

CALCUTTA HIGH COURT

Bilasiram Thakursidass

Vs

Ezekiel Abraham Gubbay

(Lancelot Sanderson, C.J Woodroffe and A Mookerjee, JJ.)

29.11.1915

JUDGMENT

Lancelot Sanderson, C.J.

1. In this case the plaintiff brought his action against the defendants claiming damages for breach of contract. The contract was in respect of 300 tons of Brown Java Sugar, which was to be delivered in Calcutta, and the contract price was rupees six and pies six per bazar maund; the goods were to be delivered Ex. Kidderpore Docks Jetty or ghat, and the shipments were to be made by steamers during July to December 1914. The date of the contract was the 4th of June 1914 and the first shipment would have to be made in July. But in the contract there was a clause giving the shipper seven days' margin, so that if he shipped the July shipment by the 7th of August, it would be in accordance with the terms of the contract.' It was given in evidence in the course of the case that the length of the voyage would be eleven days but it was said on behalf of the plaintiff that it would be thirteen days, and for the sake of this case we may take it from eleven to thirteen days, so that the first shipment under this contract' namely, the July shipment, if the shipper took the whole margin which was allowed to him, that is, the first seven days of August, would be due to be delivered in Calcutta about the 18th or 19th of August. Now, on the 4th of August, as everybody knows, war was declared, and a letter was written a few days afterwards by the defendants in these terms, "We beg to intimate to you that owing to the war no sugar can be shipped from Java without war insurance being effected on payment of extra war rates. We shall thank you to intimate to us if you are prepared to take the sugar on payment of the extra war insurance rates charged therefor. Unless we hear from you within 24 hours agreeing to pay the extra war insurance rates we shall take it that you have cancelled the July to December portions of the above contract which has been ready for despatch from Java." The answer to that from the plaintiff was, "I write to inform you that I am bound by the contract under which I purchased and you have sold me the sugar and that I am prepared to carry out all and only such obligations as are included in the terms of the contract." On the 13th the defendants wrote,

"Unless you give us a definite reply to whether you accept the condition within two days, we shall consider the contract as cancelled." On the 14th the plaintiff replied practically confirming what he had already said that he stood by his contract. On the 18th he wrote complaining "that he had not yet received notice of arrival of July shipment of sugar purchased from the defendants under contract No. 503." On the 18th of August the defendants wrote as follows: "With reference to your letter of the 14th and 18th instant, we regret we cannot add anything now to what we wrote to you on the 13th instant. Please note that we have already cancelled your contract. Farther correspondence with regard to the said contract will be useless." Now, upon that, the first point that was raised by the learned Counsel for the defendants was that that was a repudiation of the contract and that the repudiation took effect from the 15th of August, basing their argument upon the letter of the 13th of August in which they said, "unless you give us a definite reply to whether you accept the condition within two days we shall consider the contract as cancelled." It has been argued on the part of the plaintiff that that was not a definite repudiation and that it gave time for further consideration, further correspondence and further negotiations, and if the defendants had chosen to go back upon what they said in the letter of the 13th of August they could have done so. I think the plaintiff is right upon that point, and that the letter of the 13th August was not a sufficiently definite statement of repudiation, and, as a matter of fact, the actually definite repudiation was not made until the 18th of August 1914. That letter of the 18th was delivered between 6 and 7 P.M. of the 18th, and I do not think it can be seriously disputed that it was too late for the plaintiff to do anything on that day. Therefore, the matter stands in this way, that on the 18th of August the defendants repudiated their contract and definitely told the plaintiff that they were not prepared to carry it out any further. Therefore, there was a breach the contract on the part of the defendants, and the question arises, to what damages the plaintiff was entitled.

2. Now, such a question as this in my experience nearly always gives rise to matters which are very difficult to decide, and I do not think that this is an exception in that respect--it does raise difficulty as to the proper measure of damages.

