

CALCUTTA HIGH COURT

F.T. Kingsley

Vs.

Secretary of State for India in Council

(Asutosh Mookerjee and Chotzner, JJ.)

18.08.1922

JUDGMENT

Asutosh Mookerjee, J.

1. This is an appeal by the plaintiff in a suit, instituted against the Secretary of State for India, for damages in respect of a license for catching elephants in Assam. On the 16th June, 1915, the plaintiff, Frederick Thomas Kingsley, a European British subject, obtained from the Deputy Commissioner, Goalpara, a license to catch elephants in Goalpara Mahals Nos. 1 and 11 and Bhutan Mahals Nos. 1 and 11, for the period from 1st October, 1915 to 31st March, 1916 and from 1st October, 1916 to 31st March, 1917. The plaintiff paid a consideration of ₹ 66,000 for the license. The plaintiff captured 279 elephants in the first year and 342 elephants in the second year. The case for the plain tiff was that he could not catch as many elephants as he would have done, but for the wrongful acts of the officers of the defendant. His grievance was three-fold; first, the operations were delayed by reason of the failure of the defendant to provide him with the requisite passport; secondly, the removal of captured elephants was hindered by reason of wrongful refusal of the officers of the Forest Department to accept the prescribed royalty and to issue, the transit passes; and thirdly, that the depot at Hail River and the whole of the Goalpara Mahals were wrongfully burnt out under the orders of the officers of the Forest Department. The damages under these three heads were claimed as follows:

- (i) Delay in commencement of operations ... ₹ 5,800 (ii) Hindrance in the removal of elephants ... ₹ 5,000 (iii) Loss due to fire- (a) Hail Depot ... ₹ 951 (b) Goalpara Mahal 1915-16 ... ₹ 1,21,500 (c) Goalpara Mahal 1916-17 ... ₹ 23,400

2. The Subordinate Judge has assessed ₹ 1,537-8-0 under the first head and has refused the claim in respect of the other two heads. The plaintiff has appealed against this decree, and a memorandum of cross-objections has been filed on behalf of the defendant. The matters in

controversy have thus been reopened in their entirety.

3. As regards the first point, we are of opinion that the plaintiff had a cause of action against the defendant. The plaintiff who acquired the right to the license as the highest bidder at a public auction, was a European British subject. He could not cross the inner line into the Bhutan Mahals without the special sanction of the Government of India. The officer of the defendant should consequently have been ready to provide the plaintiff with the requisite inner line pass. It is an elementary rule that the grantor of license is under an obligation to place the licensee in a position to enjoy the license. The result was that the reference to the Government of India took some time, and the plaintiff was not enabled to enter the Bhutan territory till about the 15th October at the earliest. It cannot be reasonably urged that the plaintiff might have managed the business through his agents. The answer is that he was entitled to be present and to start the operations personally. There is thus no escape from the position that the operations were delayed for two weeks, by reason of default on the part of the officers of the defendant. The plaintiff is consequently entitled to damages. The Subordinate Judge has held that the damage should be assessed on the basis of what he calls the "actual loss" sustained by the plaintiff rather than the "profit" the plaintiff would have made during this period. On this basis, which ignores the fundamental principle of the law of compensation formulated by the Roman jurist Celsus, *damnum emergens--loss suffered, gain prevented*--the Subordinate Judge has allowed the plaintiff a refund of the license-fee during this period and the expenses incurred in connection with the stockades. This he has assessed at ₹ 1,537-8-0. The plaintiff, on the other hand, urged in the Court below, and the argument has been repeated here, that the damages should be assessed on the basis of the probable number of elephants which might have been captured during the period. The Subordinate Judge describes the assessment of damages on this basis as purely speculative because there is no certainty as to the number or value of the elephants which might have been captured. We are not prepared to agree with the Subordinate Judge on this point. It may be conceded that though every breach of duty arising out of contract gives rise to an action for damages, without proof of actual damage *Marzetti v. Williams*¹ *Embrey v. Owen*² the amount of damages recoverable is, as a general rule, governed by the extent of the actual damage sustained in consequence of the defendant's act: *Hiort v. L. & N.W. Ry. Co*³. In cases admitting of proof of such damage, the amount must be established with reasonable certainty: *The Commerce* (1850) 3 W. Rob. 287. But this does not mean that absolute certainty is required; nor, in all cases, is there a necessity for direct evidence as to the amount. Damages are not uncertain for the reason that the loss sustained is incapable of proof with the certainty of mathematical demonstration, or is to some extent contingent and incapable of precise measurement. As Harlan, J., observed in delivering the judgment of the Supreme Court of the United States in *Hetzel v. Baltimore & O.R. Co*⁴, certainty to reasonable extent is necessary, and the meaning of that language is that the loss or damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it was most likely to follow from the breach of the contract and was a probable and direct result thereof. To the same effect is the decision in *Morris v. United States*⁵ that where absolute certainty is impossible, judgment of fair men as to damages

