

(1983) 08 SHI CK 0007
In the High Court Of Himachal Pradesh
Case No : Civil Suit No. 35 of 1982

Himachal Pradesh State Forest Corporation, Simla	APPELLANT
Vs	
Hari Chand	RESPONDENT

Date of Decision : 18-08-1983

Acts Referred:

Contract Act, 1872 — Section 74

Citation : AIR 1984 HP 51 : (1983) 12 ILR HP 414

Hon'ble Judges : V.P. Gupta, J

Bench : Single Bench

Advocate : H.M. Sharma, for the Appellant; D.D. Sud vice and Chhabil Das, for the Respondent

Final Decision : Dismissed

Judgement

V.P. Gupta, J.—The plaintiff is a corporate body and is engaged in the extraction of resin from the forests of Himachal Pra-desh. It has a factory known as "Rosin and Turpentine Factory" at Nahan for the manufacture of rosin out of resin. In the month of March 1979, forest in lot No. 2 of 1979 of Chopal Forest Division was auctioned to defendant and an agreement was executed between the parties on 1st August, 1979. As per terms of the agreement the defendant was allotted 20,585 blazes and the minimum yield per thousand blazes was at the rate of 20 quintals and the total yield for the entire lot was fixed to be 412 quintals resin. This resin was to be delivered by the defendant at the "Rosin and Turpentine Factory" at Nahan and the defendant was to receive payment at the rate of Rs. 166 per quintal. The contract was to be completed till 31st December, 1979. According to the terms of the agreement, the defendant was handed over the possession of 20585 blazes. The defendant could also get some running payment as per conditions of the agreement but could not do any illicit tapping or cause damage to the trees. In case of illicit tapping or causing damage the defendant was liable to pay compensation at the rate of Rs. 400 per quintal. The extracted resin was to remain at the risk and responsibility of the defendant and in case of

default, unauthorised removal, attempted or reported theft of the resin the defendant was to pay a penalty of Rs. 400 per quintal for the loss. The defendant was also subjected to a penalty at the rate of Rs. 400 per quintal for failure to extract and supply minimum agreed yield of 412 quintals.

2. It is alleged that the defendant extracted 791 tins of resin but did not deliver the same at the Nahan factory with the result that the plaintiff had to carry 373 tins weighing 60.45 quintals to the factory on 3-2-1980. The defendant was entitled to receive a payment of Rs. 10,647.40 paise for these resin tins. The defendant is alleged to have lost 418 tins containing 73.36 quintals of resin which were extracted by him and, therefore, a penalty is claimed for this loss in terms of Clause 29 of the agreement at the rate of Rs. 400 per quintal. The defendant also did not extract the minimum quantity of resin and was liable to pay penalty under Clause 30 of the agreement. It is alleged that there was some illicit tapping and for this the defendant is liable to pay penalty. The plaintiff also claims Rs. 2455.95 as freight, loading and unloading charges for the carriage of 373 resin tins. The defendant received some running payments also. After calculations the plaintiff has claimed an amount of Rs. 1,76,771-55 paise from the defendant for the various items as shown in para 21-A of the plaint. A credit of Rs. 6,137-40 for some items as mentioned in para 21-B of the plaint is allowed. Thus the plaintiff claims a principal amount of Rupees 1,70,634.15 from the defendant" and after adding interest at the rate of 18% per annum from 1-1-1981 to 31-5-1982 amounting to Rs. 74,725-85, the total claim of the plaintiff is Rs. 2,44,860. Now for recovery of Rs. 2,44,800 (2,45,360?) the plaintiff has filed this suit on 11th June, 1982. Further interest is also claimed.

3. The defendant contested the plaintiff's claim alleging that the suit has not been filed through an authorised person and that the plaintiff is not entitled to the amount. The clause regarding imposition of penalty is alleged to be void and unenforceable and the defendant claims the amount of security deposited by him along with the price of resin. The defendant has also disputed the claim regarding interest.

