1947 *Present:* **Keuneman and Canekeratne JJ.**

MOHAMED, Appellant, *and* WIJEYEWARDENE, Respondent.

232—D. C. Colombo, 14,579

Building contract—Provision for payment of liquidated damages for delay in completion of building—Condition precedent for applicability of such provision.

In a building contract a provision for payment of liquidated damages for delay in completion of the building applies, unless otherwise expressly provided for, only when the Contractor has in fact completed the building, and has no application where he does not complete the work.

APPEAL from a judgment of the District Court of Colombo.

The plaintiff sued the defendant for damages on an alleged breach of a building contract. He alleged that the defendant, the builder, had without justification stopped the execution of the works and failed to proceed with and complete the same.

The defendant had in fact agreed to complete the buildings ready for occupation by May 21, 1942. This was under clause 21. Clause 22 of the agreement ran as follows:—"22. If the contractor fails to complete the works by the date named in clause 21 or within any extended time to which he may become entitled under these presents and if the architects shall certify in writing on or before the date of issue of their certificate for the last payment to which the contractor may become entitled hereunder that the works could reasonably have been completed by the said date or within the said extended time, then the contractor shall pay or allow to the employers the sum of Rs. 500 per month as agreed and liquidated damages and not by way of penalty for every month beyond the said date or extended time, as the case may be, during which the works shall remain unfinished, and such damages may be deducted from any moneys due or which may become due to the contractor."

It was argued on behalf of the appellant that clause 22 could only operate if the builder or contractor in fact completed the building and had no application where he did not complete the work.

H. V. Perera, K.C. (with him *C. Thiagalingam*), for the defendant, appellant.

N. Nadarajah, K.C. (with him *Ivor Misso*), for the plaintiff, respondent.

Cur. adv. vult.

February 26, 1947. KEUNEMAN J.—

This is an action for damages on an alleged breach of building contract. The plaintiff alleged that the defendant, the builder, had without justification stopped the execution of the works and failed to proceed with and complete the same. Plaintiff claimed as damages (1) Rs. 4,000 from the date of the alleged breach until date of action at the rate of Rs. 500 per month, and (2) Rs. 2,651.25 being the balance due out of an advance of Rs. 6,000 with interest at five per cent. less the sum of Rs. 3,723.75 being for work done by the defendant.

The defendant raised various defences to the plaintiff's claim and counterclaimed on various grounds in the sum of Rs. 2,035.76.

The District Judge as regards plaintiff's claim (1) awarded him Rs. 3,000 and as regards claim (2) Rs. 1,587.66, making a total of Rs. 4,587.66.

The principal matter which was argued before us related to plaintiff's claim (1). The only issue framed regarding damages was issue 5 as amended, viz., "Has defendant become liable under clause 22 of the contract to pay plaintiff as agreed and liquidated damages Rs. 500 per mensem for every month the work remains unfinished after May 21, 1942?". The defendant in fact agreed to complete the buildings ready for occupation by May 21, 1942. This was under clause 21.

Clause 22 of the agreement P 1 runs as follows :—

"22. If the contractor fails to complete the works by the date named in clause 21 or within any extended time to which he may become entitled under these presents and if the Architects shall certify in writing on or before the date of issue of their certificate for the last payment to which the contractor may become entitled hereunder that the works could reasonably have been completed by the said date or within the said extended time, then the contractor shall pay or allow to the employers the sum of Rs. 500 per month as agreed and liquidated damages and not by way of penalty for every month beyond the said date or extended time, as the case may be, during which the works shall remain unfinished, and such damages may be deducted from any moneys due or which may become due to the contractor."