directly resulting governs. The true doctrine lies between the two opposing extreme views which are well set out in the following judicial pronouncements, made in jurisdictions where damages are left to be assessed by juries:

Dupue, J.

¹(1830) 1 B. & Ad. 415 : 35 R.R. 329 : 9 L.J. (O.S.) K.B. 42 : 109 E.R. 842

²(1851) 16 Ex. 353 : 86 R.R. 331 : 20 L.J. Ex. 212 : 15 Jur. 633 : 17 L.T. (O.S.) 79

³(1879) 4 Ex. D. 188 48 L.J. Ex. 545 : 40 L.T. 674 : 27 W.R. 778

⁴(1897) 169 U.S. 26 at p. 38 : 42 Law. Ed. 648 ⁵(1898) 174 U.S. 196 at p. 291 : 43 Law. Ed. 946

4. Observed as follows in *Wolcott v. Mount*⁶

It must not be supposed that...mere speculative profits, such as might be conjectured to have been the probable results of an adventure which was defeated by the breach of the contract sued on, the gains from which are entirely conjectural, with respect to which no means exist of ascertaining, even approximately, the probable results, can, under any circumstances, be brought within the range of damages recoverable. The cardinal principle in relation to the damages to be compensated for on the breach of a contract is, that, the plaintiff must establish the quantum of his loss by evidence from which the Jury will be able to estimate the extent of his injury, will exclude all such elements of injury as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty.

Christiancy, J. - 5. Observed as follows in⁷

Shall the injured party be allowed to recover no damages (or merely nominal) because he cannot show the exact amount with certainty, though he is ready to show to the satisfaction of the Jury, that he has suffered large damages by the injury? Certainty, it is true, would be thus attained; but it would be the certainty of injustice. Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see non-objection to placing before the Jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit.

6. In the case before us, the plaintiff has proved that he has on an average captured one elephant per stockade per week, which would make six elephants in two weeks in the three stockades concerned; on this basis, he urges that the damage should be calculated on the aggregate price of six possible captures. The Subordinate Judge has rejected this contention on the ground that there

is no certainty that, during the period in question, any elephant at all would have been captured. If this view were well-founded, no damages could, be assessed where a person had been dispossessed from a fishery or even a tract of land. It might well be argued that there was no certainty that if the owner had continued in occupation, he would have been able to catch fish or grow crops. Yet, when a person has been forcibly prevented from fishing in public waters, he may give evidence of the average quantity of fish caught in the waters from which he has been, excluded by the defendants and the probable value thereof; this is taken as a fair measure of the damage which he has suffered from being deprived of the opportunity to make a catch of fish. Similarly, in the case of dispossession of land, the mesne profits are based on an estimate of the average outturn of crops, though there is no guarantee that in a particular year the entire crop might not have been destroyed by drought or flood, even if the land had remained in the occupation of the rightful owner. It must further be remembered that in