4. On the pleadings of the parties the following issues were framed on 26-1-1983:--

1. Whether the suit has been filed through an authorised person? OPP
2. Whether the plaintiff is entitled to the recovery of Rs. 1,70,634-15 as principal amount mentioned in para 21 of the plaint?

OPP

3. Whether the plaintiff is entitled to interest? If so, at what rate and how much?

OPP

4. Whether the clause regarding imposition of penalty is void and unenforceable as alleged by the defendant? OPD

5. Whether the defendant is entitled to the amount of security and the price of the resin? If so, how much? OPD

6. Relief.

5. The parties led evidence and arguments were heard.

Issue No. 1.

6.. This issue is not contested by the learned counsel for the defendant. This suit. has been filed through the Managing Director, who is the principal officer of the plaintiff-company. N.K. Bakshi (PW 1) Office Manager of the plaintiff states that the Managing Director is the principal officer of the plaintiff and, is authorised to file the suit and prosecute the proceedings. There is, no rebuttal. In these circumstances this issue is decided in favour of the plaintiff.

Issue No. 2.

7. The plaintiff has claimed Rs. 1,70,634-15 as principal, as is shown in Col. 21-C of the plaint. The plaintiffs claim is stated in para 21-A of the plaint i.e. (1.) a penalty at the rate of Rs. 400 per quintal for short supply of 346.55 quintals of resin (2) penalty for 5.96 quintals resin from 299 blazes illicitly tapped by the contractor (3) price of 73.36 quintals of resin of 418 tins reported to be lost or missing at the rate of Rs. 400 per quintal (4) damage for illicitly tapping 299 blazes (5) freight charges etc. paid by the plaintiff for carriage of resin. The total amount claimed for the aforesaid five items is Rs. 1,76,771-55.

8. The learned counsel for the defendant did not contest the right of the plaintiff for item No. 5, that is freight charges etc. of Rs. 2455-95. This claim is even otherwise proved. 373 tins of resin were admittedly lying in the jungle and according to the term of the agreement Ex. PW1/A the defendant was to deliver this resin at Nahan factory. These tins were not carried by the defendant to Nahan with the result that the plaintiff carried these tins in truck No. HPS 4566. Durga Ram (PW 3), Range Officer, Ram Shehar, has proved the documents Ex. PW3/A to Ex. PW3/C. From Ex. PW3/C, it is proved that the plaintiff spent an amount of Rs. 2455-95 paisa on the carriage of 373 resin tins. Hence the plaintiff is en titled to this amount.

9. Claim No. (2) relates to the penalty for 5.96 quintals of resin illicitly tapped by the defendant From 298 blazes at the rate of Rs. 400 per quintaland claim No. (4) is the amount of damages for illicitly tapping of 298 blazes. To prove illicit tapping, the plaintiff has relied upon the letter of the Divisional Forest Officer, Chopal, Bw. PW1/G. This letter was proved in the statement of Shri N.K. Bakshi (PW 1) Office Manager of the plaintiff. This witness is riot the writer of this letter He only stated that the plaintiff received a letter from the DFO, Chopal regarding, illicit resin tapping done by the defendant. The DFO, Chppal has not appeared as a witness. Ex. PW1/G was written by DFO, Chopal to the Divisional Manager of the plaintiff and a copy of the same was forwarded to the Conservator of Forests Simla for information. It is not proved as to when the inspection of the forest was

done and by whom. The DFO, Chopal has only claimed an amount of Rupees 3967-60 for damages/illicit tapping which was found in lot No. 2 of 1979 (the disputed lot) for 298 blazes. There is no other evidence regarding illicit tapping or damage.

10. The defendant (DW 1) has stated that he did not cause any damage to the forest trees and no inspection was ever carried out in his presence.

11. As the document Ex. PW 1/G is not duly proved by persons who had written the same or by the person who carried out the inspection, therefore, no reliance can be placed upon Ex. PW1/G. In these circumstances it is held that no illicit tapping or damage is proved and the plaintiff is not entitled for any amount with respect to claims Nos. (2) and (4).