3. The first point on this part of the case which was raised by the leading Counsel for the defendants is this: He argued that although the defendants, the sellers, were entitled to deliver the 300 tons of Brown Java Sugar by instalments by shipment in each month, from July down to December, the buyer had not the right to demand delivery by such shipments or instalments but that the sellers, if they had chosen, could have delivered the whole of the consignment--the whole of the 300 tons--in August; or, on the other hand, he could have postponed delivery of the whole 300 tons until the last month specified in the contract. In my judgment that is not a correct construction to be put upon this contract--it is not in accordance with the terms of the contract,

nor is it in accordance with the common sense of the matter. I am of opinion that just as a seller had the right to deliver by separate shipments spread over the months from July to December, the buyer in the same way had the right to demand delivery of the goods during those months from July to December. It would be an astonishing proposition from a business point of view that the seller could have delivered by instalments in the way he claimed he had the right to do, yet the buyer was found to take the whole lot at the beginning of the period or at the end of the period. For these reasons, I do not think that the first point raised by the learned Counsel was a good point.

4. The next point that was raised by the learned Counsel for the appellant was in respect of the July shipment. The learned Judge who tried the case, in assessing the damages, has taken the market price for the July shipment to be Rs. 7-6, and he has deducted from that the contract price, Rs. 6-0-6, and has awarded damages upon that basis. It was argued by the learned Counsel for the appellants that the learned Judge should have taken a lower rate than Rs. 7-6 as the market price. I think there was sufficient evidence to justify the finding of the learned Judge that Rs. 7-6 was the market price in respect of the July shipment, and I do not think there is sufficient reason for disturbing the learned Judge's judgment upon that point.

5. The next point that was raised by Sir Satyendra is that in assessing the damages, not only ought the July shipment be taken at the ready rate, but the August shipment also ought to be taken at the ready rate. As I understood him, his ground was that inasmuch as the shipper, if he had liked, could have delivered the August shipment by the 19th of August, therefore, the market rate for the ready goods (I am not sure whether that is the correct way of specifying the matter, what I mean is the market rate for the goods which could be delivered then) ought to be taken in respect of the August shipment. I do not think that that is a sound contention for the reason that the shipper was not bound to deliver the August shipment until September, and that until September arrived there would have been no breach of contract (apart from the repudiation) on the part of the seller if he had not delivered the August shipment. I, therefore, do not think it is correct to say that the learned Judge in assessing the damages for the August shipment was bound to take the ready rate.

6. But then comes the matter which I think is really difficult in this case. That is with regard to the shipments other than the July shipment. The learned Judge has taken the market price as Rs. 8 and he has deducted from that the contract price, Rs. 6-0-6. Now, with the greatest deference to the learned Judge who tried this case, I cannot bring myself entirely to agree with that part of his judgment which deals with the evidence which was given on behalf of the defendants. The evidence which was given on behalf of the defendants consisted of the evidence of the representative of Messrs. Ralli Brothers, and another gentleman whose name was Manna Lall. I

