

GENERAL ENTERPRISES, INC., PLAINTIFF AND APPELLEE, VS. LIANGA BAY LOGGING COMPANY, INC., DEFENDANT AND APPELLANT.

G.R. No. 18487. August 31, 1964

Ponente: BAUTISTA, ANGELO, J.

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BAUTISTA, ANGELO, J.:

On May 25, 1959, Lianga Bay Logging Company, Inc., a corporation duly organized under the laws of the Philippines, and General Enterprises, Inc., another corporation, entered into a contract, herein marked as Annex A, whereby the former, a producer of logs from a timber concession at Liangn, Surigao, designated the latter as distributor of a portion of its log production to Korea and Europe on condition that it would pay the distributor a commission of 13 per cent of the gross f.o.b. value of the logs exported. In the agreement, the Lianga Bay Logging Company, Inc. was named as producer and the General Enterprises, Inc. as Distributor.

The pertinent provisions of the agreement are hereunder quoted:

"2. Distributor * * * obliges to obtain the best market prices for the logs sold by it * * * that the selling price shall not be lower than the current market price, such term 'current price' being the average price received by producer on other log sales over a ninety (90) day period; 'current market price' shall, if producer requests, be subject to renegotiation every sixty (60) days during the term of this agreement; except that such renegotiation shall not take place where firm, long-term orders solicited by distributor shall have been accepted by producer.

* * * * *

"4. It is further understood that this agreement in no manner affects the existing and future barter arrangements that producer has and will have covering logs; ***

"5. Distributor hereby agrees and obliges to market, sell, export and dispose under this agreement at least one million (1,000,000) BOARD FEET BREARETON SCALE FOR PRODUCER every month during the first months of the term of this agreement; and the producer hereby agrees and obliges that each month thereafter, beginning September, 1959, producer will make available not less than 2,000,000 bd. ft. per month for export to the sales area.

* * * * *

"7. In order that producer may increase its productive capacity, distributor has made available to producer One (1) brand new TD-24 tractor, valued at approximately P105,000.00, which Producer will purchase, payment thereafter to be made in 24 or fewer equal monthly installments); distributor further agrees that it will lend to producer pesos as needed by the latter up to P95,000.00 for local purchases of logging machinery, equipment and spare parts, producer agrees to repay any amount so loaned in twenty four (24) or less equal monthly installments, it being understood that each loan shall be understood to be a separate transaction. In the case of purchase of equipment, DISTRIBUTOR may retain title thereto, until such loan has been fully repaid.

"8. It is mutually agreed as follows:

"(a) That if either party shall be unable, by reason of the happening of any one or more of the causes set forth in the next succeeding paragraph marked '(b)' to carry out its obligations under this contract, either wholly or partly, the party so failing shall give notice and full particulars of such cause or causes in writing to the other party as soon as possible after the occurrence of any such cause; and, thereupon, such obligation shall be suspended during the continuance of such cause, which, however, shall be removed or remedied as soon as possible, and the obligations, terms and conditions of this contract shall be extended for such period as may be necessary for the purpose of making good any suspension so caused;

"(b) That the causes of suspension herein before referred to shall be taken to mean, fire, flood, casualty, unavoidable, accident, strikes, labor conditions, lockouts, acts of God, the enactment of any national or local law or ordinance, or the issuance of any executive or judicial order, the issuance of any prohibitive or restrictive order, rule or regulation by the Central Bank of the Philippines or other government agency, accident to machinery, or any other cause not within the control of the party making relief from: any of the requirements of this contract, and that, by the exercise of due care and diligence, the said party is unable to prevent or overcome.

"9. Subject to any prior termination of this contract, the term of this contract, for the distribution of logs shall be two (2) years beginning June 1, 1959. * * *

Thereupon, the parties immediately began implementing the provisions of the contract by having the Distributor deliver to the Producer the tractor it agreed to deliver and by having the Producer deliver logs to the Distributor for export as agreed upon. On October 27, 1959, the Producer sent a notice to the Distributor stating that after the November shipment there will be no longer logs available for export to Korea and Europe "unless the price of such logs become comparable to what we may expect to receive in the way of returns from lumber and veneer of barterable and export grades", giving as reasons therefore the following:

"It will be necessary for us to increase our log production if we are to have logs available for the sales area covered by the Agreement. To increase log production we must have additional logging machinery. Such machinery had been available at Surigao; however, we have been advised by our representative, who investigated the matter in Surigao, that the equipment which we had agreed to buy had been sold to another purchaser under rather peculiar circumstances.

"By reasons of restrictions imposed by the Philippine Government we cannot barter logs (for, among other purposes, obtaining logging machinery and equipment) but we can barter lumber and low grade veneers. We have decided that we must take advantage of the situation and use our lumber for barter immediately; concurrently we are taking the necessary steps to erect the power house and veneer plant offered by a U.S. Firm. This will mean the immediate utilization by ourselves of an excess of one million or more feet of logs per month. The net result will be that we will not have logs for your sales area."

