(1920) 06 CAL CK 0043

Calcutta High Court

Case No: None

Manindra Chandra Nandy and Others		APPELLANT
	Vs	
Aswini Kumar Acharyya		RESPONDENT

Date of Decision: June 15, 1920

Citation: AIR 1921 Cal 185 : 60 Ind. Cas. 337

Hon'ble Judges: Asutosh Mookerjee, Acting C.J.; Ernest Fletcher, J

Bench: Division Bench

Judgement

Asutosh Mookerjee, Acting C.J.

1. This is an appeal from the judgment of Mr. Justice Rankin in a suit for recovery of money The plaintiff-respondent makes his claim in connection with a contract, dated the 22nd December, 19.5, entered into by the defendants with the Corporation of Calcutta for the supply of stone metal. The plaintiff was not a party to this contrast, but his case is that the defendants agreed to pay him, (1) a sum of Rs. 20,000 if he could secure acceptance pf their offer by the Corporation, and defrayed, at his own risk, the preliminary expenses in connection therewith; (2) brokerage at two annas for every hundred cubic feet of stone metal delivered to the Corporation during the subsistence of the contract, and (3) two-fifths share of the profits of the business which was to be placed under his management for the same period. The plaintiff alleges that he was paid Rs. 5,000 by way of preliminary expenses, but has received nothing under the other two heads. The contract with the Corporation was to be in operation for twenty years, and twenty lakhs cubic feet of stone metal were to be supplied annually. Consequently, the plaintiff would be entitled to reactive Rs. 2,500 a year for twenty years on account of brokerage. The profits are calculated by the plaintiff at Rs. 50,000 a year; on this basis, his share of profits would be Rs. 20,000 a year for twenty years. The grievance of the plaintiff is that, although it was mainly through his efforts that the defendants were able to secure the contract, they have repudiated the arrangement made with him and have falsely denied that be was of

any assistance to them in the matter. He accordingly claims damages for breach of contract, although no transactions have yet taken place between the defendants and the Corporation; his claim is for nearly three lakhs of rupees; namely, Rs. 15,000 for preliminary expenses, Rs. 50,000 for loss of brokerage during twenty years, and Rs. 2,29,398 6-5 for loss of profits during the same period. Mr. Justice Rankin has given him a decree for Rs. 57,000 in all, with costs on Scale No. 3, that is, Rs. 15,000 for preliminary expenses, Rs. 20,000 for brokerage and Rs. 22,000 on account of loss of profits. The defendants have appealed to this Court, and have disputed the claim as greatly exaggerated, if not entirely unfounded. They have also urged that costs on Scale No. 3 should not have been allowed. In our opinion, the appeal must fail on the merits, but the order for costs cannot be supported.

2. As regards the first point, namely, the claim for preliminary expenses, the substantial point in controversy is, whether the defendants agreed to pay the plaintiff a sum of Rs. 20,000 for preliminary expenses, or only RUCJ sum not exceeding Rs. 20,000 as the plaintiff might find it actually necessary to spend on account of preliminary expenses. Mr. Justice Rankin has accepted the story of the plaintiff that the defendants agreed to pay him its. 20,000 provided the contract was secured, and that a art payment of Rs. 5,000 was made. We are not prepared to dissent from this conclusion. In our view, the plaintiff has carried out his part of the bargain, and is entitled to the balance of the sum agreed upon, that is, Rs. 15,000. It has been faintly suggested, however, on behalf pi the appellants that, what is euphemistically sailed preliminary expenses included in a large measure sums of money paid to various influential persona with a view to secure their assistance in the acceptance of the tender of the defendants by the Calcutta Corporation. To put the matter plainly, the imputation is, that this agreement to place Rs. 20,000 at the disposal of the plaintiff for so called preliminary expenses is against public policy. Now, it cannot be disputed that, as was laid down in Ledu v. Hira Lal 29 Ind. Cas. 625 : 21 C.L.J. 687 : 43 C. 115 : 19 C.W.N. 919 and Montefiore v. Menday Motor Components Co. (1918) 2 K.B. 241 : 87 L.J.K.B. 907 : 119 L.T. 340 : 62 S.J. 585 : 34 T.L.R. 463 it is contrary to public policy to induce public officers, for money or other valuable consideration, to use their position and influence to procure a benefit. An agreement of this character holds out an inducement to Public Officers to act with partiality or from corrupt motives or to bias them in the discharge of their official duties; such conduct, if tolerated, would sap the foundation on which official honesty rests and legalise temptations which would lead away from the path of rectitude many an of official who, without Such inducements, might perform his duty, These principles are indisputable: but, in the case before us, the materials on the record are not sufficient to justify the application of these rules. Indeed, the evidence does not appear to have been expressly directed to this point, for the obvious reason that, neither the plaintiff nor the defendants would be over anxious to disclose the alleged secrets. The award of Rs. 15,000 for preliminary expenses must, consequently, be confirmed.

