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Present: Bertram C.J. and De Sampayo J.

SUBRAMANIAM *v.* ABEYWARDENE.

142—D. C Kalutara, 7,270.

Liquidated damages—Penalty—Agreement to sell arrack at market rate less Rs. 25—Breach of agreement.

In consideration of a sum of Rs. 8,000 advanced by the plaintiff to the defendant, the defendant covenanted that he would deliver to the plaintiff all arrack, not less than 70 leagues, manufactured in his distilleries as and when required by the plaintiff at any time before a specified day at the market price less Rs. 25; half the price of arrack was to be paid for on delivery, and the other half was to be credited to the defendant against the advance. It was further provided that in the event of the defendant failing to deliver the arrack, the defendant was to pay to the plaintiff Rs. 100 as liquidated damages for each leaguer not delivered, and if the plaintiff should refuse to take delivery, he should pay Rs. 100 per leaguer. The plaintiff sued defendant (*inter alia*) for damages for non-delivery of a certain quantity of arrack.

Held, the amount stipulated in the bond should be treated as penalty, and not as liquidated damages.

THIS was an action for the recovery of a sum alleged to be due to the plaintiff on account of advances and payments made against the supply of arrack under an agreement and for the recovery of damages for failure to supply part of the arrack promised at the rate of Rs. 100 per leaguer. The material portions of the agreement were as follows:—

(1) That in consideration of the sum of Rs. 8,000 lawful money of Ceylon, being amount paid on the execution of these presents by the said wholesale dealer (the receipt whereof is hereby admitted and acknowledged), the said distiller doth hereby covenant and agree with the said wholesale dealer that he, the said distiller, shall and will sell and deliver to the said wholesale dealer, or Messrs. Kasi Nadar Vaitialingam or Kasi Nadar Vaitialingam Marcandan, or his heirs or their agent or agents duly authorized by him, all arrack, not less than 70 leaguers, of 161 gallons per leaguer, manufactured in the distillery standing on Hatarahawulmanana bearing excise No. 197, situated at Galboda aforesaid, and in the distillery standing on Mukkanappugewatta bearing excise No. 200, and situated at Yalagama, in or over which the said distiller shall have the management, control, or interest, as and when required by the said wholesale dealer or his agent or agents at any time before December 31, 1915, commencing from the date of these presents the price to be paid for all arrack being any sum less Rs. 25 than the then market price per each leaguer to the said distiller. . . . .

(5) That in the event of the said distiller failing, refusing, or neglecting to sell and deliver the said arrack within the period aforementioned, he, the said distiller, doth hereby covenant and agree that he shall and

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will pay to the said wholesale dealer Rs. 100 per each leaguer as liquidated damages. In like manner, if the said wholesale dealer shall refuse, fail, or neglect to purchase and take delivery of all such arrack as aforesaid within the period aforementioned, he shall and will pay as damages Rs. 100 to the said distiller.

The District Judge gave judgment for plaintiff as prayed for.

The defendant appealed.

Bawa, K.C., and *F. de Zoysa*, for the appellant.

E. W. Jayawardena and *Balasingham*, for the respondent.

The following authorities were cited at the argument:— *Halsbury, vol. X., p. 331, s. 605; (1915) A. C. 79; 15 N. L. R. 125; (1892) 1 Q. B. 127; 47 L. T. 389; 21 Ch. D. 243; 22 Mad. 453; 27 Cal. 421; (1886) 11 A. C. 332; 14 N. L. R. 170; 13 N. L. R. 47.*

September 19, 1918. BERTRAM C.J.—

[His Lordship dealt with the questions of fact raised, and continued]:—

The only question left for us to consider is the question of the damages to which the plaintiff is entitled. He claims damages on the footing of the words of his agreement. That agreement shows that in consideration of the sum of Rs. 8,000 advanced by the plaintiff to the defendant, the defendant, who is a distiller, covenanted that he would deliver to the plaintiff all arrack, not less than 70 leaguers, manufactured in two distilleries as and when required by the plaintiff at any time before December 31, 1915. The price to be paid for all the arrack was the market price per leaguer less Rs. 25 and it was provided that half the price of arrack should be paid for on delivery, and that the other half should be credited to the defendant against the advance of Rs. 8,000.

Now comes the provision as to damages. It was provided on the one side that, in the event of the defendant failing, refusing, or neglecting to sell or deliver the said arrack within the period aforementioned, the defendant was to pay to the plaintiff Rs. 100 for each leaguer as liquidated damages. Similarly, it was provided that if the plaintiff should refuse, fail, or neglect to purchase or take delivery of all such arrack stipulated to be purchased, he should pay Rs. 100 per leaguer to the defendant.

Now, the plaintiff claims that the Rs. 100 per leaguer mentioned in the deed shall be taken as the measure of his damages. To that the defendant replies that that measure cannot be taken, because, though it is spoken of as liquidated damages, the facts show it to be a penalty.

It is argued on behalf of the plaintiff in this case that we ought not to go into that question, because the issue as to whether or

not the sum mentioned in the deed should be treated as liquidated damages or as a penalty was never before the District Court. I am not satisfied on that point. I think that the expressions used in the judgment of the learned District Judge indicate pretty clearly that he had the question in mind. At any rate, I think that, on the issues actually framed, the parties ought to have addressed themselves to that question.

