

# CALCUTTA HIGH COURT

Gisborne and Co

Vs

Subal Bowri

(Richard Garth, C.J. Mcdonell, J.)

08.12.1881

## JUDGMENT

### **Richard Garth, C.J.**

1. I am of opinion that the instrument in question is not a bond within the meaning of the Stamp Act of 1869; and that it requires (so far as I can see) an eight-anna stamp only.
2. The definition of a bond in Section 5 of the Act is precisely what we understand by a bond in England, and it is an obligation of a different character from a covenant to do a particular act, the breach of which must be compensated in damages.
3. Whether a penal clause is attached to such a covenant or not, the remedy for the breach of it is in form and substance a suit for damages; and by Section 74 of the Indian Contract Act, the English rule with regard to liquidated damages is abolished, and the plaintiff in such a suit has no right under any circumstances to claim the penalty itself as such. He can only recover such compensation, not exceeding the amount of the penalty, as the Judge at the trial considers reasonable; but he is entitled to that compensation, whether he proves any actual damages or not.
4. The remedy upon a bond is very different. The plaintiff in the case of a simple money-bond recovers the sum named in the bond, or in the case of a bond conditioned for the performance of covenants, he recovers the actual damage which he can prove that he has sustained. In either case not only is the bond a contract of a different form and nature from a covenant with a penal clause, but the remedy upon it, and the amount recoverable for the breach of it, is also different.
5. I therefore agree with Mr. Justice Phear's judgment in the case of *Robert and Charriol v. Shircore*<sup>1</sup> and with all deference to the majority of the High Court of Allahabad, in the Full Bench case of In the matter of a Reference by the Board of Revenue, N.W.P. I.L.R. 2 All., 654, I think that the view taken by the learned Chief Justice in that case was the correct one.

6. If the majority of the Court were right, it would seem to follow that every covenant or agreement containing a penal clause must be a 'bond' within the meaning of the Stamp Act.

7. In that particular case, it is clear that if the Mittra defendants had been guilty of any breach or breaches of their contract, the Collector could not have sued for the Rs. 5,000, but only for such reasonable compensation as the Court thought fit to allow.

8. If the Legislature had intended that the word 'bond' should include a covenant with a penal clause, I presume that they would have said so. As it is, we can only deal with the definition according to its ordinary and legal meaning.

9. I think, therefore, that the case should, go back to the Court of First Instance, with directions, that the plaintiffs are entitled to such compensation for the defendant's breach of contract, not exceeding Rs. 200, as the Munsif may consider reasonable, and that such compensation may be given, although the plaintiffs are unable to prove any actual damage.

Cases Referred.

17 B.L.R. 510