3. As regards the second point, the plaintiff claimed Rs. 50,000 as brokerage at the rate of Rs. 2,500 a year for twenty years. Mr. Justice Rankin has awarded Rs. 20,000 only. The defendants contend that the award is excessive, specially as the plaintiff seeks a decree even before the first instalment has become due. Now, there can be no doubt that a breach of contract may take place before the time fixed for performance of the contract has arrived, where, as here, the promisor has repudiated the contract. In Such an event, the promisee may elect to sue him for breach of the contract without waiting for the time fixed for performance. This principle applies where the contract has to be performed in instalments; in such cases, the question may arise, whether the refusal to perform any particular part of the contract amounts to a repudiation of the whole contract or not. No Such question, however, arises in the present case, because the defendants have repudiated in its entirety their arrangement with the plaintiff. The point here, consequently, reduces to the proper mode of assessment of damages in the event of what has sometimes been called--felicitously though, perhaps, not logically anticipatory breach of a contract. Lord Wranbury observed in Bradley v. Newsum Sons & Co. (1919) A.C. 16 : 88 L.J.K.B. 35 : 119 L.T. 238 : 24 Com. Cas. 1 : 14 Asp. M.C. 340 : 34 T.L.R. 613: The expression (anticipatory breaoh of contract) is, I think, unfortunate. In Hochster v. De la Tour (1853) 2 El. & Bl. 678 : 22 L.J.Q.B. 455 : 17 Jur. 972 : 1 W.R. 469 : 22 L.T. (O.S.) 172 : 95 R.R. 747 : 118 E.R. the leading case upon this subject, Lord Campbell made no use of the expression in his judgment. It is used several times by Lord Esher in Johnstone v. Milling (1886) 16 Q.B.D. 460 : 55 L.J.Q.B. 162 : 54 L.T. 629 : 34 W.R. 238 : 50 J.P. 694 but not by either of his colleagues. The words used are, of course, immaterial, unless they lead, in course of time, to an erroneous impression. There can be no breach of an obligation in anticipation. It is no breach not to do an act at a time when its performance is not yet contractually due. If there be a contract to do an act at a future time, and the promisor, before that time arrives, says that when the time does arrive he will not do it, he is repudiating his promise which binds him in the present, but is in no default in not doing an act which is only to be done, in the future. He is recalling or repudiating his promise, and that is wrongful, His breach is a breach of a presently binding promise, not an anticipatory breach of an act to be done in the future. To take Bowen, L.J.''s words in Johnstone v. Milling (1886) 16 Q.B.D. 460 : 55 L.J.Q.B. 162 : 54 L.T. 629 : 34 W.R. 238 : 50 J.P. 694 it is a wrongful renunciation of the contractoal relation into which he has entered. The result is, that the other party to the contract has an option either to ignore the repudiation or to avail himself of it. If he does "the latter, it is still, by consensus of the parties, and not by some superior force, that the contract is determined."