The principles on which the Courts act with regard to the question of penalty and liquidated damages have been discussed in a great number of cases from the days of Lord Mansfield, and they have been reviewed and very lucidly explained in recent years in the judgment of the House of Lords in the case of *Dunlop Pneumatic Tyre Company, Limited v. New Garage and Motor Company, Limited.*[1]

The problem that arises in this case is a comparatively simple one. It is not necessary for us to review all the classes of cases which are referred to in the judgments of the Lords in that case, because, in this particular instance, the stipulation we have to consider is a single stipulation. The difficulty usually arises where there are a great number of stipulations, some of which are of different degrees of importance, or, where there is a single stipulation, of which there may be several breaches of different degrees of importance.

In the present case the stipulation is single, capable only of one sort of breach, and the principle which we have to apply to that determination has been very clearly defined. The question in each case is, What actually was the intention of the parties? If by inserting a clause fixing the damages in the deed the parties intended that that sum should be held out *in terrorem* against any person committing a breach, then clearly it is a penalty. If, on the other hand, the circumstances show that the amount stated in the document may reasonably be considered as what is described as a pactional pre-estimate," then the amount is to be treated as liquidated damages, even though in the document it may be described as a penalty.

Now, we have to apply that principle to this particular case, where there is a single stipulation and a single breach. We may take the law applicable to that question as formulated by Lord Parmoor at page 110 of the report. He there mentions that there are two classes of cases in which the Court has interfered, when the agreed sum is referable to the breach of a single stipulation. The second class need not concern us. This case, if at all, comes within the first, as to which Lord Parmoor says, " the agreed sum, though described in the contract as liquidated damages, is held to be a penalty, if it is extravagant or unconscionable in relation to any possible amount of damages that could have been within the contemplation of the parties at the time when the contract was

[1] *(1915) A. C. 79.*

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made." He further says, "to justify interference there must be an extravagant disproportion between the agreed sum and the amount of any damage capable of pre-estimate."

Now, applying those principles to the present facts, what is the position? We have to ask ourselves, firstly, Do the circumstances show that the parties intended Rs. 100 as a pre-estimate of the damage, or must it, on the contrary, be regarded as a penalty *in terrorem;* and secondly, to assist us to determine that question, we have to ask ourselves, Is there an extravagant disproportion between the agreed sum and the amount of damage capable of pre-estimate? In my opinion this sum is a penalty, and not liquidated damages.

My reasons for thinking so are as follows. This is a bilateral stipulation. I mean by that that the deed provides for these damages both as regards the obligation of the plaintiff and as regards the obligation of the defendant. If the defendant failed to deliver arrack when called upon, he was to pay Rs. 100 per leaguer. If the plaintiff failed to take the arrack when tendered, he was to pay Rs. 100 per leaguer. There cannot be the slightest possible doubt with regard to the obligation of the plaintiff. The amount there fixed was a penalty. If he declined to take any delivery of arrack tendered by the defendant, he was to pay that sum. That being the case, it surely follows almost of necessity that the corresponding Rs. 100 imposed upon the defendant is also in the nature of a penalty.

Further, that the amount is a penalty and not liquidated damages is indicated by this fact. By the terms of the agreement the parties indicate what the actual damages would really be. The arrack was to be paid for, not at a fixed rate, but by reference to the market price. The plaintiff was to pay the market price less Rs. 25 per leaguer. That indicates pretty clearly that what he stood to gain if the agreement was fulfilled was a sum of Rs. 25 per leaguer. That was the measure of the benefit he was to derive from the fulfilment of the contract. If, therefore, the contract was not fulfilled, this Rs. 25, the measure of his benefit, would be also the measure of his loss. Then we have to ask ourselves, is there such an extravagant disproportion between the agreed sum and the amount of damages capable of pre-estimate? In this case what the plaintiff is asking for is practically four times the amount of the actual damage. That being so, it seems to me that it follows almost conclusively on the principles expounded above that the sum must be treated as a penalty, and not as liquidated damages.

[*After discussing a point arising out of the facts, the Chief Justice continued*]—

I am clearly of opinion, therefore, that the sum must be treated as a penalty. That being the case, what is, in fact, to be the measure of his damages? In the first place, I think the plaintiff is certainly

entitled to claim a sum of Rs. 25 per leaguer in respect of each leaguer not delivered. He must be presumed to have supplied himself with arrack to the extent to which he was not able to get the arrack under his contract. But, in addition to this, he has sustained a further loss. Had the defendant carried out the stipulations of his agreement, the plaintiff would, on December 31, 1915, have been in possession of the whole of his Rs. 8,000 advanced. By reason of the failure of the defendant to supply the arrack provided for, the plaintiff was kept out of his money, and is still out of his money. The consequences, therefore, of the breach of the stipulations of the deed by the defendant is that the plaintiff suffered that damage, and was continuing to suffer that damage down to action brought. We have, therefore, in awarding the plaintiff damages, to arrive at some estimate of his loss. I think the reasonable estimate of the damage he has sustained would be the legal interest from December 31, 1915, down to action brought. I would, therefore, add that sum to the sum calculated on the basis of Rs. 25 per leaguer, and give him judgment for the total amount. In all other respects I would leave the judgment of the District Judge as it stands.

With regard to costs, the costs as ordered by the judgment of the District Judge should stand. With regard to the costs of the appeal, the appellant has substantially improved his position on the question of damages. I think, therefore, that the equitable course would be that there should be no order as to the costs of the appeal.

DE SAMPAYO J.—I agree.

Varied.