the plaintiff, could not, by reason thereof, maintain the action; but the relief prayed remained unaltered.

On May 31, 1906, the following issues were settled by the agreement of the plaintiff's proctor and the defendants' counsel:—

"(1) Whether this Court has jurisdiction to hear and determine this action?

"(2) Did the plaintiff request the defendants to make certain additions to and deviations from the works specified in Schedule B of the agreement pleaded, and was the completion of the work thereby delayed?

"(3) Did the plaintiff in consequence extend the time for the completion of the work to September 1, 1905, and waive his claim to damages, if any?

"(4) After September 1, 1905, did the defendants, at the request of the plaintiff, make further additions and deviations as aforesaid, and was the completion of the work thereby delayed, and was the time for completion extended thereafter, from time to time, with the consent of the plaintiff, till December 31, 1905?

"(5) Was the work, in point of fact, completed on December 31, 1905, and did plaintiff take possession of the house on or about that date?

"(6) What damages, if any, is the plaintiff entitled to recover?"

It will be observed that no issue is raised upon the paragraph added by amendment to the appellant's answer.

The District Judge on June 5, 1906, delivered judgment on the first issue, holding rightly, in their Lordships' view, that he had jurisdiction to entertain the suit. This order was appealed from, and the Supreme Court, by its order of October 2, 1906, dismissed the appeal.

An application was made on behalf of E. M. Shattock to the District Judge of Kandy in the month of January, 1907, that his name might be added as a plaintiff to the record. The application was refused; but by an order of the Supreme Court dated April 24, 1907, the order of the District Judge was set aside, and an order purporting to be made in pursuance of the provisions of section 404 of the Civil Procedure Code, 1889, was made to the effect that Shattock might be added as a co-plaintiff with De Pless Pol.

The case ultimately came on for trial before the District Judge at Kandy on September 22, 1907. It appears to have lasted several days. The issues of fact were all, it would seem, found in favour of the plaintiffs. The Trial Judge apparently held that the omission or neglect of the appellants to complete the works after September 1 was a continuing breach of their contract, and that the sum of Rs. 150 stipulated in paragraph 5 of the agreement to be paid in respect of every day they remained uncompleted was in the nature of liquidated damages, and not merely a penalty. He accordingly awarded to the respondent, De Pless Pol, damages at this rate in respect of the delay from September 1 to the institution of the action on December 19, 1905. In their Lordships' view the District Judge was right in holding that the breach was a continuing breach, and having regard to the number, dissimilar character, and vague description of the several things contracted by the appellants to be done, their Lordships see no reason to dissent from his conclusion that the sum of Rs. 150 per day were liquidated damages, and not a penalty, and therefore that the sum of Rs. 16,500 was well and properly awarded.

The second part of the order of the District Judge presents more difficulty. In respect of the non-completion of the work after the date of the institution of the action up to the date of the judgment he awarded Rs. 60,000 damages, and declared the agreement of February 17, 1905, to be determined from that date. It is obvious that the sum of Rs. 60,000 is much less than Rs. 150 per day from December 19, 1905, to November 11, 1907, but it is urged by Mr. Lawrence against this part of the decision that the Court, even if the breach were continuous, had not, either under the Roman-Dutch law or the Civil Procedure Code of 1889, any jurisdiction, such as is conferred by rule on English Courts, to award damages in respect of the portion of the breach which continued after action brought; and further, that neither of the parties ever repudiated

1911.

LORD ATKINSON

Pless Pol v. Lady de Soysa

the contract, or refused to perform it; that nothing in the nature of rescission had occurred, and therefore that the District Judge had no power either to declare the contract to be determined, or to do what he contends that Judge has in effect done, namely, awarded to the respondent damages for the loss of his contract. There is, no doubt, considerable force in this contention; but, on the other hand, one party to a contract is not bound to give to the other unlimited time after a day named to do that which the other has contracted to do. There must be some point of time at which delay or neglect amounts to refusal. The action was brought about two months after the extended time had expired. Judgment was not delivered until almost two years had elapsed from the bringing of the action—years into which was crowded a mass of angry and, to a large extent, useless litigation, by which De Pless Pol was financially crippled, and, if not absolutely ruined, was, at all events, rendered incapable of carrying out his side of the contemplated project, while the appellants took no adequate steps to carry out their side of it. In truth, the projects seem to have been to a great extent, if not altogether, abandoned by all the parties concerned. Having regard to the issues raised, the evidence given, and the mode in which the trial was conducted, it would appear to their Lordships that it was assumed on both sides that the District Judge should award damages down to the date of his judgment; that it was practically admitted the contemplated project would never be carried out, and that it had in effect been abandoned. On this basis the damages do not appear to be excessive; and, irrespective of the point raised upon the lessors' covenant not to withhold assent to an assignment to be presently considered, their Lordships do not see any ground for disturbing the judgment of the District Judge, affirmed as it has been twice by the judgments of the Supreme Court. As to the point on the assignment, their Lordships agree with Mr. Lawrence's contention that the provision in paragraph 4 of the agreement does suggest that the contracting parties contemplated and intended that there should be in the lease some provision dealing with assignment by the lessee of his interest. Where they disagree with him is that they think section 4 (*d*) is not so specific in its terms as to justify the introduction, by implication, into the agreement of a provision that the lease should contain a covenant by the lessee not to assign or sub-demise his interest without the consent of the lessor first had and obtained. Unless the covenant to be implied comes to that, the case would not be covered by the *Eastern Telegraph Company, Limited v. Dent*,[1] the authority on which he relies. A forfeiture would not be worked, and the plaintiffs would not be disentitled to sue for breach of agreement. But it is quite obvious that section 4 (*d*) would be quite consistent with a covenant by the lessee, that the latter should not without consent

[1] (*1899*) *1 K. B. 835.*

assign the premises for a particular purpose, or to a particular class of persons, of whom Perianen Chetty was not one, or except upon the payment of an increased rent. The covenant by the lessor that he would not withhold his consent, except for exceptionally strong and good reasons, would be quite as applicable to each of these stipulations as to that which Mr. Lawrence presses should be implied. For these reasons their Lordships think the contention of the appellants upon this point is unsound. On the whole, they are of opinion that substantial justice has been done, that the decisions appealed from were right, and should be affirmed, and this appeal be dismissed, and they will humbly advise His Majesty accordingly.

The appellants must pay the costs.