4. Where there is Such a breach by an unqualified and positive refusal to perform a contract though the performance thereof is not yet due, the injured party may bring his action at once for recovery of damages. The damages for breach of a contract by renunciation thereof before performance is due, are measured by what the injured

party would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself. The substance of the matter then is, that the damages are assessed as on the date of the breach; nevertheless, they are to be a compensation for the loss caused by depriving the plaintiff of the benefit of the contract as it was originally made. The doctrine of anticipatory breach is not a doctrine which fictitiously moves the performance ahead to the time on the repudiation, and regards the repudiation as a failure to perform the contract. The anticipatory breach takes effect as a premature destruction of the contract rather than as a failure to perform it in its terms. The damage caused by Such a premature destruction is, to be sure, due to the consequent failure to course performance, but this is a failure to secure performance according to its original terms, that is, performance at the time and place when performance was required according to the terms of the agreement. Since the injury is the destruction of the contract regarded as an article of property, the measure of damages is the value of such property at the time of its destruction; but since the value of a contract will ordinarily be determined by the benefit which its performance would confer, the exact measure of damages upon an anticipatory breach is, in the ordinary case, precisely the same as it would be if the repudiation were not accepted as a breach and the injured party brought a suit, after the time of performance,, for the non-performance at the time set. In other words, though the plaintiff sues at once for an anticipatory breach of the contract his damages are to be assessed according to the cost of performance, not at the time and place of the breach, but at the time and place set for performance. These principles were applied by this Court in the case of Bilasiram Thakursidass v. Ezekiel Abraham Gubbay 43 C. 305 : 23 C.L.J. 62 : 20 C.W.N. 240, where reliance was placed upon the decisions in Roper v. Johnson (1873) 8 C.P. 167 : 42 L.J.C.P. 65 : 28 L.T. 296 : 21 W.R. 384 Frost v. Knight (1872) 7 Ex. 111 : 41 L.J. Ex. 78 : 26 L.T. 77, Brown v. Muller (1872) 7 Ex. 319 : 41 L.J. Ex. 214 : 27 L.T. 272.

5. Now, what is the position of the defend, ants if the claim for brokerage put forward by the plaintiff is tested in the light of; these principles. The essence of the transaction was that the defendants agreed to pay the plaintiff Rs. 50,000 as brokerage on account of services rendered by him in, securing them the contract. "The sum however, was not payable in one instalment on, a single specified date; the payment, was to be distributed over twenty years at the rate of Rs. 2,500 a year. If the defendants had not wrongfully rescinded, the contract before the time for performance, had arrived, the plaintiff would have received Rs. 2,500 annually for twenty years. The, result of the renunciation by the defendants, is, that the plaintiff has become forthwith, entitled at his election, to sue for damages for breach of the entire contract and the damages must be so calculated that he may. be placed, so far as pecuniary benefit is concerned, as nearly as possible in the position he would have occupied if the defendants had carried cut the contract. The qualification that the damages are to be abated to the extent that the plaintiff might have mitigated

his loss does not apply in the circumstances of this particular claim where a definite sum was payable by the defendants to the plaintiff as the Value of services already rendered by him. Consequently, the plaintiff is prima facie entitled to the present value of the annuity of Rs. 2,500 for twenty years; this may easily be shown by calculation to amount to Rs. 81,155 or Rs. 28,674, according as the rate of interest is assumed to be five per cent. or six per cent, per annum. As the plaintiff has been awarded Rs. 20,000 only, that sum is by no means excessive.