am leaving out the evidence of another witness because both the learned Counsel for the appellants have laid no stress upon his evidence. Now, to my mind, there was evidence given which requires very careful consideration. There was first of All the evidence of the representative of Messrs. Ralli Brothers, who produced his market rate book which was made up in the ordinary course every day at 5 o'clock in the afternoon, and, presumably, a gentleman,' - who represents such a well-known firm as Messrs. Ralli Brothers, goes to the market, makes up his book at the end of -each day, is in a position to know what the market rates were, and the entries are' made from day to day in the ordinary course. Speaking for myself I think that is most cogent evidence, and further, when I compare the entries in that book, as far as I can, with the entries which were made in the market rate book of Messrs. Sassoon and Co., namely, with regard to the 15th, 17th and 18th August, I find that the rates which were entered in Messrs. Sassoon and Co.'s book agree practically with the rates entered in Messrs. Ralli Brothers' book, thereby showing that they are bona fide business entries. Unfortunately Messrs. Sassoon and Co.'s entries with regard to the forward rates did not go beyond the 18th: but up to the 18th, they do conform to the entries in Ralli Brothers' book. Then after the 18th, Messrs. Ralli Brothers' entries are in respect of the forward rates for shipments from July to December which is the period specified in the contract, with which we are concerned. Those rates on the 19th August were Rs. 7-7, on the 20th of August Rs. 7-10-11, on the 21st August Rs. 8 for ready, and the rate for forward August--December Rs. 7-14. The learned Judge with regard to that has simply said this, With regard to the evidence on behalf of the defendant most of the contracts were settlement contracts." Well, it may be so; the contract to which the witness referred specifically may have been a settlement contract, but I may point out here that with regard to the entries made in the book Ram Coomar Bhakat has said, "there were buyers and sellers in the market for ready and forward goods, otherwise there can be no rates." Then the learned Judge goes on to say, "Messrs. Ralli Brothers' Banian who was examined said that the Ralli Brothers were not sellers at the rate mentioned by him. He could not say whether they were sellers at Rs. 8 or not. He said, ho did not know. This I find difficult to accept." It seems to me, with great respect to the learned Judge, that he has not given sufficient consideration to the very cogent evidence which was put forward by this representative of Messrs. Ralli Brothers in respect of the entries in the book. Further than that, there was evidence given by a witness called Manna Lall who spoke to a particular transaction of the 19th of August for September to December shipment at the price of Rs. 7-3" and with regard to him, the learned Judge says: "There was another witness named Manna Lall who purported to give evidence of an actual sale. It is difficult to say from his evidence as to what the nature of that transaction was. It seems to me to have been in the nature of a settlement, in which the defendant was concerned." Now, the evidence was that it was not in the nature of a settlement, and there was not any ground for the statement that Manna Lall and the defendant were connected in some shape or form with the transaction. These are the grounds for my saying,

with great deference to the learned Judge, that he has not given sufficient consideration to the evidence on this point. But the matter does not stop there. Supposing I am not satisfied that the evidence of the defendant has been sufficiently appreciated, what is the position? I have got to consider now upon the evidence what are the rights of the parties, and I think that if I were now to proceed upon the evidence which is before me, to assess the damages upon a correct basis and upon the right principle as laid down by the authorities, as far as I understand Mr. Mitter, I should have to come to the conclusion that the plaintiff would be entitled to more damages than the learned Judge has already awarded him, and I will now proceed to say why. The principle upon which the damages should be assessed is this: I am reading from a passage in *Leak on Contract*, 5th Edition, page 638 which correctly states the law on the point; "Where there is a contract for the sales; and delivery of goods at a future time, or in instalments at future times, a notice by the seller to the buyer of his intention not to deliver may be accepted and acted: upon as an immediate breach, and the buyer is prima facie entitled to damages measured by the difference between the contract price and the market price at the appointed time or times of delivery, leaving it to the seller to show in mitigation that he could in the interval have obtained a new contract upon better terms, or if the time for delivery has not elapsed when the damages are assessed, the future damages must, be estimated prospectively." To make it perhaps a little bit clearer I may read *Roper v. Johnson*¹ where there was a contract to deliver coal during certain months, as in this case, and where the defendant refused to deliver any coal, and the plaintiff brought an action for damages for this breach, it was held that in the absence of evidence on the part of the defendant that the plaintiffs could have obtained a new contract on such terms as to mitigate their loss, the true measure of damages was the sum of the differences between the contract price and the market price at the several periods for delivery, notwithstanding that the last period had not elapsed when the action was brought, or when the cause was tried. Therefore, I repeat that if I had to begin now and assess the damages afresh upon the true basis, I should have to consider, first of all, what was the contract price that was fixed by the contract, and I should have to ascertain from the evidence what the market price was in August, September, October, November and December, and then to subtract the contract price from the market price at the appointed times of delivery in each month, and add the differences together, in order to make out the total amount of damages. It is in evidence that from August the market was a rising market. Then we have the evidence that the market price increased until it rose to something like Rs. 10, perhaps even more, Rs. 10-1-0. Therefore I say that if I had to begin now to assess the damages again, as far as I can see according to the evidence, I should have to award to the plaintiff a larger sum than that which he has obtained under the judgment of the learned Judge. Therefore, although I, cannot say that the judgment which the learned Judge has given is good with regard to the way in, which he has treated the defendants' evidence, I am not in a position to say that the plaintiff ought to be awarded less damage than what the learned Judge has given him.

