

CALCUTTA HIGH COURT

The Brahmaputra Tea Co. Ltd

Vs

E. Scarth

(McDonnell and Macpherson, JJ.)

11.05.1885

JUDGMENT

McDonnell and Macpherson, JJ.

1. This appeal raises questions under Sections 27 and 74 of the Contract Act. On the 3rd of October 1880, the defendant, the respondent in this appeal, entered into an agreement with the Brahmaputra Tea Company, by which he undertook to serve the Company as assistant tea-planter for a term of three years, to be computed from the date of the termination of his fourth year's service under a prior agreement. The Company agreed to pay him a salary of Rs. 300 a month for the fifth year, Rs. 350 for the sixth year, and Rs. 400 for the seventh year. It is admitted that this agreement took effect from the 5th of November 1881. On the 17th of May 1882, the defendant gave notice of his intention to leave, and on the 27th of November following, he actually did leave the Company's service without their consent, and became manager of the Moabund Tea Estate, which is about two miles distant from one of the Company's gardens. It is alleged that he has, by so doing, infringed the 8th, 10th and 11th clauses of the agreement.

[Here followed the 8th, 10th, 11th clauses which are set out above.]

3. The Company on the 30th of June 1883 brought this suit to recover Rs. 3,109-6, the equivalent of £250, for the infringement of the 8th clause; and for an injunction to restrain the defendant from serving on the Moabund Tea Estate; or, in the alternative, to recover Rs. 12,437, the equivalent of £1,000 as damages for the infringement of the 10th clause. The lower Court held that the agreement in Clause 10, being in restraint of trade, was void under Section 27 of the Contract Act. For the infringement of the agreement in the 8th Clause it awarded a sum of Rs. 900 as compensation.

4. The plaintiff-Company appealed against that decision on the grounds that the contract contained in the 10th Clause is not void, and that the compensation awarded is unreasonably small.

5. We entertain no doubt that the contract in the 10th Clause is void, so far as it restrains the defendant from taking service, or from engaging in, or promoting directly or indirectly, the cultivation of tea for a period of five years from the date of the termination of his agreement, although the restriction only extended to a distance of forty miles from any of the Company's gardens. Couch, C.J., and Pontifex, J., held in the case of *Madhub Chunder Poramanick v. Rajcoomar Das*¹ that the words "restrained from exercising a lawful profession, trade or business" do not mean an absolute restriction, and are intended to apply to a partial restriction. It is quite clear that such a contract would not come within any of the exceptions to Section 27, and it is impossible to suppose that the Legislature, while making certain exceptions to the general rule, would omit to provide for a contract of this kind, if it was intended to be an exception. Contracts by which persons are restrained from competing, after the term of their engagement is over, with their former employers within reasonable limits, are well known in English law, and the omission to make any such contract an exception to the general prohibition contained in Section 27 clearly indicates that it was not intended to give them legal effect in this country. Kindersley, J. in *Oakes v. Jackson*² refused to give effect to such a contract as contrary to the law in India; but there the restriction was also considered unreasonable under the English law. It is unnecessary to refer to the English cases which have been cited as the case must be governed by the Contract Act. An agreement of service by which a person binds himself during the term of the agreement not to take service with any one else, or directly or indirectly take part in, promote or aid any business in direct competition with that of his employer, is, we think, different. An agreement to serve a person exclusively for a definite term is a lawful agreement, and it is difficult to see how that can be unlawful which is essential to its fulfilment, and to the due protection of the interests of the employer, while the agreement is in force. It is unnecessary to consider all the conditions in the 10th clause. It is sufficient to say that we are not disposed to agree with the Judge that it is wholly void. As, however, the agreement has long since expired, no injunction can now issue. We need not consider the question of damages, as we should not, under any circumstances, have awarded any without giving the respondent an opportunity of complying with an injunction.

6. The remaining contention is that the sum awarded as compensation for the breach of the condition in the 8th Clause is unreasonably small. The case clearly falls within Section 74 of the Contract Act, the effect of which was to do away with the distinction between liquidated damages and a penalty, and to leave it to the Court in all cases in which a sum is named in the contract as the amount to be paid, to award against the party who has broken the contract reasonable compensation not exceeding the sum named. It is clear that the Court might have awarded the full sum stipulated without any proof of damages or loss. The plaintiff gave no proof of actual damage or loss, and the Court assessed the damages with reference wholly to the increased emoluments which the defendant had drawn subsequent to the time when the agreement came into operation. Though averse to interfere with the decision of the Judge on this point, we think he has not exercised his powers rightly or discreetly in this matter. The agreement

was deliberately entered into and as deliberately broken. The Company refused to assent to the defendant's leaving before his time. He not only went, but took service as manager of a neighbouring factory, The sum of £250 was entered in the agreement by the defendant himself, so he knew full well what he was doing and what risk he was incurring, and, so far as we can see, there was no reasonable or sufficient ground for his act. No doubt the Court has a discretion to fix what it considers reasonable compensation; but when the parties have already agreed among themselves as to what the penalty should be, we think the Court should not, in fixing the compensation, wholly ignore the amount agreed on, unless this is, on its face, wholly unreasonable with reference to the position of the parties and the breach provided against. In this instance the sum, though large, cannot be considered wholly unreasonable; and it was, we must take it, fixed after due consideration with reference, not only to any actual expense to which the plaintiff might be put in supplying the defendant's place, but to all the circumstances attending the loss of his services, which the agreement was intended to secure. These circumstances the Judge has not at all taken into consideration. He has merely made the defendant pay as compensation the amount of the increased salary which he obtained under the agreement. We have had great doubt whether we ought not, under the circumstances, and in the absence of any proof to the contrary, to consider as reasonable the sum which the parties themselves agreed on. We are clearly of opinion that the amount awarded by the Judge was unreasonably small; and having a discretion in the matter, which we exercise in favour of the defendant, we think a sum of Rs. 2,000 would be a proper sum to allow. The appeal is decreed to that extent, but as it only partially succeeds, we think each party should bear his own costs in this Court. The order of the Court below as to costs will stand.

Cases Referred.

114 B.L.R. 76

2I.L.R. 1 Mad. 134