12. Claim No. (3) is with respect to 73 76 quintals of resin (418 tins) reported to be lost/burnt. The plaintiff has claimed an amount at the rate of Rs. 400 per quintal under Clause 29 of the agreement (Ex. PW1/A). Clause 29 of the agreement reads as follows:--

"29. All produce of this contract shall remain at the contractor's risk from the date of signing of the agreement and the contractor shall take reasonable precautions to protect the produce from loss or damage. For any unauthorised removal or attempted/ reported theft of produce from forest in the transit, the contractor shall be liable to penalty at the rate of Rs. 400 per quintal and no claim for extraction charges of the said produce shall be entertained in case the Divisional Manager is satisfied after proper verification that the contractor(s) his/ their agent(s) is/are directly or indirectly involved in the misdirection of produce at any stage the Managing Director shall be at liberty, to quash the contract and forfeit the security money and payments due, favouring the Corporation at the discretion of the Managing Director.

No claim for damage/loss suffered by the contractor on account of such action shall be entertained. The contractor shall also be liable to be blacklisted."

13. The defendant in his statement, Ex. PW2/A dt. 28-2-1980 and the application Ex. PW1/E dt. 25-12-1979 has admitted that he extracted 791 tins of resin from the disputed lot. He has also admitted this fact before this Court on 21-6-1983. In the application Ex. PW1/E the defendant has stated that some of his resin tins were destroyed in fire and some were stolen or taken away by some unknown persons. According to the agreement, the defendant was to deliver the resin at the Nahan factory and he was to keep the same in safe condition.

14. Claim No. (1) is with respect to Short supply of 346.55 quintals resin. The plaintiff is claiming penalty at Rs. 400 per quintal under Clauses 9 and 30 of the agreement Ex. PW1/A. Clauses 3 and 30 of the agreement read as follows;--

"3. The Corporation in consideration of the payment of extraction charges of Rupees 166.00 per quintal for a minimum quantity of 20.00 quintals per thousand blazes of crude resin and delivery thereof at Nahan R & T Factory and

subject to the terms and conditions appearing hereinafter, hereby grants to the contractor the right to extract and supply crude resin from the blazes/channel marked in lots mentioned in annexure B hereto.

30. In case the contractor(s) fails/fail to extract the minimum yield fixed for each lot. a penalty up to Rs. 400 per quintal will be imposed at the discretion of the Managing Director. Decrease up to 10% may be accepted, if management is satisfied that the decrease in yield is on account of facts beyond the control of contractor(s)".

15. In claim No. (3) the plaintiff is claiming the penalty amount at the rate of Rs. 400 per quintal under Clause 29 of the agreement because the plaintiff could not be given the delivery of 418 tins of resin due to the fact that it was lost or burnt. In claim No. (1) he is claiming the penalty at the rate of Rs. 400 per quintal due to short supply of the resin under Cls. 3 and 30 of the agreement Ex. PW1/A.

16. If Clauses 3, 29 and 30 are read together then it is evident that claim No. (3) pertains to short supply of that resin which is admitted to have been extracted by the contractor while claim No. (1) pertains to short supply of resin which the contractor should have extracted from the lot.

17. In this manner in the present case the plaintiff is claiming a double penalty i.e. a penalty of Rs. 800 for 73.36 quintals of resin. The plaintiff has claimed penalty for this quantity in claim No. (1) also and has again included this quantity in claim No. (3). Such overlapping or double penalty cannot be allowed to the plaintiff under principles of equity and fair play.

18. With respect to the claim No. 1, the plaintiff agreed to extract resin for a minimum quantity of 20 quintals per thousand blazes and the plaintiff was bound to extract the minimum quantity of resin from the lot. The learned counsel for the plaintiff contends that the plaintiff is claiming the amount as given in para 21-A (i) of the plaint by way of damages and the word "penalty" in fact means damages or compensation payable to the plaintiff for the non-fulfilment of the terms of the agreement. It is contended that Rs. 400 per quintal is not an excessive amount of compensation. The learned counsel for the defendant contends that the plaintiff has failed to prove the actual damages/compensation or the loss suffered by the plaintiff due to non-fulfilment of the terms of the agreement and in these circumstances, the plaintiff is not entitled to any amount. He contends that the penalty clause is not enforceable.