If I had to disturb this judgment, I should have to proceed to assess the damages upon the right principle, and according to the evidence I should have to award to the plaintiff more than what he has already obtained, and for this reason I do not think that it would be right for me to disturb the judgment of the learned Judge.

7. I think this covers all the points which have arisen in this appeal.

8. The appeal must, therefore, be dismissed with costs.

John Woodroffe, J.

9. On the question of the market rate we have been asked to say that the finding of the learned Judge that the rate in August and September, to December was Rs. 8 is wrong. If the evidence be closely examined, it will be found that the only item which directly bears, upon the appellant's, argument is that which was given by the witness Ram Kumar Bhakat, the sugar Banian of Messrs Ralli Brother, The question in this case is not in my opinion so much the issue whether if we had heard the case ourselves we should or should not have preferred his evidence to that given on behalf, of the plaintiff, but whether that evidence having been rejected by the learned. Judge it is by itself sufficient to enable us to hold that the judgment on this point is erroneous. I refer to the evidence of Ram Kumar Bhakat because the evidence of the witness Narendra Krishna was not relied upon on behalf of the appellant, and the only other witness is the 3rd witness Manna Lall. He states that on the 19th August 1914 he purchased. 50 tons of September to December, shipment at Rs. 7-3 from one Janki Dass Bullabux, The rate at which that sale was effected is different from and lower than that given as the market rate on the same date by the witness Bhakat and is a lower rate than that which, it is contended by the 12th ground of appeal, should have been awarded to the plaintiff. What then is the evidence of Bhakat upon which the appellant's argument rests. He is the sugar Banian of Messrs. Ralli Brothers and is certainly an important witness. He states that the rate of ready goods on the 19th August was Rs. 7-7, for forward goods deliverable July to December same rate, and on the 20th August ready goods were quoted at Rs. 7-10 and forward for the same month at the same rate. Now against this we have it upon the evidence of this witness that there was on the 19th a sale to Messrs. Shaw Wallace & Co. at a rate which was higher than that which is stated to be the market rate on the 19th August and on the 20th August we have a sale to Messrs. Ralli Brothers at Rs. 7-8 which is lower than what was stated to be the market rate for the 20th August. We further have it that when the witness was asked whether if any one wished to purchase from him from the 17th to 20th August he would have sold at the rate at which he had sold to Messrs. Ralli Brothers on those dates, he replied that he would have sold to Messrs. Ralli Brothers and Shaw Wallace & Co., if they wished to buy, but he would not sell to other buyers at this rate. When he was asked at what rate

he would have sold to them he made a somewhat vague statement that the rate would depend upon the parties 0-1-0, 0-2-0, 0-3-0 or higher according to the customers. He was further asked whether Messrs. Ralli Brothers whose Banian he was were prepared to sell at Rs. 8. With regard to this he says he did not know; he could not say. With regard to this portion of his evidence Mr. Justice Chaudhuri finds some difficulty in accepting it. And speaking for myself I think I should have found some difficulty, considering what the position of the witness was, namely, he was the Banian of Messrs. Ralli Brothers and so far as the sugar business of Messrs. Ralli Brothers was concerned he was in fact the representative of Messrs. Ralli Brothers. This witness, however, affords strong corroboration to another piece of evidence given on behalf of the plaintiff when he states that the market went steadily up and that the rate upon the day on which he gave evidence was as high as Rs. 10-1. Now, the question before us on this matter is one of pure fact. There is evidence which supports the learned Judge's finding, though it is true that some of the criticisms which have been passed on it may be said to be well founded. On the other hand, I am clearly of opinion that it is not sufficient to show, as it is incumbent, on the appellant to show, that the evidence before us is such that the finding is so clearly erroneous that it should be reversed.

