May 16, 1911

Present : Lascelles C.J. and Middleton J.

JAYASINGHE *v.* SILVA.

27—*C. R. Colombo*, 20,654.

Penalty—Liquidated damages—Fidelity bond—Deposit of a sum of money—Agreement to forfeit that sum for dishonesty.

The plaintiff, who was a tavern-keeper under the defendant, entered into a fidelity bond and agreed *inter alia* to forfeit the sum of Rs. 100, which he had deposited with the defendant, if he acted dishonestly in the sale of arrack. The plaintiff was detected selling a bottle of arrack containing " two fingers " less than the proper quantity (causing a loss of about three cents to the buyer). The defendant dismissed the plaintiff and forfeited his deposit of Rs. 100.

Held, the forfeiture was legal.

A Court will not enter into the question of *quantum* of damages where a penalty is fixed, unless it is shown that the *pœna* is *ingens* or *immanis* or *immensis*.

THE facts are set out in the judgment of Lascelles C.J.

A. St. V. Jayawardene, for the defendant, appellant.—The plaintiff deposited the Rs. 100 with the defendant and agreed to forfeit that amount should he act dishonestly. Under these

circumstances the Court would not inquire whether the deposit is in the nature of a penalty or liquidated damages. *Wallis v. Smith*,[1] *Hinton v. Sparkes*.[2] [Lascelles C.J.—Has it not been held that the Roman-Dutch law governs this question ?] Yes, it has been so held by Bonser C.J. in *Fernando v. Fernando*.[3] See also *Webster v. Bosanquet*.[4] The amount agreed upon cannot be said to be *ingens*.

Seneviratne, for respondent, argued that the amount agreed upon was *ingens*, as the plaintiff had sold arrack of the value of three cents only below the proper quantity.

Cur. adv. vult.

May 16, 1911. LASCELLES C.J.—

The defendant is the renter, under the Government, of the Colombo arrack farm, and the plaintiff was a tavern-keeper in charge of the Hendala tavern, in the defendant's employment. On his appointment the plaintiff entered into the bond D 3, conditioned in the sum of Rs. 500, by which he bound himself, amongst other things, to account duly and faithfully for all goods and property which might be entrusted to him for or on account of the obligee, and not to embezzle or misappropriate any goods or property belonging to the obligee, and to be strictly honest in the sale of arrack. The bond also contained a provision by which the plaintiff deposited with the obligee the sum of Rs. 100, which sum he hypothecated to secure the performance of his obligations under the bond. A circular notice (D 1) was also sent to the plaintiff and other tavern-keepers warning them that if they were found selling arrack by short measurement they would be dismissed at once and their wages and security money forfeited.

On August 29, J. Fernando, an inspector employed on the arrack farm, paid a surprise visit to the plaintiff's tavern and detected the plaintiff selling a bottle of arrack containing " two fingers " less than the proper quantity. The defendant inquired into the matter and ultimately dismissed the plaintiff, forfeiting his deposit of Rs. 100, and also Rs. 25, the amount of wages then owing to him. The plaintiff now sues to recover these sums, and the Commissioner of Requests, though he finds that the plaintiff was rightly dismissed, has given judgment for him on grounds which, I confess, I do not quite appreciate.

The provisions of the Roman-Dutch law with regard to the enforcement of penalties are clearly explained in *Fernando v. Fernando*[3]. After citing the passages from *Voet* bearing on the subject, Bonser C.J. stated :—

" In other words, where the amount of the penalty is out of all proportion to the damages likely to be caused by the breach of the contract, in such a case the equitable course is, not to give judgment

[1] *L. R. 21 Ch. D. 243.*
[2] *L. R. C. P. 161.*
[3] *(1899) 4 N. L. R. 285.*
[4] *(1909) 13 N. L. R. 43.*

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for the whole amount of the penalty, but to reduce the amount to something more like the real loss incurred by the parties.

" That, however, is no authority for the proposition that whenever a penalty is fixed it is the duty of the Court to enter into the question of *quantum* of the damages. It must be shown that the *poena* is, as *Voet* describes it, *ingens*, or, as other writers call it, *immanis or immensis* ".

The respondent's counsel has urged that the penalty imposed in this case is in fact *ingens*, and has emphasized the contrast between the penalty which has been imposed and the three cents which is the estimated value of the spirit by which the amount sold was deficient. This view is in my judgment fallacious. When an inspector, on a surprise visit, discovers a tavern-keeper, who had previously been detected in the same offence, selling by short measurement, it is a reasonable inference that the tavern-keeper has been systematically carrying on this practice. It is impossible to estimate the damage to which the renter is exposed, owing to mal-practices of this nature on the part of his servants. A trader whose servants are allowed to sell by short measurement is likely to lose his customers. There is also the further consideration that it is of paramount importance to an arrack renter that his business should be carried on honestly ; for an arrack renter is the holder of a special privilege from Government, which may not be renewed or continued if mal-practices are allowed in his business. It is clear to me that the damage which a renter sustains by short sales may be very considerable. But there is another consideration in the present case which, in my opinion, is a complete answer to the suggestion that the penalty is grossly excessive.

