1963

January, 15.

FATEH CHAND

v.

BALKISHAN DAS

(B. P. SINHA, C. J., P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA and J. C. SHAH, JJ.)

Contract—Compensation for breach of contract where penalty stipulated for—"the contract contains any other stipulation by way of penalty", if applicable to all stipulation by way of penalty—Indian Contract Act, 1872 (Act IX of 1872), s. 74—Code of Civil Procedure, 1908 (Act 5 of 1908), s. 2 (12) and O. 20 r. 12(1)(c).

By agreement dated March 21, 1949, the plaintiff contracted to sell leasehold rights in a piece of land and in the building constructed thereon to the defendant. The plaintiff received Rs. 25,000/- under the agreement and delivered possession of the building and the land in his occupation to the defendant, but the sale was not completed before the expiry of the period stipulated in the agreement, and for this default each party blamed the other. The plaintiff instituted a suit in the court of the Subordinate Judge claiming to forfeit the amount of Rs. 25,000/- received by him, and praying for a decree for possession of the land and building and for compensation for use and occupation of the building from the date of delivery of possession to the defendant of the property. The defendant contended that the plaintiff having broken the contract could not forfeit the amount of Rs. 25,000/- received by him nor claim any compensation. The trial Judge held that the plaintiff had failed to put the defendant in possession and could not therefore retain Rs. 25,000/- and accordingly directed that on the plaintiff depositing Rs. 25,000/- less Rs. 1,400/- the defendant do put the plaintiff in possession and awarded to the plaintiff future mesne profits at the rate of Rs. 140/- per mensem from the date of the suit until delivery of possession. On appeal the High Court modified the decree of the trial court and declared "that the plaintiff was entitled to retain out of Rs. 25,000/- paid by the defendant under the sale agreement, a sum of Rs. 11,250/-" and directed that the plaintiff do get from the defendant compensation for use at the rate of Rs. 265/- per mensem.

Held, that the High Court was right in holding that the defendant had committed breach of the contract.

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Held, further, that the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty—whether it is for payment on breach of contract of money, or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by s. 74 of the Indian Contract Act. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of a contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture.

In the present case in the absence of any proof of damage arising from the breach of contract, the amount of Rs. 1,000/- which had been forfeited and liability to forfeiture whereof was not challenged and the advantage that the plaintiff derived by retaining the sum of Rs. 24,000/- was sufficient compensation to the plaintiff for loss suffered by him. In the absence of evidence to show that the value of the property had depreciated, since the date of the contract, the decree passed by the High Court awarding 10% of the contract price to the plaintiff as compensation could not be sustained.

Abdul Gani & Co. v. *Trustees of the Port of Bombay*, I. L. R. 1952 Bom. 747 and *Natesa Aiyar* v. *Appavu Padayachi*, (1913) I. L. R. 38 Mad. 178, distinguished.

Held, further, that the plaintiff was not only entitled to mesne profits at the rate fixed by the trial court, but was also entitled to interest on such profits : vide s. 2(12) of the Code of Civil Procedure.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 287 of 1960.

Appeal from the judgment and decree dated August 22, 1957 of the Punjab High Court in (Circuit Bench) at Delhi in Civil Regular First Appeal No. 37-D of 1960.

M. C. Setalvad, Attorney General of India, M. L. Bagai, S. K. Mehta and *K. L. Mehta*, for the appellant.

Mohan Behari Lal, for the respondent.

1963. January 15. The Judgment of the Court was delivered by

SHAH, J.—By a registered deed of lease dated May 19, 1927, which was renewed on January 30, 1947, the Delhi Improvement Trust granted leasehold rights for 90 years to one Dr. M. M. Joshi in respect of a plot of land No. 3, 'E' Block, Qarol Bagh, Delhi, admeasuring 2433 sq. yards. Dr. Joshi constructed a building on the land demised to him. Chandrawati, widow of Dr. Joshi, as guardian of her minor son Murli Manohar, by sale-deed dated April 21, 1947, sold the leasehold rights in the land together with the building to Lala Balkishan Das—who will hereinafter be referred to as 'the plaintiff'—for Rs. 63,000/-. By an agreement dated March 21, 1949 the plaintiff contracted to sell his rights in the land and the building to Seth Fateh Chand—hereinafter called 'the defendant'. It was recited in the agreement that the plaintiff agreed to sell the building together with '*pattadari*' rights appertaining to the land admeasuring 2433 sq. yards for Rs. 1,12,500/-, and that Rs. 1,000/- were paid to him as earnest money at the time of the execution of the agreement. The conditions of the agreement were :