10. As regards the question of construction of the contract and that it was not in fact repudiated until the 18th of August and as regards the rate as regards the July shipment I agree with what has been said by the Chief Justice. I have nothing further to add. I agree with him that the appeal should be dismissed.

Asutosh Mookerjee, J.

11. This is an appeal by the defendant in a suit for damages for breach of a contract, made on the 4th June 1914 for delivery of 300 tons of Brown Java Sugar by him to the plaintiff at the rate of Rs. 6-0-6 per maund. The contract provided that the shipments would be made by steamers during July to December 1914, and that any shipment might be made within seven days after the expiry of the particular month. After this contract had been made war was declared on the 4th August 1914. Six days later, the seller wrote to the buyer and asked him to bear the extra war insurance. The purchaser replied that he was bound by the contract and was prepared to carry out all and only such obligations as were included in its terms. The result of further correspondence was that on the 18th August 1914, the seller intimated to the purchaser that he had definitely cancelled the contract; the present suit was thereupon instituted on the 26th August 1914. The plaintiff claimed damages for the July instalment at the difference between the market rate on the 20th August 1914 and the contract rate. As regards the August installment, he claimed damages at the difference between the forward rate on the 20th August 1914 and the contract rate. For the later instalments of September, October, November and December, he claimed damages at the same rate. Mr. Justice Chaudhuri has decreed the claim in full. That decree has been assailed

before us substantially on two grounds; the first raises the question of the true interpretation of the contract, the second involves the question of the principle on which damages should be assessed.

12. In support of the first ground, it has been argued that upon a true construction of the contract, the seller was under no obligation to deliver the goods by monthly instalments, and that, in fact, he was at liberty to deliver the goods in one instalment on any date between the 1st July and the 31st December 1914. This contention is, in my opinion, entirely unfounded. It is well settled that an agreement to accept delivery by instalments may, in the absence of an express agreement, be inferred from the conduct of the parties and circumstances of the case: *Thornton v. Simpson*² *Torling v. Ricrdan*³ *Colonial Insurance Company of New Zealand v. Adelaide Marine Insurance Company*⁴

13. The contract in the present case does not expressly state that the goods were to be delivered in monthly instalments, much less that the instalments were to be of equal quantities. But there are indications in two paragraphs of the instrument, namely, the twelfth and the sixteenth that the parties contemplated delivery in instalments. This, however, is not decisive of the question, whether the buyer could insist upon delivery by instalments; that must be determined with reference to the conduct of the parties and the circumstances of the case. Now, if we look to the correspondence between the parties which preceded the institution of this suit, we find that on the 10th August 1914 the seller referred to the July and August portions of the contract," which he stated were ready for despatch from Java. On the 18th August, the purchaser referred to my July shipment of sugar." On the 19th August, the solicitors of the purchaser spoke of the 50 tons which should have been shipped in July, and there is a similar statement in their letter of the 20th August. The second paragraph of the plaint states expressly that the defendant had agreed to deliver sugar to the plaintiff in monthly shipments of 50 tons each, to be made by steamers during July to December 1914. This was not challenged in the written statement, though I do not overlook the comprehensive allegation that whatever was not expressly admitted therein must be deemed to have been denied. An examination of the proceedings before the Trial Judge also shows that both parties proceeded on the assumption that the goods were to be delivered in monthly instalments. It is further plain that no business man would read the contract in the way suggested by the appellant; it is impossible to believe that the parties could have intended that the buyer should be entirely at the mercy of the seller and that the latter was at liberty to deliver the goods either in one or in many instalments just as suited his convenience. I hold accordingly that the interpretation which the appellant now seeks to place upon the contract should not be accepted.