The plaintiff voluntarily set aside and deposited a certain sum on the condition that it should be forfeited for the breach of certain stipulations, some of which may be very trifling. No authority has been cited from the Roman-Dutch law, and there is none in English law (*Wallis v. Smith*[1]), in support of the proposition that in such a case the Courts are at liberty to refuse to give effect to the bargain between the parties on the ground that it is unreasonable.

In my opinion the judgment of the Commissioner should be set aside, and the action dismissed with costs both here and in the Court below.

MIDDLETON J.—

This is an action to recover Rs. 125 *i.e.*, Rs. 100 deposited by the plaintiff with the defendant on entering the defendant's service, which the defendant pleads were forfeited in conformity with an agreement between the parties, marked D 3 in the case, and Rs. 25 for balance of wages earned by the plaintiff for the month of August,

[1] *21 Ch. D. 258.*

1910, which the defendant pleads have been forfeited to him in terms of a circular issued by the defendant to his employees in the arrack farm of Colombo, acquiesced in and assented to by the plaintiff. The issues agreed on were as follows :—

(1) Was the security deposited subject to the conditions specified in the answer ?

(2) If so, is the defendant entitled to have it forfeited, as well as the wages due at the time of the dismissal ?

The Commissioner of Requests has found on the evidence that the plaintiff, on the day alleged by the defendant, sold for the value of a bottle of arrack a quantity less by three cents worth than a full bottle : that the deficiency was due to dishonesty on the part of the plaintiff ; that the defendant ran the risk of losing his credit by short sales ; that the circular in question and its contents were brought to the notice of the plaintiff ; and that plaintiff was rightly dismissed without notice, and there is no doubt that plaintiff signed the security bond marked D 3 and was well aware of its terms. The Commissioner gave judgment for the plaintiff, and the defendant appealed. No objection is taken to the findings of the Commissioner but it is contended that he was wrong in holding that the forfeiture under the bond could not be enforced, and in giving judgment for the plaintiff upon this.

Now, the document D 3 has taken the form of a fidelity bond by which the obligor, the plaintiff, binds himself to pay the sum of Rs. 500 to the obligees, one of whom is the defendant. It recites the business of the obligees and the agreement to employ the plaintiff and his agreement to act in that employ, and it goes on to state that the plaintiff deposited with the obligees the sum of Rs. 100 averring that it was hypothecated for securing the payment of all sums of money payable under or in respect of the bond and the performance of the covenants and obligations therein on his part.

One of the obligations was to be strictly honest in the sale of arrack, and the plaintiff covenanted, amongst other things, that if he acted dishonestly in the sale of arrack or otherwise, or committed any breach of the covenants therein contained, he should forfeit the sum of Rs. 100 so deposited, in addition to the liability on his part to make good all damages to the defendant's firm. The plaintiff not only agreed to forfeit his deposit, but to pay damages in addition.

The defendant in his answer has elected to rely on the forfeit of the deposit as sufficient damages, and makes no claim in reconvention for any further damages. The question then is, is the deposit to be treated as forfeited under the circumstances ? The cases of *Wallis v. Smith* [1] and *Hinton v. Sparkes* [2] have been cited for the appellant, particularly in respect to the deposit here of the sum sought to be forfeited in the hands of the obligees.

[1] *L. R. 21 Ch. D. 243.*

[2] *L. R. C. P. 161.*

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Now, the penalty here in the bond is the sum of Rs. 500, and not the sum of Rs. 100 deposited so that the sum to which attention must be given in respect to its construction upon the reported cases, as either a penalty or liquidated damages, is the larger and not the smaller sum. In my opinion the intention of the parties as expressed in the bond was clearly that the sum deposited should be forfeited to the obligees, if the plaintiff acted dishonestly in the sale of arrack or committed a clear breach of any of the conditions of the bond. It has been decided on sufficient evidence by the Commissioner of Requests that the plaintiff was dishonest in the sale of arrack, and there can be no question that such dishonesty might have materially affected the credit of the defendant far beyond the amount deposited. I think, therefore, that according to the terms of the agreement which the plaintiff entered into with the defendant the sum of Rs. 100 must be deemed to be forfeited to the defendant by him.

As regards the wages, it was, I understood, the amount payable for a part of the month up to the date when the plaintiff was, as the Commissioner of Requests found, rightly dismissed by the defendant.

In my opinion, irrespective of the circular, he would not be entitled to claim for these wages as not having served for the period when they become due, but the circular, with the contents of which the Commissioner has found the plaintiff was acquainted and assented to, clearly renders them forfeitable. In my opinion the appeal must be allowed, and the action dismissed with costs in both Courts.

Appeal Allowed.