> "(1) I, the executant, shall deliver the actual possession, i. e. complete vacant possession of kothi (bungalow) to the vendee on March 30, 1949, and the vendee shall have to give another cheque for Rs. 24,000/- to me, out of the sale price.
>
> (2) Then the vendee shall have to get the sale (deed) registered by the 1st of June, 1949. If, on account of any reason, the vendee fails to get the said sale-deed registered by June, 1, 1949, then this sum of Rs. 25,000/- (twenty-five thousand) mentioned above shall be deemed to be forfeited and the agreement cancelled.

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Moreover, the vendee shall have to deliver back the complete vacant possession of the kothi (bungalow) to me, the executant. If due to certain reason, any delay takes place on my part in the registration of the sale-deed, by 1st June 1949, then I, the executant, shall be 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."

The southern boundary of the land was described in the agreement "Bungalow of Murli Manohar Joshi."

On March 25, 1949, the plaintiff received Rs. 24,000/- and delivered possession of the building and the land in his occupation to the defendant, but the sale of the property was not completed before the expiry of the period stipulated in the agreement. Each party blamed the other for failing to complete the sale according to the terms of the agreement. Alleging that the agreement was rescinded because the defendant had committed default in performing the agreement and the sum of Rs. 25,000/- paid by the defendant stood forfeited, the plaintiff in an action filed in the Court of the Subordinate Judge, Delhi, claimed a decree for possession of the land and building described in the plaint and a decree for Rs. 6,500/- as compensation for use and occupation of the building from March 25, 1949, to January 24, 1950, and for an order directing enquiry as to compensation for use and occupation of the land and building from the date of the institution of the suit until delivery of possession to the plaintiff. The defendant resisted the claim contending *inter alia* that the plaintiff having committed breach of the contract could not forfeit the amount of Rs. 25,000/- received by him nor claim any compensation. The trial Judge held that the plaintiff had failed to put

the defendant in possession of the land agreed to be sold and could not therefore retain Rs. 25,000/- received by him under the contract. He accordingly directed that on the plaintiff depositing Rs. 25,000/- less Rs. 1,400/- (being the amount of mesne profits prior to the date of the suit) the defendant do put the plaintiff in possession of the land and the building, and awarded to the plaintiff future mesne profits at the rate of Rs. 140/- per mensem from the date of the suit until delivery of possession or until expiration of three years from the date of the decree whichever event first occurred. In appeal the High Court of Punjab modified the decree passed by the trial Court and declared "that the plaintiff was entitled to retain out of Rs. 25,000/- paid by the defendant under the sale agreement, a sum of Rs. 11,250/-" being compensation for loss suffered by him and directed that the plaintiff do get from the defendant compensation for use and occupation at the rate of Rs. 265/- per mensem. The defendant has appealed to this Court with certificate under Art. 133(1)(a) of the Constitution.

The first question which falls to be determined in this appeal is as to who committed breach of the contract. The plaintiff's case as disclosed in his pleading and evidence was that he had agreed to sell to the defendant the leasehold rights in the land and building thereon purchased by him from Murli Manohar Joshi by sale-deed dated April 21, 1947, that at the time of execution of the agreement the defendant had inspected the sale deed and the lease executed by the Improvement Trust dated January 30, 1947 and the sketch plan annexed to the lease, that the plaintiff had handed over to the defendant a copy of that plan and had put the defendant in possession of the property agreed to be sold, but the defendant despite repeated requests failed and neglected to pay the balance remaining due by him and to obtain the sale deed in his favour.

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The defendant's case on the other hand was that the plaintiff had agreed to sell the area according to the measurement and boundaries in the plan annexed to the lease granted by the Improvement Trust and had promised to have the southern boundary demarcated and to have a boundary wall built, that at the time of the execution of the agreement of sale the plaintiff did not show him the sale deed by which he had purchased the property, nor the lease obtained from the Improvement Trust in favour of Dr. Joshi nor even the 'sketch plan,' that the plaintiff had given him a copy of the 'sketch plan' not at the time of the execution of the agreement, but three or four days after he was put in possession of the premises and that on measuring the site in the light of the plan he discovered that there was a "shortage on the southern side opposite to Rohtak Road", that thereupon he approached the plaintiff and repeatedly called upon him to put him in possession of the land as shown in the plan and to get the boundary wall built in his presence but the plaintiff neglected to do so. We have been taken through the relevant evidence by counsel and we agree with the conclusion of the High Court that the defendant and not the plaintiff committed breach of the contract.