6. As regards the third point, there can be no room for reasonable doubt upon the evidence that the defendants agreed to place the plaintiff in charge of the work for the whole period of twenty years and to pay him for services to be rendered not a fixed salary but a share of the profits. Mr. Justice Rankin has calculated the average annual profit likely to result from the execution of the contract at Rs. 20,000 a year for twenty years. Consequently, it may be taken that if the plaintiff had been entrusted with supervision of the work pursuant to the agreement he would have been in receipt of two fifths of this sum, that is, Rs. 8,000 a year. The plaintiff in his plaint estimated his share of the net annual profits at Rs. 20,000 and demanded as damages the present value of an annuity of Rs. 20,000 a year for twenty years on the assumption that the rate of interest would be six per cent. per annum. This clearly was a greatly exaggerated claim and has not been allowed by Mr. Justice Rankin, who has given the plaintiff a decree under this head for Rs. 22,000 only. It is manifest that the present claim is covered by the principle previously enunciated, namely, that when repudiation of a contract by the promisor has been acted upon by the promisee who has treated the contract as ended, though dam-ages are to be measured by ascertaining what would have arisen by non-performance at the appointed time, they should be abated by reason of circumstances of which the promisee should have reasonably availed himself. Reference may, in this conneotion, be made to the decision in Hachster v. De la Tour (1853) 2 El. & Bl. 678 : 22 L.J.Q.B. 455 : 17 Jur. 972 : 1 W.R. 469 : 22 L.T. (O.S.) 172 : 95 R.R. 747. There the plaintiff had agreed to serve the defendant and the defendant had undertaken to employ the plaintiff, as a courier, for three months; but the defendant subsequently informed him that he had changed his mind and would not require his services. The Court ruled that the refusal of the defendant constituted a breath, giving the plaintiff an immediate right of action. Lord Campbell, C.J. added: "instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract." To the same effect is the decision of Cookburn, C.J., in Frost v. Knight (b) where, after referring to the case of Danube and Black sea Railway and Kustendjie Harbour Co. v. Xenos 13 C.B. (N.S.) 825 : 31 L.J.C.P. 284 : 8 Jur. (N.S.) 439 : 10 W.R. 320 : 132 R.R. 527 : 143 E.R. 325, Avery v. Bowden (1855) 5 El. & Bl. 714 : 25 L.J.Q.B. 49 : 1 Jur. (N.S.) 1167 : 4 W.R. 93 : 27 L.T. (O.S.) 119 : 103 R.R. 695 : 26 L.J.Q.B. 3 : 3 Jur. (N.S.) 268 : 5 W.R. 45 : 28 L.T. (O.S.) : 106 R.R. 882 : 118 E.R. 653, Barrick v. Buba (1857) 2 C.B. (N.S.) 583 : 26

L.J.P.C. 280 : 5 W.R. 665 : 29 L.T. (O.S.) 199 : 109 R.R. 789 : 140 E.R. 634, he added that the promisee who elects to treat the repudiation of the other party as a wrongful putting an end to the contract, may at once bring his action as on a breach of it, "in which he will be entitled to Such damages as would have arisen from the nonperformance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." The doctrine recognised in these cases has been repeatedly applied by the Supreme Court of the United States. Thus, in Pierce v. Tennessee Coal, Iron and Railroad Co. (1899) 173 U.S. 1 : 43 Law. Ed. 591 it was held that on discharge from a contract of employment, the party discharged may elect to treat the contract as absolutely and finally broken and recover in an action the full value of the contract to him at the time of the breach, including all that be would have received in the future as well as in the past, deducting any sum that he might have earned or that he might earn (hereafter. See also Rochm v. Horst (1900) 178 C.S. 1 : 44 Law. Ed. 953. We are not unmindful that ii the present case, the plaintiff was to be paid not a fixed salary but a share of the profits. This makes no differentia in the application of the principle. As painted oat by Sir Robert Collier in Cowasjee Nanabhoy v. Lallbhoy Vullubhoy 3 I.A. 200 : 1 B. 468 P.C.) : 3 Suth P.C.J. 326 : 3 Sar. P.C.J. 645 : 11 Mad. Jur. 392 : 26 W.R. 78 : 1 Ind. Dec. (N.S.) 309, quoted with approval by Bankes L.J., in Beigaie v. Union, Manu facturing Co. (1918) 1 K.B. 592 : 87 L.J.K.B. 724 : 118 L.T. 479, the man who is paid by a salary is not necessarily affected by the prosperity or adversity of the company of even by its dissolution, while the man who agrees to be paid by a commission upon sales, speculates to a certain extent on the prosperity of the company. but in principle, the rights of the two parsons stand on the same footing, subject to the difference that in the one case the amount of the sustained is certain, in the other it is variable and uncertain. In both cases, however, there is, as Mr. Justice Rankin has pointed oat, the inevitable uncertainty of life and health. Consequently, in circumstances like these, the damages cannot be assessed with any approach to mathematical accuracy. In view, however, of the fast that the Court below has assessed the damages at less than three years estimated profits, we are not prepared to hold that the award is excessive.