19. According to the agreement Ex. PW1/A, the plaintiff was interested in getting crude resin from lot No. 2 of the forest for manufacture of rosin at Nahan factory. The plaintiff had agreed to pay a price of Rs. 166 per quintal as extraction charges for crude resin to the defendant. The lot was handed over to defendant for extraction of crude resin and a minimum quantity of 20 quintals per thousand blazes was to be supplied by the defendant to the plaintiff. In case the number of blazes was less or the contractor was unable to extract minimum quantity of resin due to any natural calamities etc. then in that case the contractor was to

apply to the plaintiff. After considering the various facts the plaintiff could allow the contractor to supply lesser quantity. A penalty of Rs. 400/- per quintal was fixed so that the contractor should not misuse the extracted resin. This rate of Rs. 165/- per quintal was in lieu of the extraction charges, that is, the labour charges and freight etc. The price of resin is not included in these charges.

20. Section 74 of the Contract Act reads as follows:--

"74. Compensation for breach of contract where penalty stipulated for.-- When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be. the penalty stipulated for.

Explanation -- A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception -- When any person enters Into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation -- A person who enters into a contract with Government does not necessarily thereby undertake any public duty or promise to do an act in which the public are interested."

21. According to Section 74 of the Contract Act reproduced above, the plaintiff is entitled to receive reasonable compensation not exceeding the amount of penalty stipulated in the agreement.

22. In *Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd.*, it is held that if a sum is mentioned as liquidated damage in a contract then such a term in the contract is enforceable u/s 74 of the Contract Act. In this case Chuni Lal Mehta and Company Bombay, was appointed as managing agent of the respondent for 21 years by an agreement dt. 15th June, 1933. In 1945 the benefits of Chuni Lal Mehta and Company were assigned to the appellant. In 1951 the Board of Directors of the company terminated the agreement of 1933 and passed a resolution removing the appellant as managing agent. The appellant claimed damages for wrongful termination of agreement. It was admitted that the termination of the appellant's employment was wrongful, and the only question which remained for the decision was the quantum of damages which could be paid to the appellant. This question was dependent upon construction of the following clauses of the agreement;--

"Clause 14 : In case the Firm shall be deprived of the office of Agents of the Company for any reason or cause other than or except those reasons or causes specified in Clause 15 of these presents the Firm shall be entitled to receive from the Company as compensation or liquidated damages for the loss of such appointment a sum equal to the aggregate amount of the monthly salary of not less than Rs. 6000/- which the firm would have been entitled to receive from the company, for and during the whole of the then unexpired portion of the said period of 21 years if the said Agency of the Firm had not been determined".

"Clause 10 : The company shall pay to the Firm by way of remuneration for the services to be performed by the Firm as such agents of the Company under this Agreement a monthly sum of Rs. 6000/- provided that if at the close of any year it shall be found that the total remuneration of the firm received in such year shall have been less than 10 per cent of the gross profits of the Company shall pay to the Firm in respect of such year such additional sum by way of remuneration as will make the total sum received by the Firm in and in respect of such year equal to 10 per cent of the gross profits of the Company in that year. The first payment of such remuneration shall be made on the first day of August, 1933"

"Clause 12 ; The said monthly remuneration or salary shall accrue due from day to day but shall be payable by the company to the Firm monthly, on the first day of the month immediately succeeding the month in which it shall have been earned."

23. After interpreting these clauses it was held that the parties had themselves provided for precise amount of damages that would be payable by the Company to the Managing Agent, if the Managing Agency's agreement was terminated before the expiry of the period for which it was made. It was further held that when the parties named a sum of money as liquidated damages they must be deemed to exclude the right to claim unascertained sum of money as damages. It was observed that the parties never intended to allow the party who had suffered by breach to give a go by to the sum specified and claimed instead a sum of money which was not ascertainable at the date of the breach. With these observations it was held that the compensation of Rs. 6,000 per month could be allowed under Clause 14 of the agreement.