The defendant's case is founded primarily on two pleas :

(i) that the plaintiff offered to sell land not according to the description in the written agreement, but according to the plan appended to the Improvement Trust lease, and, that he—the defendant—accepted that offer, and

(ii) The plaintiff had undertaken to have the southern boundary demarcated and a boundary wall built thereon,

If the case of the defendant be true, it is a singular

circumstance that those covenants are not found incorporated in the written agreement nor are they referred to in any document prior to the date fixed for completion of the sale. The defendant was put in possession on March 25, 1949 and he paid Rs. 24,000/- as agreed. If the plaintiff did not put the defendant in possession of the entire area which the latter had agreed to buy, it is difficult to believe that the defendant would part with a large sum of money which admittedly was to be paid by him at the time of obtaining possession of the premises, and in any event he would have immediately raised a protest in writing that the plaintiff had not put him in possession of the area agreed to be delivered. It is implicit in the plea of the defendant that he knew that the southern boundary was irregular and that the plaintiff was not in possession of the area agreed to be sold under the agreement. Why then did the defendant not insist that the terms pleaded by him be incorporated in the agreement ? We find no rational answer to that question ; and none has been furnished. The story of the defendant that he agreed to purchase the land according to 'the measurement and boundaries' in the Improvement Trust Plan without even seeing that plan, is impossible of acceptance.

It is common ground that according to this plan the land demised was rectangular in shape admeasuring 140' x 160' though the conveyance was in respect of 2433 sq. yards only. Manifestly if the land conveyed to the predecessor-in-interest of the plaintiff was a perfect rectangle the length of the boundaries must be inaccurate, for the area of a rectangular plot of land 140' x 160' would be 2488 sq. yards and 8 sq. feet and not 2433 sq. yards. The plaintiff had purchased from his predecessor-in-interest land admeasuring 2433 sq. yards and by the express recital in the agreement the plaintiff agreed to sell that area to the defendant. At the request

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of the plaintiff the trial Court appointed a Commissioner for measuring the land of which possession was delivered to the defendant, and according to the Commissioner the land "admeasured 141/142' feet by 157/158 feet". The Commissioner found that two constructions—a latrine and a garage—on the adjacent property belonging to Murli Manohar Joshi "broke the regular line of the southern boundary". The fact that the southern boundary was irregular must have been noticed by the defendant at the time of the agreement of sale, and in any event soon after he obtained possession of the property. But for nearly three months after he obtained possession the defendant did not raise any objections in that behalf. His story that he had orally called upon the plaintiff repeatedly to put him in possession of the land as shown in the Improvement Trust Plan cannot be believed. The defendant's case that a part of the land agreed to be conveyed was in the possession of Murli Manohar Joshi was set up for the first time by the defendant in his letter dated June 17, 1949. On June 1, 1949, the defendant informed the plaintiff by a telegram that the latter was responsible for damages as he had failed to complete the contract. The plaintiff by a telegram replied that he was ready and willing to perform his part of the contract and called upon the defendant to obtain a sale deed. The defendant then addressed a letter on June 9, 1949, to the plaintiff informing him that the latter had to get the document executed and registered after giving clear title by June 1, 1949. To that letter the plaintiff replied that the defendant had inspected the title-deeds before he agreed to purchase the property and had satisfied himself regarding the plaintiff's title thereto and that the defendant had never raised any complaint about any defect in the title of the plaintiff. The defendant's Advocate replied by letter dated June 17, 1949 :

> "This is true that my client paid Rs. 25,000/- and got possession of the Kothi on the clear

understanding that your client has clear title of the entire area mentioned in the agreement of sale and sketch map attached to it. Long before 1st June, my client noticed that a certain area of the Kothi under sale is under the possession of Shri Murli Manohar Joshi on which his garage stands. Again on the same side Shri Murli Manohar Joshi has got latrines and there is clear encroachment on the land included in the sale. It was clearly understood at the time of bargain that vacant possession of the entire area under sale will be given by your client. My client was anxious to put a wall on the side of Shri Murli Manohar Joshi and when he was actually starting the work this difficulty of garage and latrine came in. Your client was approached x x x."

