Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Middleton.

1909.
March 4.

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

D. C., Kandy, 17,549.

Building agreement—Damages for delay in completion of works—Liquidated damages and penalty—Roman-Dutch Law—English Law.

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.

APPEAL by the defendants from a judgment of the District Judge of Kandy (J. H. Templer, Esq.). The facts sufficiently appear in the judgments.

H. Jayewardene (with him *H. J. C. Pereira*), for the defendants, appellants.

Bawa (with him *VanLangenberg*), for the plaintiff, respondent.

Cur. adv. vult.

1909.
March 4.

March 4, 1909. HUTCHINSON C.J.—

The claim in this action is for damages for breach of an agreement in writing between the plaintiff and the defendants dated February 17, 1905, by which the defendants agreed to grant to the plaintiff a lease of premises called "Haramby House" at Kandy for ten years from June 15, 1905, and to complete certain alterations and improvements to the premises before May 15, 1905, and in default to pay the plaintiff Rs. 150 a day for each day after that date that the work was unfinished. The District Court gave judgment for the plaintiff. The judgment is appealed against on several grounds.

(1) On the issue, "Whether the plaintiff requested the defendants to make certain additions to and deviations from the works specified in the agreement, and whether the completion of the work was thereby delayed," the District Judge has found that the plaintiff did so request the defendants, but that none of the alterations or deviations was requested after June, 1905, at the latest, and that "the work was thereby very slightly delayed, if at all." And he has found, in answer to the second issue, that the plaintiff extended the time for completion of the work to September 1, 1905, and waived his claim to damages up to that date; and he was of opinion that this extension was due more to the plaintiff's anxiety to get a loan from the defendant, J. W. C. de Soysa, than as any concession to the lessors in consideration of the additions and deviations. The extension was granted by a letter (J 1) dated July 25, 1905, from the plaintiff to J. W. C. de Soysa. The defendants pleaded that the plaintiff from time to time extended the time for the completion of the work after September 1, and consented to the defendants having such time as they might require for the completion. The District Judge has found that no additions or deviations was made, at the plaintiff's request, after September 1, and that the plaintiff did not grant any further extension of the time for completion. I am not at all convinced that any of those findings of fact was mistaken. And the result is that the time for completion was by agreement of the parties extended from June 15 to September 1, and no longer.

(2) On the issue, "Was the work completed on December 31, 1905, and did the plaintiff take possession of the house on or about that date?" The District Judge has found that the work was not completed on December 31, 1905, in terms of the agreement, and that the plaintiff never took possession of it. He said: "There cannot be the least doubt that, even if there had been no additions or deviations on the works contemplated by the agreement, Haramby House, even up to the present date" (March 11, 1907) "has not been completed and finished, fit for habitation or use; neither has the work been done in a good, substantial, and workmanlike manner, nor were fit and proper materials used, nor was proper deligence employed in the construction of the works." The

evidence, especially that of Speldewinde (including his reports on the buildings dated February 19, 1906, R 4) fully bears out that finding.

(3) In that part of his judgment which refers to the state of the buildings in December, the Judge, speaking of the five extra bedrooms which he thought were the principal additions that the plaintiff required, said : " Although I was unable to enter these rooms when I visited the premises on September 28, 1907 " (with the parties and their counsel during the trial), " I had, as a matter of fact, been over Haramby House in December, 1905, when the building was still in the hands of De Soysa, and went into most of those five rooms; and, as far as I can remember, I considered them so small, ill-ventilated, and ill-lit that no European would ever dream of occupying one if he could get a room elsewehere ; " and he describes their dimensions. The appellants urge that the Judge was wrong in importing into the case knowledge acquired by him in the absence of the parties long before the trial, and making that knowledge one of his grounds of decision ; and that they were prejudiced by his doing so, and are therefore entitled to a new trial. I can hardly take that objection seriously. It would have been better if the Judge had forgotten that he had ever seen the place before he inspected it in the presence of the parties; but, after all, his judgment as to the condition of the whole of the buildings in December, 1905, was not founded on his recollection of the size and condition of those five rooms, but on the evidence as to the whole of the buildings.

(4) I think the Judge was right in finding that the plaintiff never took possession. Some of the furniture and other things which he had bought for the purpose of the proposed hotel were stored in some of the rooms, and it seems that the keys of these rooms, or some of them, were kept by the plaintiff or his clerk ; but the things were stored there at the suggestion of De Soysa's agent, so that there might be some security for the money which De Soysa had lent to the plaintiff ; and it is clear that the plaintiff did not take possession of the premises before he brought this action.