24. In Fateh Chand Vs. Balkishan Das, the scope and applicability of Section 74 of the Indian Contract Act was discussed and it was compared with the English Common Law. It was held that the Indian Legislature by enacting Section 74 of the Contract Act has made a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulation by way of penalty. In this case leasehold rights were granted to one Dr. M. M. Joshi who constructed a building on this land. Smt. Chandrawati widow of Dr. Joshi as guardian of her minor son sold the leasehold rights with the building etc. to the plaintiff Balkrishan Das (vendor) who contracted to sell his rights in the land with the building etc. to the defendant Fateh Chand (vendee). Rs. 1,000 was paid as

earnest money at the time of agreement entered into between Balkrishan Das and Fateh Chand. One of the conditions of the agreement was that the vacant possession of the property was to be delivered to the vendee who shall give another cheque of Rs. 24,000 and the vendee was to get the sale deed registered. It was further stipulated that if the vendee fails to get the sale deed registered then the sum of Rs. 25,000 would be forfeited and the agreement cancelled. The vendee was to deliver back the complete vacant possession of the Kothi (bungalow) to the vendor and if due to certain reasons any delay takes place then the executant was liable to pay a further sum of Rs. 25,000 as damages, apart from the aforesaid sum of Rs. 25,000 to the vendee and the bargain shall be deemed to be cancelled. Balkrishan Das (vendor) received Rs. 24,000 and delivered possession, of the building and land to Fateh Chand but the sale could not be completed within the stipulated period. Each party claimed a default in performance of the agreement with the other party and Balkrishan Das (vendor) claimed that the sum of Rs. 25,000 stood forfeited. A suit was filed by Balkrishan Das (vendor) claiming a decree for possession of land and building and Rs. 65,000 as compensation for use and occupation of building. This suit was resisted and it was alleged by Fateh Chand (vendee) that the amount of Rs. 25,000 could not be forfeited. It was held that the contract containings a stipulation by way of "penalty" comprehensively applies to every covenant, involving a penalty whether it is for payment on breach of contract or money delivery of property in future, or for forfeiture of right to money of other property already delivered. It was also held that in all cases, where a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provided for forfeiture, the Court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount of penalty. Thus it was held that Balkrishan Dass, (vendor) was entitled to retain the amount of Rs. 1,000 received by him as earnest money and that he was also entitled to compensation at the rate of Rs. 140 per month and interest on that sum at the rate of 6% as it accrued due month after month from 1st June, 1949, till the date of delivery of possession. The clause regarding penalty was not held to be unenforceable and it was held that any amount, lesser than the penalty amount could be awarded after, taking into consideration various circumstances.

25. In AIR 1929 PC 179, Bhai Panna Singh v. Bhai Arjun Singh. it is held that the effect of Section 74 of the . Contract Act is to disentitle a plaintiff to recover a fixed sum mentioned in the agreement whether as penalty or as liquidated damages. The plaintiffs have, to prove the loss or the damage suffered by them and are entitled to receive the same from the party who had broken the contract, reasonable compensation but. this reasonable compensation cannot exceed the amount named as liquidated damages or penalty.

26. In Maula Bux Vs. Union of India (UOI), it is held that if the forfeiture of the earnest money under a contract for sale of property is reasonable compensation that it does not fall u/s 74. But if the forfeiture is in the nature of penalty then Section 74 of the Contract Act applies and only reasonable compensation can be