⁶(1873) 36 New Jersey 262 at p. 271 : 13 Am. Rep. 438

⁷ *Allison v. Chandler* (1863) 11 Mich. 542 at p. 555

the extreme case where the defendant has, by his own wrong, put it out of the plaintiff's power to prove the quantum of damage exactly, the presumption is against the defendant, and the burden is upon him to reduce the amount from the highest possible estimate. Mr. Bonnerjee has urged, in the words used by Lord Macnaghten in *Williams v. Giddy*⁸ that if any more exact standard were set up, "plain folk would call it a mockery, a sham, a pretence." This is emphatic language; but the substance of the matter is, that only such approximation to certainty is required as would satisfy the mind of a prudent and impartial person; see the decision of the House of Lords in *Grade v. Argentina*⁹ Besides, if the method adopted by the Subordinate Judge were approved, the plaintiff would be entitled to nothing beyond a return of the purchase-money and refund of the expense actually incurred, even if he were deprived of all enjoyment of the right granted to him. We are of opinion that in the present case the damage, under the first head should have been assessed on the basis claimed by the plaintiff and ₹ 5,800 should have been awarded instead of ₹ 1,537-8-0.

7. As regards the second point, the Subordinate Judge has correctly held that the plaintiff has a cause of action against the defendant. The Deputy Commissioner directed that royalty be received from the plaintiff at the Haltugaon Forest Office and the transit passes issued therefrom. The Deputy Conservator of Forests did not, however, carry out the instructions. The result was that the Range Officer at Haltugaon declined to receive from the plaintiff ₹ 4,100 on the 2nd January, 1916 and to issue transit passes. The Deputy Commissioner gave the direction in exercise of his lawful authority and his subordinate officers should have carried it out. The plaintiff was thereafter entitled to tender the royalty dues at the Haltugaon Forest Office, and the wrongful refusal on the part of the officer concerned gave the plaintiff a cause of action for damages for breach of contract. But, although the Subordinate Judge has taken this view he has dismissed the claim on the ground that the plaintiff has failed to prove actual damage. The

evidence, however, leaves no room for doubt that the plaintiff was seriously inconvenienced, as the elephants were held up; by reason of the refusal of the Forest Officer to receive the royalty tendered and to issue the transit passes. It is no answer to say that elephants are auctioned off immediately on arrival at the depot; that is the general rule. But it is not proved that this happened with each of the elephants held up on the 2nd January, 1916. Besides, even if the elephants found buyers, the plaintiff would be bound to provide them with transit passes, and if the animals were likely to be detained, the fact would, in the normal course of events, be taken into account in the settlement of the prices offered. We must further remember that in actions for breach of contract, where there has undoubtedly been an infringement of a right, nominal damages are recoverable, even though no actual damage can be proved: *Marzetti v. Williams*¹⁰ *Warre v. Calvert*¹¹ *Embrey v. Owen*¹² *Twyman v. Knowles*¹³ But we are of opinion that the evidence makes out that the plaintiff did

⁸(1911) A.C. 381 : 80 L.J.P.C. 102 : 104 L.T. 51 : 27 T.L.R. 443

⁹(1889) 14 App. Cas. 519 : 59 L.J. Adm. 17 : 61 L.T. 706 : 6 Asp. M.C. 433

¹⁰(1830) 1 B. & Ad. 415 : 35 R.R. 329 : 9 L.J. (O.S.) K.B. 42 : 109 E.R. 842

¹¹(1937) 7 A. & E. 143 : 45 R.R. 694 : 2 N. & P. 126 : W.W. & D. 528 : 6 L.J. (O.S.) K.B. 219 : 1 Jur. 450 : 11 E.R. 425)

¹²(1851) 16 Ex. 353 : 86 R.R. 331 : 20 L.J. Ex. 212 : 15 Jur. 633 : 17 L.T. (O.S.) 79

¹³(1853) 13 C.R. 222 : 93 R.R. 510 : 22 L.J.C.P. 143 : 17 Jur. 238 : 136 E.R. 1183

suffer actual damage from the non-receipt of the transit passes, specially as the trained elephants would have to be maintained during the period. In view of the number of elephants (100) detained, and the period of detention (2 weeks), ₹ 1,000 may fairly be assessed as damages under this head.