One thing is noticeable in this letter : according to the defendant, there was a sketch-plan attached to the agreement of sale, and that it was known to the parties at the time of the agreement that a part of the land agreed to be sold had been encroached upon before the agreement by Murli Manohar Joshi. If there had been an "understanding" as suggested by the defendant and if the plaintiff had, in spite of demands made in that behalf by the defendant, failed to carry out the agreement or understanding, we would have expected this version to be set up in the earliest communication and not reserved to be set up as a reply to the plaintiff's assertion that the defendant had never complained about any defect in the title of the plaintiff. According to the written agreement the area agreed to be conveyed was 2433 sq. yards and the land was on the south bounded by the Bungalow of Murli Manohar Joshi. It is common ground that the defendant was put in possession of an area exceeding 2433 sq. yards, and the land is within the four boundaries set out in the agreement. But the defendant sought to make out

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the case at the trial that he had agreed to purchase land according to the Improvement Trust plan—a fact which is not incorporated in the agreement, and which has not been mentioned even in the letter dated June 17, 1949. The assertions made by the defendant in his testimony before the Court, show that not much reliance can be placed upon his word. He stated that the terms of the contract relating to forfeiture of Rs. 25,000/- paid by him in the event of failure to carry out the terms of the contract were never intended to be acted upon and were incorporated in the agreement at the instance of the writer who wrote the deed. This plea was never raised in the written statement and the writer of the deed was not questioned about it. The defendant is manifestly seeking to add oral terms to the written agreement which have not been referred to in the correspondence at the earliest opportunity. We therefore agree with the High Court that the plaintiff carried out his part of the contract to put the defendant in possession of the land agreed to be sold, and was willing to execute the sale-deed, but the defendant failed to pay the balance of the price, and otherwise to show his willingness to obtain a conveyance.

The claim made by the plaintiff to forfeit the sum of Rs. 25,000/- received by him from the defendant must next be considered. This sum of Rs. 25,000/- consists of two items—Rs. 1,000/- received on March 21, 1949 and referred to in the agreement as 'earnest money' and Rs. 24,000/- agreed to be paid by the defendant to plaintiff as "out of the sale price" against delivery of possession and paid by the defendant to the plaintiff on March 25, 1949 when possession of the land and building was delivered to the defendant. The plaintiff submitted that the entire amount of Rs. 25,000/- was to be regarded as earnest money, and he claimed to forfeit it on the defendant's failure to carry out his part of

the contract. This part of the case of the plaintiff was denied by the defendant.

The Attorney-General appearing on behalf of the defendant has not challenged the plaintiff's right to forfeit Rs. 1,000/- which were expressly named and paid as earnest money. He has, however, contended that the covenant which gave to the plaintiff the right to forfeit Rs. 24,000/- out of the amount paid by the defendant was stipulation in the nature of penalty, and the plaintiff can retain that amount or part thereof only if he establishes that in consequence of the breach by the defendant, he suffered loss, and in the view of the Court the amount or part thereof is reasonable compensation for that loss. We agree with the Attorney-General that the amount of Rs. 24,000/- was not of the nature of earnest money. The agreement expressly provided for payment of Rs. 1,000/- as earnest money, and that amount was paid by the defendant. The amount of Rs. 24,000/- was to be paid when vacant possession of the land and building was delivered, and it was expressly referred to as "out of the sale price." If this amount was also to be regarded as earnest money, there was no reason why the parties would not have so named it in the agreement of sale. We are unable to agree with the High Court that this amount was paid as security for due performance of the contract. No such case appears to have been made out in the plaint and the finding of the High Court on that point is based on no evidence. It cannot be assumed that because there is a stipulation for forfeiture the amount paid must bear the character of a deposit for due performance of the contract.

The claim made by the plaintiff to forfeit the amount of Rs. 24,000/- may be adjudged in the light of s. 74 of the Indian Contract Act, which in its material part provides :—

"When a contract has been broken, if a sum is

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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."

The section is clearly an attempt to eliminate the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract *in terrorem* is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.