(5) The Judge awarded the plaintiff damages at the rate of Rs. 150 a day from September 1 to December 19, when the action was commenced, and also a further sum of Rs. 60,000 as damages from December 19 to the date of judgment. Two objections are taken to this award :—(*a*) The award is founded on the 5th clause of the agreement, by which it was agreed that " if the lessors shall not complete all the said works in the said Schedule B hereto on or before May 15, 1905, the lessors shall pay or cause to be paid to the lessee a sum of Rs. 150 per day for each and every day beyond that date that the said works or any of them shall be and remain unfinished and incomplete, such sum to be so payable to be deemed, not as a penalty, but by way of liquidated damages."

1909.
March 4.

HUTCHINSON C.J.

The appellants say in their answer that, assuming that there was any breach of contract on their part, the plaintiff is entitled only to recover such damages as he may have actually sustained, and that he in fact sustained no damage. There was no issue as to whether he had sustained no damage other than the general issue : " What damage, if any, is the plaintiff entitled to recover ? " The appellants contended that the evidence showed that towards the end of 1905 the plaintiff was hopelessly impecunious and could not have opened and carried on the hotel for which the buildings were designed, if they had been perfectly complete for the purpose at that time ; and that therefore he actually suffered no damage. They say that by the Roman-Dutch Law the sum fixed by the parties in an agreement as the amount of damages in case of breach cannot be recovered if it turns out that it was excessive, "*ingens*" ; in support of this statement of the law reference was made to *Voet, 45, 1, 13; Van Leenwen's Censura Forensis, Bk. 4, Ch. 15 (page 110 of Berwick's translation) ; Ramanathan (1820), 39 ; Ramanathan (1877), 362, 371 ; 4 N. L. R. 285 ; Pothier 1, 207 ; Maasdorp on Obligations, 252 ; Nathan, 2, 669-674.* They admit that at the time when the agreement was made it could not have been said that the amount fixed was excessive, but say that it turned out afterwards that the plaintiff would not have had the means to take up the lease and make a profitable use of it, and therefore the amount was proved to have been excessive.

My opinion is that, where it is impossible to say beforehand what the amount of damage will be, if the contract is broken, and the parties in the contract agree on the amount and say that it shall be taken to be liquidated damages and not a penalty, the authorities show that that amount is recoverable, unless it appears from the contract itself that the amount is excessive, and was really intended by the parties to be a penalty. In this same agreement there is a clause providing that if the lessee shall not accept the lease, he shall pay to the lessors Rs. 7,000, " such sum to be deemed also, not as a penalty, but by way of liquidated damages." In both cases it seems to me clear that the parties meant what they said, and were bound by it. If the lessors had carried out their part of the agreement and the lessee had not accepted the lease, and they had sued him for the Rs. 7,000, he would not, in my opinion, have been able to escape payment by proving that the lessors had suffered no loss, because, for example, they could have let the property to some one else at a higher rent. But if my opinion on that point is wrong, and it was a good defence to the present action to prove that Rs. 150 a day was excessive, it has not been proved. There was no express issue on this point, and it is not proved that, if the buildings had been ready on September 1, the lessee would not have been able to obtain funds to take up the lease and carry on the hotel.

(6) With regard to the damages awarded for the period from December 19 to the date of judgment, it seems that in strictness the Judge should have awarded much more than he has done, for Rs. 150 a day would amount to a great deal more than Rs. 60,000. The respondent has not, however, pressed that objection, and I think that the award should stand. And with regard to the statement in the judgment that the agreement is determined as from the date of the judgment, that does not appear in the formal decree, and I need say nothing more about it.

In my opinion the decree of the District Court should be affirmed with costs.

MIDDLETON J.—

This was an action for breach for an agreement in a contract dated February 15, 1905, by which defendants agreed at their own charges and expenses on or before May 15, 1905, to erect, build, complete, and finish, fit for habitation and use, in a good, substantial, and workmanlike manner, with fit and proper materials certain works to Haramby House in Schedule B of the contract (before May 15, 1905). If not complete, the defendants agreed to pay the plaintiff Rs. 150 a day, not as a penalty, but by way of liquidated damages. The defendants further agreed to let the said premises for ten years to the plaintiff when so complete, and the plaintiff agreed to pay Rs. 7,000 as liquidated damages if he did not accept the said lease.