The Producer thereafter stopped supplying the logs for export, whereupon the Distributor reminded the Producer that it had a contract to fulfill relative to its log production as otherwise it would be held responsible for the consequences of the breach that may ensue, but the Producer did not heed this reminder adducing reasons which in its opinion justify the action it had taken, thereby causing the Distributor to initiate the present action before the Court of First Instance of Rizal alleging breach of contract and praying for damages both actual and compensatory.

In due time, both parties presented their evidence, and on December 8, 1960, the court *quo* rendered decision in favor of the plaintiff and against the defendant ordering the latter to pay the sum of P400,000.00 as actual damages, the sum of P100,000.00 as exemplary damages, and the sum of P40,000.00 as attorney's fees and expenses of litigation. This is an appeal from said decision.

The issues raised, stripped of non-essentials, may be summarized as follows:

- Is agreement Annex A valid?
- Can the Effectivity of the agreement be terminated or suspended for reasons and causes stipulated by the parties?
- Has appellant the right to demand negotiation of prices as provided in paragraph 2 of the agreement, and, in the affirmative, is appellant under obligation to export thru appellee logs during pendency of the negotiation?
- Has appellant the right to use its log production for barter arrangements irrespective of Section 5 of said agreement?
- V. Is appellant's obligation to make available 2,000,000 board feet of logs monthly absolute or conditional?
- Is the lower court's adjudication of actual and exemplary damages and attorney's fees justified?
- Did not the lower court err in not dismissing the complaint, declaring the agreement rescinded and awarding appellant's counterclaim?
- Did not the lower court err in not allowing the amended answer?

I. Appellant claims that the agreement Annex A on which the complaint is based is null and void on the ground that it has no cause or consideration or that it has no secured thru fraud or misrepresentation. Basis of the alleged fraud and misrepresentation is the claim that Mr. Freider, president of appellee, led appellant to believe that he could secure for said appellant a certain Surigao logging equipment on which appellee had a second mortgage and that he could place at the disposal of appellant at any time the sum of P95,000.00 by way of loan to enable it to purchase the needed logging equipment, when appellee knew well that it did not have such money nor could secure the Surigao logging equipment.

The claim of fraud has no basis, for while Mr. Freider stated in his testimony that the Distributor could take steps to secure the Surigao logging equipment for the use of appellant no assurance was given that such equipment would be acquired as a necessary incident of their contract. In fact, Mr. Dempsey, a high official of appellant, admitted in open court that Mr. Freider merely promised to help appellant to procure or acquire that equipment if the latter needed it, but appellant did not take any further step in this direction.

Neither can we attribute fraud to appellee's failure to grant appellant the loan of P95,000.00 for the purchase of logging equipment, for the evidence shows that appellant did not make any demand for it. And this is buttressed by the fact that in the five letters sent by appellant to appellee regarding the demand for suspension of the contract it nowhere appears that the alleged failure is one of the reasons that had motivated such suspension. Had appellee really failed to comply with such important commitment, it is reasonable to expect that appellant would have adduced it as a reason for the unilateral suspension of the agreement.

We also find untenable the claim that the agreement has no cause or consideration considering that the same imposes reciprocal obligations. A perusal of the agreement would show that appellant designated appellee as its distributor to export logs to Korea and Europe at the best market price obtainable on condition that it would, pay appellee a commission of 13% of the gross value of the logs. The cause of a contract is the essential reason which moves the contracting parties to enter into it (8 Manresa, 5th edition, p. 450). In other words, the cause is the immediate, direct and proximate reason which justifies the creation of an obligation thru the will of the contracting parties (3 Castan, 4th edition, p. 347). Such being the case, it is clear that for appellant the cause of the agreement is the distribution of its logs in the areas agreed upon which appellee undertook to accomplish, whereas for appellee the cause is its commitment to sell or export the logs for onerous consideration.

The contention that the essential reason which induced appellant to enter into the contract is the promise of

appellee to secure for it the Surigao logging equipment and to make available the loan of P95,000.00 likewise has no merit. In the first place, such commitment to procure the Surigao logging equipment is not mentioned in the agreement, Annex A, though it was incidentally mentioned in the preparatory stage leading to it, while the lending of P95,000.00 is merely a commitment made to appellant to help it purchase some logging equipment to increase its productive capacity, if it may so require, but it has never been considered as part of the cause of the agreement. In fact, as already stated, no such requirement or demand was ever made by appellant. No doubt is entertained that if such demand were made appellee would have gladly granted the loan in the same manner it readily delivered to appellant the brand new TD-24 tractor valued at P105,000.00 mentioned in paragraph 7 of the agreement.