allowed. It is further held that proof of actual loss or damage is essential and the plaintiff has to prove the same. In this case the plaintiff entered into an agreement with the Government of India for supply of potatoes and deposited an amount of Rs. 10,000 as security for due performance of contract. He entered into another agreement to supply poultry eggs and fish and deposited an amount of Rs. 8,500 for due performance of the contract. The plaintiff failed to perform his part of the contract and ultimately filed a suit for recovery of Rs. 20,000 being the amounts deposited with the Government of India. It was held that the amount paid by the plaintiff was not the earnest money and that if the clause of forfeiture is in the nature of penalty then Section 74 would apply. It was further held that the plaintiff had failed to perform his part of the contract but at the same time the clause of forfeiture was a penal clause and in these circumstances the defendant could only claim a reasonable compensation and for proving a reasonable compensation the defendants had to prove the loss suffered by them. It was further held that the defendants had failed to prove the loss suffered by them due to the non-performance of the contract by the plaintiff and as the defendants had failed to prove the loss by leading evidence, therefore, the plaintiff was entitled to a decree of Rs. 18,500 deposited by him with interest.

27. In *Union of India (UOI) Vs. Rampur Distillery and Chemical Co., Ltd.*, it is held that where the plaintiff does not suffer any loss due to non-performance of the contract then in that case the plaintiff is not entitled to forfeit the security deposit due to the fault of the defendant in performing the contract.

28. In *State of U.P. Vs. Chandra Gupta and Co.*, it is held that the person complaining breach of contract cannot realise anything by way of penalty and Section 74 of the Contract Act only entitles a person to get reasonable compensation. In case a contract is not duly performed but still no damage is suffered on account of non-performance, the promisee would not be entitled to get damages.

29. In *AIR 1960 Patna 87, Union of India v. Vasudeo Agarwal*; also the scope of Sections 73 and 74 of the Contract Act has been discussed. It is held that the essence of a penalty, is a payment of money stipulated as in terrorem of the offending party. while the essence of liquidated damages is a genuine covenanted pre-estimate of damage, and to decide as to whether the word "penalty" has been used in place of liquidated damages, the court should try to point out the real nature of the transaction and should take into consideration the intention of the parties as evidenced by the language of the document and the circumstances of the case. It is also held that the actual damage suffered by the parties has to be proved, whether the same is mentioned as penalty or liquidated damages in a contract.

30. In *AIR 1934 Lah 59 Firm Kanhaya Lal v. Firm Bishen Dass Mewa Ram*. it is held that if the plaintiff produces no evidence to show as to what was the market rate :on or about the date of the contract then the plaintiff was not entitled to any damages on account of the breach of contract for non-delivery of goods.

31. Thus according to the law as enunciated above the plaintiff is entitled to recover a reasonable compensation from the defendant which cannot exceed the amount of penalty mentioned in the agreement.

32. In the plaint, the plaintiff has not claimed any amount as compensation. It is simply stated that the plaintiff is entitled to the amount as penalty in accordance with the terms of the agreement. Now the words "penalty and compensation" are used in the agreement separately." In Clause 9 of the agreement the word used is "compensation" while in Clauses 29 and 30 of the agreement the word used is "penalty", in any case whether it is compensation or the penalty, I have already held that u/s 74 of the Contract Act the plaintiff is entitled to an amount which is proved to be a reasonable compensation for the loss/damages suffered by the plaintiff on account of the breach of agreement on the part of the defendant.

33. Regarding the actual amount of loss/ damages suffered by the plaintiff due to the non-delivery of resin by the defendant the defendant has stated that he extracted 791 tins of resin but delivered only 373 tins to the plaintiff and in this way 418 tins of resin were not delivered by the defendant to the plaintiff. For the remaining resin which should have been extracted by the defendant, there is no evidence as to whether this resin was extracted by the defendant or not. There could be reduction in the extraction of resin, if the resin blazes were rendered unfit for tapping during the contract period owing to natural calamities such as wind fall, fire etc. or otherwise not available for tapping due to various developmental activities in the locality. In such cases the Managing Director could allow proportionate rebate on the quantity of resin extracted. In the event of such unavoidable calamities and circumstances the defendant was to inform the plaintiff or its officers about such calamities. The defendant never cared to send any such information. Similarly, in case of fire, theft etc. the defendant was duty bound to inform the authorities about such happenings. The defendant, however, did not send any information about the alleged theft, fire etc. In view of these circumstances it is held that the defendant has failed to perform his part of the contract and has committed breach of the terms of the contract in not delivering the resin of the minimum quantity to the plaintiff.

