

(1880) 01 AHC CK 0007

Allahabad High Court

Case No: None

In Re: Reference by
Board of Revenue,
N.-W.P., Under Act I of
1879

APPELLANT

Vs

RESPONDENT

Date of Decision: Jan. 31, 1880

Citation: (1880) ILR (All) 654

Hon'ble Judges: Robert Stuart, C.J; Straight, J; Spankie, J; Pearson, J; Oldfield, J

Bench: Full Bench

Final Decision: Disposed Of

Judgement

Robert Stuart, C.J.

The result of the very anxious consideration I have given to this reference is a conclusion altogether different from that arrived at by my colleagues and by the Board of Revenue. A very careful examination of the Stamp Act I of 1879 has satisfied me that there is nothing in its provisions or its schedules that applies to the penalty of Rs. 5,000 agreed to be paid in the event or events therein expressed, and the legal character of that penalty must be determined solely on legal principle, I agree with the Board that the document is not a lease as defined by the Stamp Act, but a mere agreement or memorandum of an agreement, the proper stamp-duty on which is eight annas, and the several clauses and articles which constitute this agreement constitute the primary obligation undertaken by the parties, the Rs. 5,000 being a mere penalty contingent on the non-performance cannot be anticipated or presumed. On the contrary the presumption, according to all recognised legal principles, is that the contract or agreement will be performed, and that the circumstances under which this penalty may be sought to be enforced will never arise. That I say is the legal presumption applicable to this part of the case, the right to recover the penalty may or may not happen and which we are not to assume will happen. That being so, this penalty of Rs. 5,000 does not come into

consideration at present as matter for stamp-duty. Should the contingency provided against by this penalty occur, it will then be in the power of the Collector to recover it in a proper suit and under an appropriate court-fee. But at present we have, in my opinion, nothing to do with the penalty, what we have to do with is the true character of the instrument with which, in the manner and to the effect I have pointed out, it is incorporated.

2. A careful examination of the instrument, which I say is an agreement chargeable with a duty of eight annas, ought I think to lead to this conclusion. It recites that Nilcomal Mittra and Son, being desirous of obtaining from the Government the monopoly of the right of manufacture and sale of English and native spirits for the period of three years certain commencing from the 1st day of October 1879, had applied to the Collector for the privilege, and that the Collector, by and with the sanction of the Board of Revenue, had agreed to grant the monopoly asked for, and in consideration of which monopoly payment shall be made of Rs. 20,000 per annum as still-head duty for 5,000 gallons of rum, and other large payments including payments for license fees are stipulated for, and then comes, as Article 6 of the instrument, the condition respecting the penalty, and which is in these terms:--" In the event of any breach on the part of the said Nilcomal Mittra and Son in the observation or performance of any of the conditions hereof, the aforesaid Nilcomal Mittra and Son hereby bind themselves to pay the said Collector of Allahabad a penalty of Rs. 5,000." There can be no doubt about this penalty being a bond fide condition of the agreement on the contingency which it contemplates happening, but that it was that and nothing more is to my mind very evident, for the clauses that follow include this penalty as among the considerations moving the parties.

3. Both the Board and my colleagues describe the covenant for a penalty of Rs. 5,000 as a "bond" for that amount within the meaning of the term as given in Section 3, Clause (4), of the Stamp Act of 1879. That section provides that "unless there is something repugnant in the subject or context bond" means any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or not performed, as the case may be." But this definition only applies inversely to the case before us in which, besides, there is no condition of nullity or voidance, the penalty being applied, without discrimination or specification, to the entire contract and the whole of its provisions, and which are exclusively of a pecuniary character, and the violation of which could be adequately measured in damages. It is also to be observed that the penalty in an English bond can never be enforced excepting for the purpose of covering interest and costs. In the case of the penalty now under consideration, it was probably intended to be enforced, and is no doubt capable of being enforced, to cover damages as well as interest and costs, but in either case the penalty is not such a unit or entity as that to which a precise stamp-duty can a priori be applied.