14. It is further clear that in the absence of any indications to the contrary, as in *Calaminus v.*

*Dowlais Iron Company*⁵ the instalments must be deemed to have been intended to be distributed rateably over the period appointed for the delivery of the whole quantity of goods: *Coddington v. Palaeologo*⁶

15. In support of the second ground, which treats of the question of the measure of damages, the judgment of Mr. Justice Chaudhuri has been criticised on the ground that he has not correctly appreciated the evidence and that he has in fact ignored what was weighty evidence in favour of the appellant. Our attention has been drawn specifically to three points in the judgment. First, that it minimizes the effect of the evidence as to the market rates given by the defendant, on the ground that the evidence related to the rates of settlement contracts; it has been pointed out that a similar criticism may validly be directed against the evidence on behalf of the plaintiff, which has been accepted and has been made the foundation of the decision. Secondly, the rates for the settlement contracts have not been treated as relevant evidence; it has been pointed out with considerable force that the rates for settlement contracts must affect the market rate and must, therefore, afford more or less valuable evidence relevant to the subject under discussion. Thirdly, the evidence of the witness Manna Lall has been disregarded on the ground that he has spoken of a transaction in which the defendant was concerned; it has been conceded that there is no evidence on the record which would justify this statement.

16. It appears to me upon an examination of these grounds as also the entire evidence on the record that the judgment under appeal is open to valid criticism. That, however, does not justify the conclusion that the decree must be reversed. The question for adjudication is, what is the principle upon which damages should be assessed. If the damages have been assessed upon an erroneous principle, the judgment cannot stand; but it does not follow that the appellant is entitled to a reduction of the amount specified in the decree; he must satisfy the Court that on the correct principle he is not liable for the amount decreed against him.

17. The principle applicable to cases of this description may be concisely stated. The general principle is that where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for non-delivery. The measure of damages is the estimated loss directly resulting from the seller's breach of contract. Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they should have been delivered. The principle is lucidly stated by Lord Atkinson in the case of *Wertheim v. Chicoutimi Pulp Company*⁷ "It is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed. That is a ruling principle. It is a just principle. The rule which

prescribes as a measure of damages the difference in market prices at the respective times above mentioned is merely designed to apply this principle, and, as stated in one of the American cases cited, *Grand Tower Mining, Manufacturing and Transportation Company v. Phillips* (1874) 90 U.S. XXIII 71 : 23 Wallace 471 it generally secures a complete indemnity to the purchaser. But it is intended to secure only an indemnity. The market value is taken, because it is presumed to be the true value of the goods to the purchaser. In the case of non-delivery, where the purchaser does not get the goods he purchased, it is assumed that these would be worth to him, if he had them, what they would fetch in the open market; and that, if he wanted to get others in their stead he could obtain them in that market at that price." This principle has been applied to cases in which there is an agreement to deliver goods in instalments and the contract is repudiated before the time for performance arrives. The leading decision on the subject is that in the case of *Roper v. Johnson*⁸ which accords with *Frost v. Knight*⁹ and *Brown v. Muller*¹⁰ In that case, the defendants contracted to sell to the plaintiffs 3,000 tons of coal to be taken during the months of May, June, July and August. The plaintiffs having failed to take any coal in May, the defendants, on the 31st of that month, wrote to the plaintiffs to consider the contract cancelled. The plaintiffs on the next day replied, refusing to assent to this, and sent to take coal under the contract on the 10th of June, when the defendants positively refused delivery. The action was commenced on the 3rd of July. Three propositions were laid down in the case: first, that, on the authority of *Simpson v. Crippin*¹¹ the defendants had no right to rescind the contract by reason of the plaintiffs' default in not sending to take the May delivery; secondly, that the plaintiffs had elected to treat the positive refusal of the defendants on the 10th of June as a breach of the contract on that day; thirdly, that, in the absence of any evidence on the part of the defendants that the plaintiffs could have gone into the market and obtained another similar contract on such terms as would mitigate their loss, the measure of damages was the sum of the differences between the contract price and the market price at the several periods for delivery, although the last period fixed for delivery had not arrived when the action was brought or the cause tried. There is an instructive passage in the judgment of Mr. Justice Brett, as he then was, to which reference may be made: To entitle a plaintiff to recover damages in an action upon a contract, he must show a breach and that he has sustained damage by reason of that breach.... The general rule as to damages for a breach of a contract is, that the plaintiff is to be compensated for the difference of his position from what it would have been if the contract had been performed.... Now, although the plaintiff may treat the refusal of the defendant to accept or to deliver the goods before the day for performance as a breach, it by no means follows that the damages are to be the difference between the contract price and the market price on the day of the breach.... The election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages; and that, when you come to estimate the damages, it must be by the difference between the contract price and the market price at the day or days appointed for performance, and not at the time of breach.... It