Judgment was given for the plaintiff for Rs. 16,500 as damages from September 1, 1905, as and being the date to which the time for completion was extended till December 19, 1905, the date of action at Rs. 150 a day, and further for a lump sum of Rs. 60,000 to cover all damages sustained by plaintiff from December 19, 1905, to the date of the judgment. The judgment at the same time assumed to declare the agreement at an end, but the decree contained no statement to this effect. The defendants appealed.

The principal points raised in appeal were (1) that the District Judge had imported his own personal knowledge of the premises into the case, and had given judgment without support from other evidence in the record and ignoring the correspondence, and therefore defendants were entitled to a new trial; (2) that the District Judge was wrong in holding that there was no extension of time granted to the defendants after September 1, 1905; (3) that the premises were in fact ready for use and occupation in December, 1905; (4) that the District Judge should have held that the damages agreed upon were "*ingens*" and in the nature of a penalty, and according to Roman-Dutch Law should have reduced them to the actual damages sustained, taking into consideration the fact that the plaintiff was not in a pecuniary position to open the premises as a hotel, even if they had been ready for occupation; (5) generally

1909. March 4. MIDDLETON J.

that the damages were excessive ; (6) that the District Judge had gone outside the pleadings in declaring the contract at an end.

The District Judge has found on issue (2) that the plaintiff did request the lessors to make certain additional bedrooms, deviations as to the storerooms, minor alterations such as that to the porch, and others of a trifling nature after the agreement was signed, but that none of these alterations or deviations were asked for after June, 1905, and that the work was thereby very slightly delayed, if at all, the real delay arising from the impossibility of completing the original work within the short period of three months allowed by the contract. I see no reason for holding on the evidence that this finding is not substantially correct.

As regards issue (3), the District Judge holds that the plaintiff did extend the time for completion of the work to September 1, 1905. This, I think, is clear from J 1 dated July 25, 1905, although, as the District Judge says, it may have been granted on the grounds he suggests.

The finding also on issue (3½) that plaintiff waived his claim for damages up to September 1, 1905, appears to me also ancilliary to and consequent upon the finding on issue (3).

No facts have been put forward on appeal to show that the District Judge was wrong in holding on issue (4) that no additions or deviations were made by the request of the plaintiff after September 1, 1905, nor under issue (4½), that the completion of the work was not thereby delayed.

As regards issue (4¾), under which the District Judge has found that the time for completion was not extended after September 1, 1905, by the plaintiff for any period whatever. Neither the plaintiff's letter X 31 of October 27, 1905, nor his letter X 35 of December 11, 1905, show that any extension was granted, but rather that the plaintiff was groaning under the delay arising from the inertness of the defendants' arrangements in the carrying out of the contract.

As regards the point that the learned District Judge had imported his own personal knowledge of the state of the building in December, 1905, and had formed an opinion on the case before trial and had given judgment upon it. On issue (5), as to the completion of the work on December 31, 1905, *26, Weekly Reporter* (*P. C.*) *55* was relied on.

It is clear from the District Judge's note at the commencement of the trial that the parties desired and agreed to his personal inspection of the premises. There is, further, the evidence of Speldewinde embodied in his report R 4 given upon his inspection in February and May, 1906, which shows that the several works, buildings, alterations, and improvements agreed to be done under Schedule B had not been completely finished and made fit for occupation on

those dates even. It is objected for the appellant that Speldewinde's report and evidence do not show any omission of structural requirements upon this inspection, but the agreement was that things should be completely finished and made fit for occupation, and Speldewinde shows clearly this was not the case. There is also the letter J. W. C. 8 of December 11, 1905, from plaintiff to Charles de Soysa, which alleges that "such a lot of work is to be done at Haramby House that you will not be able to hand me over the premises even on January 18 proximo." There is also the admission made to the District Judge at page 91 of the record that the laying of water to bathrooms and kitchens had not been carried out. In my opinion no premises to be used as a house or hotel could be deemed fit for occupation without a proper water supply surely implied in the contract.

It is true that the letter J. W. C. 7 of August 28, 1905, from plaintiff to Charles de Soysa states the work is nearing the final touches, and the letter J. W. C. 10 of 31st (the date is absent) states "I am also hurrying with my front works, and have now but very little to be done." These letters, however, in my opinion, refer to the work which the plaintiff himself had undertaken to do, and not to that which the defendant had agreed to perform. Independently, therefore, of the evidence the District Judge is said to have personally imported into the case, there was sufficient evidence, in my opinion, to justify his decision.