34. There is no evidence about the actual loss/damages suffered by the plaintiff. Shri N.K. Bakshi, Office Manager of the plaintiff states that there are no entries or notes in their files to prove that the Nahan factory tried to purchase resin from the market. He further states that the Nahan factory is not expected to purchase resin from the market. Shri J.N. Goel (PW 2) Assistant Conservator of Forests states that if the Nahan factory wanted resin then the same could be had at the rates prevalent in the market and these could be higher or lower than the rates given in the agreement. He further states that he does not know that if Nahan factory tried to purchase the resin from the market. Shri Durga Rami (PW 3), Range Officer does not state anything on this score. Har Chand (DW 1) defendant states that the plaintiff has not suffered any loss due to any act on his

part.

35. The plaintiff could have produced evidence of the prevalent market rates of resin at the relevant time. The defendant was to be paid at Rs. 166 per quintal which were in fact the extraction charges and the freight charges. The plaintiff could also produce evidence that by "converting resin" into rosin the plaintiff could earn more amounts. The Plaintiff has not led any evidence to prove these Facts or for proving the reasonable compensation which the plaintiff is entitled u/s 74 of the Act. The plaintiff has only relied upon the fact that a consolidated amount of "penalty" is entered in the agreement. The penal clause is not enforceable. In these, circumstances although the defendant has committed a breach of the contract still the plaintiff has not proved the amount of reasonable compensation which could be allowed to the plaintiff for the loss or damage suffered due to breach of terms of contract.

36. Thus it is held that for want of proof of the loss/damages suffered by the plaintiff on account of the non-supply of resin mentioned in claim Nos. 1 and 3, the plaintiff is not entitled to recover any amount from the defendant. Under issue No. 2 it is held that the plaintiff is entitled to Rs. 2455.95 for claim No. (5) i.e. freight charges from the defendant. This issue is decided accordingly. Issue No. 3 ;

37. The parties never agreed to pay any interest. This issue is otherwise not of much importance because under issue No. 2, "I have held that the plaintiff is entitled to recover only freight charges from the defendant. This issue is, therefore, decided against the plaintiff. Issue No. 4 :

38. While discussing issue No. 2 I have held that the clause regarding imposition of penalty is void and unenforceable under law. The plaintiff is only entitled to recover reasonable compensation from the defendant u/s 74 of the Contract Act. This issue is decided in favour of the defendant. Issue No. 5 :

39. The defendant has supplied resin worth Rs. 10647.40 as given in para 21-B of the plaint. He has already received an amount of Rs. 6,000 from the plaintiff. The remaining amount due to the defendant on account of the supply of resin is Rs. 4647.40. The plaintiff is entitled to recover from the defendant Rs. 2455.95 as freight charges. Hence, the amount due to the defendant from the plaintiff is Rs. 2191.45. The defendant has also deposited security of Rs. 3,500 with the plaintiff. It has been held under issue No. 2 that the defendant has failed to perform his part of the contract. The defendant has also not supplied 418 tins of resin to the plaintiff although this resin was admittedly extracted by him. If it was lost or burnt or stolen then it was his duty to inform the plaintiff about it but he never informed the plaintiff. In view of all these facts and the terms of the agreement the security amount could be forfeited provided evidence regarding loss/damages had been produced by the plaintiff. As the plaintiff has not produced any evidence of this nature, therefore, the amount of security cannot be forfeited as has been held in Union of India (UOI) Vs. Rampur Distillery and

Chemical Co., Ltd., Thus under this issue it is held that the defendant is entitled to the amount of security and also Rupees 2191.45 from the plaintiff as price of resin. Issue No. 6 :

40. As a result of the above findings, the plaintiff's suit is dismissed. Keeping in view the facts and circumstances of the case I leave the parties to bear their own costs.