7. Finally, we have to consider the question of costs which have been allowed on Scale No. 3. Rule 93 of Chapter XXX VI of the Rules of Court prescribes the fees allowed to the Attorneys with reference to the importance and difficulty of the case, and lays down that, unless the class under which the case falls is determined by the Court, the costs will be taxed under class 1. For the purposes of the rule, cases are classified as short causes, ordinary causes and important causes. The appellants have contended that the present litigation falls within the description "ordinary causes." The respondent has not satisfied us why the suit should be taken out of the category of ordinary causes and classed as an important cause. It is plain that the suit does not cease to be an ordinary cause, merely because witnesses are examined at inordinate length or because the argued agreement between the

parties has to be spelt out of a lengthy correspondence. From a enquiries made, we have ascertained that, till r quite recent years, orders for taxation of costs under Scale No. 3 were, as might be expected, very sparingly made. In the case of Buldeo Narayan v. Scrymgeour 6 B.L.R. 581 Paul, J. awarded costs on Scale No. 3 stating 9 that: "This is an important case and the plaintiff has been put to much expense and his legal advisers have been, obliged to exert themselves very much. "On appeal, it was argued that costs, on Scale No. 3 should only be given in very exceptional cases. Norman, C.J., and Phear, J., who heard the appeal set aside the order for costs on Scale No. 3 and directed cash party to bear his own, costs both of the original suit and of the appeal. Norman, C.J., stated that the award of costs on Scale No. 3 was very unusual, that such costs were rarely given and could only be given in important cases. In the case of Miller v. Gouripore Co. Limited 8 B.L.R. 285 Paul, J., again awarded costs on. Scale No. 3, "to mark his sense of the grossly dishonest defence." On appeal it was contended that costs should not have been awarded on Scale No. 3. Phear and Macpherson, J.J., who heard the appeal reversed the decree and dismissed the suit with costs in both Courts on Scale No. 2 On the 20th February 1883 Pigot, J., allowed costs on Scale No. 3 in the suit of Prinsep v. Cranenburgh (Suit No, 365 of 1882) for damages for infringement of copyright. It appears that the defense in that case completely collapsed and the decree was made practically by consent. On the 2nd March 1885 Cunningham and Wilson, JJ., allowed costs on Scale No. 3 and three Counsel on each side, in the suit of Baijnath v. Graham Suit No. 552 of 1882 and analogous suits, which were heard by a Bench of two Judges on account of their special importance. In a case heard on the Admiralty Side of this Court for 27 days Drachenfels, In the matter of steamship 27 C. 860 : 14 Ind. Dec. (N.S.) 862 Ameer Ali. J., on the a 1st January 1900, directed that the costs be allowed on the special scale in respect of three heads, as, in his opinion, the fees ordinarily allowed under those heads would not be sufficient to indemnify the plaintiffs against the costs incurred by them. The same course was followed by Stanley, J., on the 11th July 1900 in the suit of Nistarini Dassi v. Nundo Lall Bose Suit No. 311 of 1898 which is reported upon other points; Nistarini Dassi v. Nundo Lal Bose 26 C. 891 : 3 C.W.N. 670 : 13 Ind. Dec. (N.S.) 1171 and Nundo Lal Bose v Nistarini Dassi 27 C. 428 : 4 C.W.N. 169 : 14 Ind. Dec. (N.S.) 282 the reason assigned for the order was that the fees ordinarily allowed under three of the headings would not be sufficient to indemnify the plaintiff against the costs necessarily incurred by her. On the 24th February 1903 Ameer Ali, J., allowed cost on Scale No. 3, only with regard to enquiries relating to certain items in the suit of Sarkies v. North German Sire Insurance Company (Suit No. 767 of 1901) "having regard to the length of the case and to the other circumstances," all other costs were ordered to be taxed on Scale No. 2. On the 9th December 1909 my learned brother, Mr. Justice Fletcher, allowed costs on Scale No. 3 as between Attorney and client, to be paid out of the estate in a testamentary matter; In the Goods of Daniel O''Brien, Hoyle 1 Orange Suit No. 3 of 1908; that case was compromised, but the question of costs was left to the Court. On the 3rd February 1919 Rankin, J., allowed costs on Scale No. 3, as between