The second clause of the contract provides that if for any reason the vendee fails to get the sale-deed registered by the date stipulated, the amount of Rs. 25,000/- (Rs. 1,000/- paid as earnest money and Rs. 24,000/- paid out of the price on delivery of possession) shall stand forfeited and the agreement shall be deemed cancelled. The covenant for forfeiture of Rs. 24,000/- is manifestly a stipulation by way of penalty.

Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases

(i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by s. 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damages"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

Before turning to the question about the compensation which may be awarded to the plaintiff, it is necessary to consider whether s. 74 applies to stipulations for forfeiture of amounts deposited or paid under the contract. It was urged that the section deals in terms with the right to *receive* from the party who has broken the contract reasonable compensation and not the right to *forfeit* what has

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already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that s. 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by s. 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture. We may briefly refer to certain illustrative cases decided by the High Courts in India which have expressed a different view.

In *Abdul Gani & Co.* v. *Trustees of the Port of Bombay* (1), the Bombay High Court observed as as follows :—

> "It will be noticed that the sum which is named in the contract either as penalty or as liquidated damages is a sum which has not already been paid but is to be paid in case of a breach of the contract. With regard to the stipulation by way of penalty, the Legislature has chosen to qualify 'stipulation' as 'any other stipulation', indicating that the stipulation must be of the nature of an amount to be paid and not an amount already

(1) I.L.R. 1952 Bom. 747.

paid prior to the entering into of the contract. The section further provides that a party complaining of a breach is entitled to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or the penalty stipulated for. Therefore, the section clearly contemplates that the party aggrieved has to receive from the party in default some amount or something in the nature of a penalty : it clearly rules out the possibility of the amount which has already been received or the penalty which has already been provided for."

In *Natesa Aiyar* v. *Appavu Padayschi* (1), the Madras High Court seems to have held that s. 74 applies where a sum is named as penalty to be paid in future in case of breach, and not to cases where a sum is already paid and by a covenant in the contract it is liable to forfeiture.

In these cases the High Courts appear to have concentrated upon the words "to be paid in case of such breach" in the first condition in s. 74 and did not consider the import of the expression "the contract contains any other stipulation by way of penalty", which is the second condition mentioned in the section. The words "to be paid" which appear in the first condition do not qualify the second condition relating to stipulation by way of penalty. The expression "if the contract contains any other stipulation by way of penalty" widens the operation of the section so as to make it applicable to all stipulations by way of penalty, whether the stipulation is to pay an amount of money, or is of another character, as, for example, providing for forfeiture of money already paid. There is nothing in the expression which implies that the stipulation must be one for rendering something after the contract is broken. There is no ground for holding that the expression "contract contains any

(1) (1913) I.L.R. 38 Mad. 178.

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other stipulation by way of penalty" is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or property delivered under the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited.

Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.

There is no evidence that any loss was suffered by the plaintiff in consequence of the default by the defendant save as to the loss suffered by him by being kept out of possession of the property.

There is no evidence that the property had depreciated in value since the date of the contract; nor was there evidence that any other special damage had resulted. The contract provided for forfeiture of Rs. 25,000/- consisting of Rs. 1000/-paid as earnest money and Rs. 24,000/- paid as part of the purchase price. The defendant has conceded that the plaintiff was entitled to forfeit the amount of Rs. 1,000/-which was paid as earnest money. We cannot however agree with the High Court that 10 per cent of the price may be regarded as reasonable compensation in relation to the value of the contract as a whole, as that in our opinion is assessed on arbitrary assumption. The plaintiff failed to prove the loss suffered by him in consequence of the breach of the contract committed by the defendant, and we are unable to find any principle on which compensation equal to ten percent of the agreed price could be awarded to the plaintiff. The plaintiff has been allowed Rs. 1,000/-which was the earnest money as part of the damages. Besides he had use of the remaining sum of Rs. 24,000/-, and we can rightly presume that he must have been deriving advantage from that amount throughout this period. In the absence therefore of any proof of damage arising from the breach of the contract we are of opinion that the amount of Rs. 1,000/- (earnest money) which has been forfeited, and the advantage that the plaintiff must have derived from the possession of the remaining sum of Rs. 24,000/-during all this period would be sufficient compensation to him. It may be added that the plaintiff has separately claimed mesne profits for being kept out of possession for which he has got a decree and therefore the fact that the plaintiff was out of possession cannot be taken into account in determining damages for this purpose. The decree passed by the High Court awarding Rs. 11,250/- as damages to the plaintiff must therefore be set aside.