As regards part (2) of issue (5), I have no doubt that the District Judge was right upon the evidence, and his inference therefrom in arriving at the conclusion that the plaintiff did not take possession of the premises on or about December 31, 1905.

It has been sought by counsel for the appellant to show that issue (6) left it open to the Court to decide whether the plaintiff was entitled to recover from the defendant the daily amount stipulated for in the contract as liquidated damages or as a penalty, and Dumonlius' opinion as given in *Vol. I. of Pothier, p. 209; Voet, Book 45, 1, 13; Ramanathan, 1877, Mr. Berwick's judgment at pages 371, 372,* were relied on.

Assuming this to be so, although I think in reality it was not the case, or the question would have been raised by a more specific issue, we have to consider what was the intention of the parties in making the stipulation, and whether that intention must be taken to be subordinate to what is intended for the appellant in the Roman-Dutch Law on the point.

In the first place, I think that the contract itself shows that the parties rather intended to be governed by the English Law on the question, and stipulated for Rs. 150 a day damages for delay as not being an unreasonable sum to impose in a case where there would be much difficulty in correctly estimating the amount of compensation which would be due. This sum, I think, was agreed upon as

1909. March 4.

MIDDLETON J.

liquidated damages, and there is no unreasonableness in its amount to lead one to a contrary opinion.

As I read the authorities relied upon for the appellant, they go no further than showing that under the Roman-Dutch Law a view very much in accordance with the principle prevailing in Courts of Equity in England on the question was prevalent, and the court was bound to determine from the circumstances of the case whether the intention of the parties was that the sum agreed upon was to be treated as a penalty or liquidated damages to use English legal phraseology. This view is strengthened by the reference to *Maasdorp, Vol. III., p. 252, Nathan, Vol. III., pp. 1,460, 1,461*, relied on by counsel for the respondent, and is not, I think, affected by the broad proposition enunciated at *p. 670 of Nathan, Vol. II.* which, I think, must be governed by the ascertainment of what was the intention of the parties. In my opinion, therefore, the parties here are bound by the stipulation they made in their contract that Rs. 150 a day was a fair and reasonable amount of liquidated damages to be paid in case of unfulfilment.

We then come to the question whether, if alterations and deviations are agreed to be made by the party bound to complete a contract within a specified time under a stipulation to pay liquidated damages in case of non-completion, he is thereby relieved from the obligation to do so. According to the rule in *Holme v. Guppy*,[1] he would be so relieved if the time requisite for finishing the work was necessarily increased. There was no provision in the contract here that other work might be ordered, or that if it were, the defendant would nevertheless complete the work within the time originally limited.

The parties, however, agreed that new work should be done. The court has found that none of this new work was asked for after June, 1905; that the completion of the original work was not thereby delayed; that no additions or deviations were made at the request of the plaintiff after September 1, 1905; that the plaintiff did extend the time for completion of the work till September 1, 1905; and that the time for completion was not extended after September 1, 1905, by the plaintiff for any period whatever.

On these findings, I think, the defendant was not prevented from performing his part of the contract by any act of the plaintiff, and he is liable for his default. *Comyn's Digest, Condition L. (6);* see Lord Esther's judgment in *Dodd v. Churton.*[2]

I must hold, therefore, that the plaintiff is strictly entitled to recover the amount stipulated for as liquidated damages as and from September 1, 1905, to the date of judgment.

Again, on the question of damages, no issue was specifically agreed to as to whether the damages agreed on were excessive, nor is there any evidence on the record to show that is the case. As to the argument that the plaintiff is not entitled to damages owing to the

[1] *3 M. and W. p. 387.* [2] *1 Q. B. D. 562.*

fact that he was not in a position to open the premises as a hotel even if they had been ready, this does not appear to me to be sound. Moreover, the evidence has left the impression on my mind that his pecuniary difficulties arose in a great measure from the delay that had occurred on the defendants' part in completing the contract.

The District Judge in giving the plaintiff Rs. 60,000 as damages from December 19 to the date of judgment, has, in fact, awarded a very much lower sum than the agreed damages would amount to, and exception can hardly be taken to this by the appellant. As regards the District Judge's declaration in respect to declaring the contract at an end, the decree does not include this.

I would therefore dismiss the appeal with costs.

Appeal dismissed.