1951 *Present :* **Gratiaen J. and Gunasekara J.**

SALIH, Appellant, *and* FERNANDO *et al.*, Respondents

S. C. 258—D. C. Colombo, 17,762/M

Contract—Bailment—Heirloom—Failure of bailee to deliver goods entrusted—Measure of damages—Market value—Sentimental value.

Plaintiffs entrusted certain articles of jewellery to the defendant, who was a jeweller, for the purpose of repairing them. On the failure of the defendant to return the jewellery, the plaintiffs sued him for the recovery of their property or, in the alternative, for compensation for their loss. The action was based on a simple breach of contract.

Held, that, in the absence of any claim based on tort or on a breach of contract accompanied by fraud or deceit, the damages awarded should be confined to the market value of the missing jewellery. No additional sum could be claimed on the ground of the special sentimental importance attaching to the jewellery as a family heirloom.

APPEAL from a judgment of the District Court, Colombo.

Cyril E. S. Perera, with *A. M. Ameen*, for the defendant appellant.

C. Thiagalingam, *K.C.*, with *N. M. de Silva* and *J. B. M. Fernando*, for the plaintiffs respondents.

Cur. adv. vult.

February 13, 1951. GRATIAEN J.—

The respondents to this appeal are husband and wife. On the occasion of their marriage in 1937 the second plaintiff received from her father a substantial dowry including certain valuable articles of jewellery which had belonged to her mother. In October, 1945, a brilliant necklace and three gold bangles which formed part of this gift were in need of repairs, and the plaintiffs entrusted them for this purpose to the defendant who was a jeweller. The arrangement was that the work should be completed within 10 days; the plaintiffs called twice at the defendant's shop after the due date, however, but were put off with various excuses and requested to return later. On December 27, 1945, they called again, and on this occasion they were informed that the jewellery had been lost. The circumstances relating to the disappearance of these valuable articles were wrapt in mystery, and it is not at all surprising that the learned District Judge took the view, which I share, that the defendant's conduct in the matter is open to very grave suspicion.

The defendant was at all relevant times carrying on his activities as a jeweller under the registered business name of " A. Ahamad and Company " at premises No. 167, Main Street, Pettah. Having lost their jewellery in 1945, the plaintiffs spent the greater part of the next year in a fruitless search for the person (or persons) whom they could run to earth as the proprietor of the particular firm of " A. Ahamed and Company " who was legally responsible to them for what had taken place. They commenced an abortive litigation against four persons (relatives of the defendant) who were registered as the proprietors of a different business carried on under the trade name of " A. Ahamed and Company " on the same premises. In due course, on March 21, 1947, they sued the proper party in these proceedings for the recovery of their property or, in the alternative, for the recovery of a sum of Rs. 15,000 as damages which they estimated to be the measure of their loss. The defendant filed an answer denying liability on grounds which he failed to substantiate at the trial. The jewellery entrusted to him was not forthcoming, and in consequence the only serious issue which arose for the adjudication of the learned District Judge was as to the sum which should be awarded to the plaintiffs as compensations for their loss.

On March 23, 1948, the learned District Judge entered judgment in favour of the defendants for a sum of Rs. 11,500 representing (*a*) Rs. 10,260 which he estimated to be the market value of the missing jewellery entrusted to the defendant, (*b*) Rs. 1,240 as damages for the pain of mind which was undoubtedly occasioned by the loss of the family heirloom and aggravated by the evasive tactics of a dishonest debtor.

The present appeal, dated March 23, 1948, is from the judgment entered against the defendant who claimed that the plaintiffs' action should have been dismissed *in toto*. Mr. Perera has however abandoned this wholly untenable position, and restricted his argument before us to the contention that the additional award of Rs. 1,240 as damages " for pain of mind " is not justified in law. The appeal was listed for argument before us on January 31, 1951—5 years and 10 months after the notification of the loss of the jewellery—and the only question for our determination is whether the defendant's liability should, as Mr. Perera now contends, be restricted to the sum of Rs. 10,260 which his counsel accepts as the market value of the jewellery. *Even this liability, which is now admitted, has not yet been discharged.*

The question for our determination turns on the measure of damages which should be awarded to the injured party in a transaction of this nature. The relevant part of the agreement of October 31, 1945, is a contract of bailment, and the cause of action is the failure of the bailee, *in breach of his obligations under the contract*, to deliver the goods entrusted to him by the bailors. The plaintiffs in the first instance demanded the return of their property and, in the alternative, claimed compensation for their loss. The issues framed at the trial, and the evidence led in support of those issues, proceeded upon the basis that the goods were, for a reason which must remain obscure owing to the defendant's unwillingness to explain their disappearance, no longer available to be delivered to the plaintiffs. In these circumstances the Court is required (*vide* section 191 of the Civil Procedure Code which gives effect to the common law principle applicable) to fix " the amount of money to be paid as an alternative if delivery cannot be had ". There is no difference between the principles of the Roman-Dutch Law and the English Law as to how the damages should be assessed where a bailee has, in breach of his contractual obligation, failed to return the property to the bailor. The dominant rule of law in such cases is the principle of *restitutio in integrum*. The true *damnum* in contract is a compensation for patrimonial loss (*Voet 39-2-1*). In other words, " the plaintiff must be placed, *as far as money can do it*, in as good a situation as if the contract had been performed. The fundamental basis is the compensation for *pecuniary* loss naturally flowing from the contract. " *British Westinghouse Co. v. Underground Railways of London*[1]. It is on this basis that the learned Judge awarded to the plaintiffs a sum of Rs. 10,260 as representing the market value of the missing jewellery.