Attorney and client in the suit of Layalka v. Solaiman Ariff Suit No. 729 of 1918, because "it was a tricky case and the defence was based upon fraud which might, for lack of care and attentdor, not have been discovered. "In the present case, however, no reasons have been assigned in support of the order for the award of costs on Scale No. 3. It is obviously desirable that, when the Trial Court holds that costs should be awarded, not as in an "ordinary cause," but as in an "important cause," reasons should be assigned for what is, in the words of Norman, C.J., a very unusual course, rarely adopted. Such statement of reasons may ensure that the order is not made without adequate consideration, assure the litigant that the award has not been arbitrarily made, and materially assist the Court of appeal in determining whether judicial discretion has or has not been properly exercised. The appellants have rightly contended that, in this respect at least, the procedure should be analogous to what is followed in England where three Counsel are allowed only when very special reasons are established; Smith v. Buller (1875) 19 Eq. 473 : 45 L.J. Ch. 69 : 31 L.T. 873 : 23 W.R. 332, Glamorgon County Council v. G.W. Ry Co. (1806) 1 Q.B. 21 : 64 L.J.Q.B. 138 : 71 L.T. 736 : 9 Ry. & Can. Traff. Cas. 1 : 59 J.P. 182, Peel v. London and North Western Railway Co. (1907) 1 Ch. 607 : 76 L.J. Ch. 879 : 96 L.T. 498, Wilson v. Wilson (1911) 28 R.P.C. 741, Mercedes v F.I.A.T. Co. (1918) 81 R.P.C. 8. We must remember that, whet ever the origin of costs might have been, they are now awarded, not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected, or, as Lord Coke puts it, for whatever appears to the Court to be the legal expenses incurred by the party in prosecuting his suit or his defence. We are now far removed from the days when "the plaintiff who failed was punished in amendment pro falso clamore, and the defendant, where the judgment was against him, in miserecordia cum expensis litis, for his unjust detention of the plaintiffs right". The theory on which costs are now awarded to a plaintiff is that the default of the defendant made it necessary to sue him, and to a defendant is, that the plaintiff sued him without cause costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in Court, and consequently the party to blame pays costs to the party, without fault. There principles apply, not merely in the award of costs, but also in the award of extra allowance or special costs. Courts are authcrised to allow such special allowances, not to inflict a penalty on the unsuccessful party, but to indemnify the successful litigant for actual expenses necessarily or reasonably incurred in what are designated as important cases or difficult, and extraordinary cases. The object of the provision plainly is, not to give exemplary damages or smart money by way of punishment to a party for unsuccessfully bringing a difficult or extraordinary section, nor to enable the successful party to make anything in the way of gain or profit over and above the expenses for maintaining or defending such an action. The object and intention of the special scale is to enable the successful litigant to obtain indemnity for his expenses in very special or unusual circumstances, which would not be covered by the ordinary scale prescribed for fill actions (other than short causes). It is manifest

that no rigid definition of an important cause can be framed; this mush is clear that the character of a case cannot be determined by any particular phase of it, but various factors, such as the difficult and complicated nature of the questions of law and fact involved, the large amount in controversy, the length of time consumed in the trial, and like matters must be taken into account, not separately but in the aggregate. Finally, apart from all this, it must be remembered that, even though a case may appear important or difficult and extraordinary, the Court is not bound to award costs on the special scale.

8. The case before us cannot, in our opinion be rightly regarded as an important cause which can be differentiated on any substantial ground from the typical suit for damages for breach of contract of service. On the other hand, we cannot ignore the fact that the claim was grossly exaggerated and that the amount awarded to the plaintiff is less than one-fifth of the sum claimed by him; indeed, if he had been moderate and reasonable in his demand, it is by no means improbable that the opposition might have been less strenuous and the litigation less protracted.

9. The result is that, this appeal is allowed in part and the decree is varied in the matter of costs which will be allowed on Scale No. 2 instead of Scale No. 3. As regards this appeal, we direct that each party do bear his own costs.

Ernest Fletcher, J.

10. I agree.