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The other question which remains to be determined relates to the amount of mesne profits which the plaintiff is entitled to receive from the defendant who kept the plaintiff out of the property after the bargain had fallen through. It is common ground that the defendant is liable for retaining possession to pay compensation from June 1, 1949 till the date of the suit and thereafter under O. 20, r. 12 (c) C. P. Code till the date on which the possession was delivered. The trial Court assessed compensation at the rate of Rs. 140/- per mensem. The High Court awarded compensation at the rate of Rs. 265/-per mensem. In arriving at this rate the High Court adopted a highly artificial method. The High Court observed that even though the agreement for sale of the property was for a consideration of Rs. 1,12,500/- the plaintiff had purchased the property in 1947 for Rs. 63,000/- and that at the date of the suit that amount could be regarded as "the value for which the property could be sold at any time." The High Court then thought that the proper rate of compensation for use and occupation of the house by the defendant when he rufused to give up possession after failing to complete the contract should have some relation to the value of the property and not to the price agreed as sale price between the parties, and computing damages at the rate of five per cent on the value of the property they held that Rs. 3,150/- was the annual loss suffered by the plaintiff by being kept out of possession, and on that footing awarded mesne profits at the rate of Rs. 265/-per mensem prior to the date of the suit and thereafter. The plaintiff is undoubtedly entitled to mesne profits from the defendant and 'mesne profits' as defined in s. 2 (12) of the Code of Civil Procedure are profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but do not include profits due to improvements made by the person in wrongful

possession. The normal measure of mesne profits is therefore the value of the user of land to the person in wrongful possession. The assessment made by the High Court of compensation at the rate of five per cent of what they regarded as the fair value of the property is based not on the value of the user, but on an estimated return on the value of the property, cannot be sustained. The Attorney-General contended that the premises were governed by the Delhi & Ajmer-Merwara Rent Control Act XIX of 1947 and nothing more than the 'standard rent' of the property assessed under that Act could be awarded to the plaintiff as damages. Normally a person in wrongful possession of immovable property has to pay compensation computed on the basis of profits he actually received or with ordinary diligence might have received. It is not necessary to consider in the present case whether mesne profits at a rate exceeding the rate of standard rent of the house may be awarded, for there is no evidence as to what the 'standard rent' of the house was. From the evidence on the record it appears that a tenant was in occupation for a long time before 1947 of the house in dispute in this appeal and another house for an aggregate rent of Rs. 180/- per mensem, and that after the house in dispute was sold, the plaintiff received rent from that tenant at the rate of Rs. 80/- per mensem, and to the vendor of the plaintiff at the rate of Rs. 106/- per mensem. But this is not evidence of standard rent within the meaning of the Delhi and Ajmer-Merwara Rent Control Act, XIX of 1947.

The Subordinate Judge awarded mesne profits at the rate of Rs. 140/- per mensem and unless it is shown by the defendant that that was excessive we would not be justified in interfering with the amount awarded by the Subordinate Judge. A slight modification, however, needs to be made. The plaintiff is not only entitled to mesne profits at the monthly rate fixed by the Trial Court, but is also entitled to

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interest on such profits vide s. 2(12) of the Code of Civil Procedure. We, therefore, direct that the mesne profits be computed at the rate of Rs. 140/- per mensem from June 1, 1949 till the date on which possession was delivered to the plaintiff (such period not exceeding three years from the date of decree) together with interest at the rate of six percent on the amount accruing due month after month.

The decree passed by the High Court will therefore be modified. It is ordered that the plaintiff is entitled to retain out of Rs. 25,000/- only Rs.1,000/- received by him as earnest money, and that he is entitled to compensation at the rate of Rs. 140/- per mensem and interest on that sum at the rate of six percent as it accrues due month after month from June 1, 1949, till the date of delivery of possession, subject to the restriction prescribed by O.20 r. 12 (i) (c) of the Code of Civil Procedure. Subject to these modifications, this appeal will be dismissed. In view of the divided success, we direct that the parties will bear their own costs in this Court.

Decree modified.
Appeal dismissed.