4. From these considerations it results that the adoption of the penalty as the measure of the stamp-duty on this agreement would involve the injustice of applying it indiscriminately and without regard to the nature and extent of the breach. On this subject I find it laid down in Broom's Commentaries on the Common Law of England (1864), p. 618:-- "Where, however, parties agree that a specific sum shall be payable by way of penalty for breach of contract, our Courts will apply equitable principles in the assessment of damages, not indeed allowing them to exceed the sum thus stipulated, but requiring evidence to be given for the purpose of fixing their precise amount, and enabling the jury to award it accordingly." And as an illustration of the law so laid down the learned author refers to the case of *Kemble v. Farren* 6 Bing. 141, which appears to be a much stronger case in favour of the principle that I would apply than the present. It was an action of assumpsit for the breach of an engagement by the defendant to perform as an actor at the plaintiff's theatre during several consecutive seasons. "This agreement," continues Mr. Broom, "contained various clauses and stipulations between the parties, inter alia, that the defendant should perform, and the plaintiff should pay him so much on every night that the theatre should be open for theatrical performances during the time in question, and that, if either of the parties should neglect or refuse to fulfil the said agreement or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of £ 1,000, which sum was declared to be liquidated and ascertained damages, and not a penalty or in the nature thereof. Notwithstanding, however, this expression of the intention of the parties, the Court of Common Pleas held that the amount specified was to be regarded as a penalty merely, and not as liquidated damages, for they observed that, if an agreement contains clauses, some sounding in uncertain damages and others relating to certain pecuniary payments, as happened in the case sub judice, and the action is brought for the breach of a clause of an uncertain nature, it would be absurd to construe the sum specified in the agreement as liquidated damages: because, if so, a very large sum might become immediately payable in consequence of the non-payment of a very small one, such case being precisely that in which Courts of Equity have always relieved, and against which Courts of Law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by the breach of contract." The fairness of the rule so expounded is obvious, and in the present case would, if applied, prevent the injustice of the full penalty being enforced without reference to the nature and extent of the breach of contract. In the case before us the breaches might involve the violation of the whole contract, in which case the full penalty of Rs. 5,000 would be enforceable. In the present case the penalty is to be paid "in the event of any breach on the part of the said Nilcomal Mittra in the observation or performance of any of the conditions hereof." But the actual breach might be something comparatively small, and it would therefore be unjust to exact the whole penalty and not such a portion of it as in such a case might be applied.

5. But this is a state of things which cannot be anticipated at the commencement of a contract, and can therefore afford no measure for a present calculation of stamp-duty.

6. For these reasons it appears to me impossible to regard this penalty as a bond within the meaning of that term as defined by the Stamp Act I of 1879, but that it ought to be looked at simply as one of several clauses of the entire agreement, and which, should it ever come to be enforced on the equitable principle I have explained, would involve the levying of a court-fee according to the amount claimed in a suit to be brought for that purpose.

7. This is my answer to the reference by the Board of Revenue, and I regret it should be given in disagreement with the opinion of my colleagues.

Oldfield, J.

8. As I understand the terms of this instrument it is an instrument by the first five clauses of which it is agreed between the parties to it, namely, Nilcomal Mittra and Son on the one side, and the Collector of Allahabad on the other side, that in consideration of Nilcomal Mittra and Son making certain annual payments to the Collector he shall receive from the Collector the exclusive right of manufacture and sale of certain spirits within certain territorial limits for a period of three years, and conditions are specified in respect of shops to be opened for the sale of the spirits and of the instalments by which the payments are to be made: and by the sixth clause Nilcomal Mittra and Son bind themselves, in the event of any breach on their part in observation or performance of any part of the conditions of the instrument, to pay to the Collector a penalty of Rs. 5,000: and by the eighth clause the Collector covenants, in consideration of the above conditions being duly observed by Nilcomal Mittra and Son, not to take away or withhold the exclusive license to manufacture or sell spirits for three years, or to do anything whereby the performance of the conditions of the agreement by Nilcomal Mittra and Son shall become practically impossible. No part of this instrument except clause six comes within the meaning of a bond as defined in the Stamp Act. I look on the main clauses as only evidence of a contract between contracting parties in respect of the lease or sale of a right of manufacture and vend of spirits, and so far the instrument is subject to stamp-duty as an agreement under Schedule i, No. 5 (c). I agree with the Board that the words in the definition of bond in the Act "on condition that the obligation shall be void if a specified act is performed, or not performed, as the case may be," refer to the obligor, and it is the obligor and not the obligee on whom the performance or non-performance of the specified act is incumbent. Clause six, however, meets the requirements of the definition of "bond," the obligors therein binding themselves to pay a penalty of Rs. 5,000 on failure by them to comply with the conditions of the contract, and the instrument will be subject to duty accordingly under the provisions of Section 7 of the Act.

Pearson, J.

9. I am of the same opinion.

Spankie, J.

10. I also agree.

Straight, J.

11. I am of the same opinion.