Mr. Thiagalingam has contended with much force that the assessment of the jewellery at their market value is in the present case inadequate having regard to the special sentimental importance attaching to it as a family heirloom. There is no doubt that the plaintiffs would have greatly preferred to have retained their jewellery *in specie*, which they had no desire to place on the market for sale. But this, unfortunately, has no relevance where the goods have been entrusted to and lost by a third party under a commercial transaction. The value of the goods in assessing damages *for breach of contract* is " their market value independently

[1] *(1912) A. C. at 688.*

of any circumstances peculiar to the plaintiff ". *Rodacanachi v. Milburn*[1]. It is not difficult to contemplate a situation where an article offered for sale in the open market may be a family heirloom possessing such historic or sentimental interest as to materially enhance its value *to prospective bidders*. But where this is not the case, it is not possible to place a pecuniary value on the special personal significance, however real, which attaches to it *in the owner's mind*. The principle is well illustrated by *Wessels* in his treatise on the " *Law of Contract in South Africa* " (*Vol. 2 page 921, para. 3192*). " A person lets his horse, of which he is particularly fond, and for which in fact, as he tells the hirer, he would not accept £100. The hirer, by his negligence, causes the death of the horse. In reality, the horse is not worth more than £25. Can the owner recover more than £25 as damages ? . . . . The answer is in the negative, because the Court cannot award as damages any *pretium affectionis* or any other amount than an indemnity for patrimonial loss ". The authority for this proposition is *Voet—45-1-9* who declares that in such cases " account can in no way be taken of any special predilection ".

It seems to me therefore that, if the present action be regarded as an action for breach of contract, the learned Judge was not entitled to award damages to the plaintiffs for pain of mind because it has not been established by the evidence that such pain of mind resulted in patrimonial loss capable of estimation in terms of money. Mr. Perera's objection to the award of Rs. 1,260 under this head must therefore be upheld. I agree with Mr. Thiagalingam that " in estimating the scope of the liability of the defaulting party, our law draws a distinction between *a breach of contract accompanied by fraud or deceit* and the case of *a simple breach of contract*. The truth of the matter is that where there is a breach of contract accompanied by fraud, our law awards compensation both on contract and on tort . . . . and the guilty party is liable not only for the *id quod* interest as in a breach of contract where no fraud exists, *but for other damages as well* ". (*Wessels, Vol. 2, page 944, paras. 3281 to 3283.*) The question however is whether this principle can be applied in the present case. It seems to me that it cannot, because neither the averments in the plaint nor the issues framed at the trial sufficiently raise the allegation that fraud or deceit on the part of the defendant accompanied the breach of his obligations under the contract of bailment. If it was intended to claim damages from the defendant on the basis of a tort, the allegation of fraud or deceit should have been specifically and unequivocally made so that he could have had the opportunity of meeting it. The present action is, in my opinion, based on contract *simpliciter*, and it does not therefore arise for consideration whether, if damages had been claimed on the basis of a tort, some additional compensation for pain of mind could properly have been awarded to the plaintiffs. The conclusion I have reached is that in the present state of the pleadings and the issues, the damages awarded should have been restricted to Rs. 10,260 which was the market value of the jewellery.

It is unfortunate for the plaintiffs that they did not file a cross-appeal against the learned Judge's decree, as there was, in my opinion, a substantial

[1] *(1886) 18 Q. B. D. 667.*

ground which would have justified this Court in granting them some additional relief against the defendant. The plaint specially claimed a decree awarding the plaintiffs legal interest on the sum which the defendant should be condemned to pay to them by way of compensation. A decree for interest in such cases is, I think, expressly authorised by the provisions of section 192 of the Civil Procedure Code, and no award of interest, possibly inadvertently, was made by the learned District Judge. In the absence of a cross-appeal, however, it is not open to this Court to order an amendment to the decree by awarding interest at this stage.

For the reasons which I have set out, I would allow the defendant's appeal by ordering him to pay to the plaintiffs a sum of Rs. 10,260 only. The defendant has substantially failed in his appeal and he must therefore pay to the plaintiffs the costs incurred by them both here and in the Court below.

GUNASEKARA J.—I agree.

Appeal partly allowed.