seems to me to follow...that the plaintiffs here did all they were bound to do when they proved what was the difference between the contract price and the market price at the several days specified for the performance of the contract, and that prima facie that is the proper measure of damages; leaving it to the defendant to show circumstances which would entitle him to a mitigation. No such circumstances appeared here: There was nothing to show that the plaintiffs ought to have or could have gone into the market--a rising market--and obtained a similar contract." In the case before us, the damages have been assessed on a different principle, and as I read the authorities, on an erroneous principle; the method propounded by the appellant is equally erroneous. If the damages had been assessed on the correct principle, the evidence shows that the plaintiff would have been entitled to a larger sum than what has been awarded to him. But Mr. Mitter has contended that the Court should not now consider a case inconsistent with that expressly made in the plaint. The appellant, however, cannot invite the Court to set aside the judgment of the Trial Judge and make a decree in his favour on what the Court considers an erroneous basis. Nor can the case be sent back, for the remand would be fruitless from the point of view of the appellant; the result will be that the plaintiff will on remand get a larger sum than what has been awarded to him. I hold accordingly that the decree as made by Mr. Justice Chaudhuri should stand.

Cases Referred.

- 1(1873) 8 C.P. 167 : 42 L.J.C.P. 65 : 28 L.T. 296 : 21 W.R. 384
- 2(1816) 6 Taunton 556 : 2 Marsh. 267 : Holt, N.P. 164 : 128 E.R. 1151
- 3(1878) 2 L.R. Ir. 82 at pp. 86, 89
- 4(1886) 12 App. Cas. 128 at p. 138 : 56 L.J.P.C. 19 : 56 L.T. 173 : 35 W.R. 636 : 6 Asp. M.C. 94
- 5(1878) 47 L.J.Q. 13. 575
- 6(1867) 2 Ex. 193 at p. 197 : 36 L.J. EX. 73 : 15 L.T. 581 : 15 W.R. 961
- 7(1911) App. Cas. 301 at p. 307 : 80 L.J.P.C. 91 : 104 L.T. 226 : 16 Com. Cas. 297
- 8(1873) 8 C.P. 167 : 42 L.J.C.P. 65 : 28 L.T. 296 : 21 W.R. 384
- 9(1872) 7 Ex. 111 : 41 L.J. Ex. 78 : 26 L.T. 77 : 20 W.R. 471
- 10(1872) 7 Ex. 319 : 41 L.J. Ex. 214 : 27 L.T. 272 : 21 W.R. 18
- 11(1872) 42 L.J.Q.B. 28 : 8 Q.B. 14 : 27 L.T. 546 : 21 W.R. 141