It has been argued by appellant's counsel that this clause can only operate where the builder or contractor in fact completes the building, and has no application where he does not complete the work. It is clear that under clause 23 of P1 the Architect for various reasons set out in that clause can make a fair and reasonable extension of time for completion, and this right of giving an extension of time is referred to in clause 22. The latter clause appears to comtemplate a stage in the proceedings when the issue of the Architect's certificate for the last payment to the contractor has become due. The Architect at this stage has to consider whether the delay in completion is unjustified, or whether some extension of time is to be given to the contractor, and his decision will have a bearing on the damages to be claimed from the contractor. I am inclined to think that clause 22 has in view a stage when the building has been completed and all that remains to be done is to make the "last payment".

At this stage the Architect has to take into consideration the fact that the work has not been completed by the appointed date and to determine whether that date should be extended in consequence of the delay being occasioned by one or other of the matters referred to in clause 23. If the Architect decides that the time is to be extended, then the Architect fixes the date of the extension and the contractor becomes liable to pay "as agreed and liquidated damages" at the rate of Rs. 500 per month for the period beyond the date so extended during which the building remains unfinished.

I think it follows that the claim for agreed and liquidated damages under clause 22 can only arise when the contractor has completed the building.

I may add that clauses 22 and 23 in P1 are in all material particulars the same as the corresponding clauses of the Form of Contract published by the Royal Institute of British Architects—see Creswell's *Law Relating to Building and Building Contracts,* 2nd Edition, page 281.

Our attention has been drawn to the decision of the House of Lords in *British Glanzstoff Manufacturing Co., Ltd. v. General Accident Fire and Life Assurance Corporation, Ltd.*[1]. Here the appellants claimed as part of their damages for breach of contract a sum of liquidated damages in respect of the non-completion of the contract within the stipulated time. The House of Lords held that upon the construction of clauses 24 and 26 the clause as to liquidated damages applied only where the contractors had themselves completed the contract and did not apply where the control of the contract had passed out of their hands, in this case by the bankruptcy of the contractors.

Unfortunately the report does not clearly show the terms of the clauses 24 and 26. But Halsbury's *Laws of England* (Hailsham Edn.) Vol. III., p. 283 paragraph 517 seems to give to this decision general application. "A provision for payment of liquidated damages for delay in completion, unless otherwise expressly provided for, applies only when the contractor himself completes, and does not apply to completion by the employer after suspension of the work by the contractor."

In the present case clause 22, in my opinion, directly favours the application of the principle enunciated. In point of fact the owner of the premises at no time had the work completed, and at any rate as far as the plaint was concerned appeared to contemplate a payment of Rs. 500 a month to herself in perpetuity.

I have accordingly come to the conclusion that the decree for Rs. 3,000 in reference to claim (1) by the owner cannot be sustained.

It has been argued for the respondent that in any event the plaintiff was entitled to some damages in this case in consequence of the refusal of the builder to complete the contract. It is of course possible that the owner may have had a claim to unliquidated damages which he may have maintained. But I do not think we can entertain the argument in this appeal. In the first place the damages were restricted under issue 5 to the agreed and liquidated damages under clause 22. Further, there has been no proof whatever that unliquidated damages have been incurred, and no opportunity has been afforded to the defendant to set out his defences to such a claim.

In view of my decision of these points it is unnecessary to consider the arguments of the appellant that the time limit set in the contract has been enlarged or abrogated either by the alleged new works in respect of piling ordered by the plaintiff, or by reason of frustration arising in consequence of D 15, *i.e., Government Gazette Extraordinary* of February 21, 1942, forbidding the commencement or continuation of building operations except under the authority of a permit granted by the Controller.

[1] *L. R. (1913) A. C. 143.*

The appellant has also contested the finding of the District Jodge as regards claim (2) of the plaintiff. I do not think there is any substance in this.

In all the circumstances I delete the figure of Rs. 4,587.66 which the defendant has been ordered to pay the plaintiff and substitute therefor the figure of Rs. 1,587.66.

As regards costs, the defendant-appellant will have the costs of this appeal, and the plaintiff-respondent will have the costs of the court below in the Rs. 1,587.66 class.

CANEKERATNE J.—I agree.

Appeal partly allowed.