8. As regards the third point, the plaintiff has, according to the Subordinate Judge failed to establish that the fires which hampered his operations were due to the action of the forest authorities; in other words, the plaintiff has not shown with reasonable certainty that loss resulted to him from the alleged wrongful act of the defendant. The evidence, which is accurately summarized by the Subordinate Judge, makes it clear that there were accidental fires as also departmental fires. The departmental fires, which are apparently periodical and systematic operations, are considered necessary for purposes of sal timber reproduction. They are as a rule carried out reasonably and properly, and the burnings are conducted under such control and supervision as is practicable in the circumstances. There is little doubt that the elephant-catching operations were, to a large extent, hampered by reason of the fires, whether accidental or departmental. On the one hand, the evidence does not indicate which fires were accidental and which were departmental. On the other hand, it is not made out with certainty that departmental fires, could not have extended beyond the original limits designed, and regarded, outside those areas, as accidental fires of unknown origin. We are, however, not prepared to disagree with the Subordinate Judge that there were extensive accidental fires in addition to the departmental fires, and that the evidence does not establish that the elephants, and if so, how many, were in fact scared away by the departmental fires or that the fodder was destroyed thereby, and if so, to what extent.

9. But the plaintiff has urged that the defendant could not derogate from his grant and could not, as grantor, interfere with the lawful enjoyment of the right conferred on the licensee. It need not be disputed that an appropriation of the land licensed to any use inconsistent with the enjoyment of the license, works a revocation, and the licensee may maintain an action for damages against the licensor for breach of contract in unlawfully revoking it. It may also be assumed that the license, in the present case, was not revocable; the license was for valuable consideration, was accompanied by the grant of a profit a prendre, and was consequently a license coupled with an interest: *Wickham v. Hawker*¹⁴ *Wood v. Leadbitter*¹⁵ *Smart v. Jones*¹⁶ *Hooper v. Clark*¹⁷ (*Kerrison v. Smith*¹⁸) It may further be conceded that, prima facie, the grant entitled the plaintiff to the exclusive right to catch elephants within the defined tracts and for the specified period. But it does not follow as a matter of course that the plaintiff would be entitled to exclusive occupation of the entire territory during such time. He has no right, for, instance, to hunt animals other than elephants in the reserved forests, nor to fell timber therein. Such rights may, under authority from the Crown, be presumably exercised by other persons, without interfering with the enjoyment of the right created in favor of the plaintiff. We observe there is no express reservation in favor of the Crown as to forest operation by recourse to departmental fires or other methods, and whether such a reservation is implied by usage or custom in the case of

¹⁴(1840) 7 M. & W. 63 : 56 R.R. 623 : 10 L.J. Ex. 163 : 151 E.R. 679

¹⁵(1845) 13 M. & W. 838 : 67 R.R. 831 : 14 L.J. Ex. 161 : 9 Jur. 187 : 153 E.R. 351

¹⁶(1864) 15 C.B. 717 : 137 R.R. 733 : 33 L.J.C.P. 154 : 10 Jur. 678 : 10 L.T. 271 : 12 W.R. 430 : 143 E.R. 966

¹⁷1867) 2 Q.B. 200 : 8 B. & Section 150 : 36 L.J.Q.B. 79 : 16 L.T. 152 : 15 W.R. 347

¹⁸(1897) 2 Q.B. 445 : 66 L.J.Q.B. 762 : 77 L.T. 344

grants of this description, Was not been investigated. The question might have been of importance, if there were any possibility of proof that the plaintiff did in fact suffer damage from the departmental fires.

10. But we are by no means satisfied that any useful purpose would be served by a further enquiry into this matter, though the impression is left on our minds, from a perusal of the official correspondence on the record, that the undoubted rights of the plaintiff were not as scrupulously safe guarded as might have been expected. On the record as it stands, it is impossible for us, however, to award the plaintiff damages under the third head; the plaintiff fails here, as well from uncertainty of cause of damage, as from uncertainty of extent of damage.

11. The result is that the appeal is allowed in part, and the cross-objections disallowed. The decree of the Subordinate Judge is modified, and the amount of damages raised from ₹ 1,537-8-0 to ₹ 6,800. The plaintiff will have his costs in both Courts on this amount where the cost is allowed ad valorem) other costs will be allowed in full. The hearing fee in this Court will be assessed at ₹ 300. The defendant will bear his own costs in both Courts.