Finally, no weight can be given to the claim that because it was not explicitly expressed in the agreement that appellee has the corresponding obligation to sell and export the additional 2,000,000 board feet appellant agreed to make available for export beginning September, 1959, that portion of the agreement has no consideration, for such could clearly be inferred from a mere perusal of the whole paragraph 5 of the agreement. It is explicit therein that appellee bound itself to export abroad whatever may be produced in the form of logs by appellant during the first months of the agreement, as well as those that may be produced thereafter, and it should not be forgotten that the term of the agreement is two years beginning June 1, 1959 (paragraph 9). Indeed, there is no point for appellant to agree to make available additional 2,000,000 board feet beginning September, 1959 if appellee should not be given the corresponding commitment to export under the same terms agreed upon.

In connection with previous production. A contrary interpretation would be irrational and absurd.

II. This issue refers to the interpretation of paragraph 8 of the agreement which reads:

"8. It is mutually agreed as follows:

"(a) That if either party shall be unable, by reason of the happening of any one or more, of the causes set forth in the next succeeding paragraph marked '(b)', to carry out its obligations under this contract, either wholly or partly, the party so failing shall give notice and full particulars of such cause or causes in writing- to the other party as soon as possible after the occurrence of any such-cause; and, thereupon, such obligation shall be suspended during the continuance of such cause, which, however, shall be removed or remedied as soon as possible, and the obligations, terms and conditions of this contract shall be extended for such period as may be necessary for the purpose of making good any suspension so caused;

"(b) That the cause or causes, of suspension herein before referred to shall be taken to mean fire, flood, casualty, unavoidable accident, strikes, labor conditions, lockouts, acts of God, the enactment of any national or local law or ordinance, or the issuance of any executive or judicial order, the issuance of any prohibitive or restrictive order, rule or regulation by the Central Bank of the Philippines or other government agency, accident to machinery, or any other cause not within the control of the party making relief from any of the requirements of this contract, and that, by the exercise of due care and diligence, the said party is unable to prevent or overcome."

Based on the foregoing stipulation, appellant served on appellee notices of suspension of the operation of said agreement for reasons stated in said notices. These notices are embodied in the following exhibits: Exhibit 2, notice of October 27, 1959; Exhibit 2-A, notice of November 7, 1959; Exhibit 2-B, notice of November 23, 1959; Exhibit 2-C, notice of February 23, 1960; and Exhibit 3, notice of December 11, 1959.

In the notice of October 27, 1959, appellant made it clear to appellee that because of restrictions imposed by the Philippine government it can no longer barter logs for the purpose of obtaining logging equipment and without such logging equipment it cannot make available to appellee any quantity of logs.

In the notice of November 7, 1959, appellant demanded a renegotiation on the question of prices for, unless it can obtain a higher price, its only alternative would be to convert its log production into lumber in order to buy the logging machinery needed to increase its production.

In the notice of November 23, 1959, appellant advised appellee that because of breakdowns of machinery and equipment and its inability to secure spare parts, replacements and wire ropes as a result of the steel strike in the United States it has to suspend its shipment of logs.

In the notice of February 23, 1960, appellant advised appellee that the enactment of the Margin Law has made it impossible for it to acquire the additional machinery to increase its production and unless the same is repealed it would be very difficult for it to produce additional logs for appellee.

In the notice of December 11, 1959, appellant made it clear to appellee that because of the conditions specified in its license agreement No. 49 with the Philippine government it becomes imperative for it to increase production and to establish a veneer plant.

The court a quo said on this issue the following:

"With respect to the defendant's claim of the adverse effect of the Barter Law and the Margin Law, the Court cannot find sufficient reason to believe that the effectivity of said law would bring defendant's production to such a stale condition as to justify its acquittance from its contractual obligations. * * * The other allegations of the defendant regarding the impassable roads caused by the rainy season, the steel strike and the like have not been substantiated by evidence to the effect that the operations of the defendant corporation in the production of logs have been substantially or wholly impeded. In other words, although it cannot be denied that some of the causes set up by the defendant are fortuitous and beyond man's control, nevertheless, they failed to show its causal relation with any substantial impairment of its operations, such that it could not possibly comply with its obligations as agreed upon. * * *"

Even assuming that the restrictions imposed by the government on barter, the breakdown of machineries and the inability to secure spare parts, replacements and wire ropes, as well as the passage of the Margin Law, have the nature of fortuitous events, yet it cannot be said that they had caused such a reduction in appellant's production of logs that made it impossible for it to comply wholly, or even partly, with its commitment with appellee. The rule is that even the happening of a fortuitous event in itself does not necessarily extinguish an obligation for, as this Court has said, the fortuitous event must be of such a character as to render it impossible for the obligor to fulfill his obligation in a normal manner (*Lassam vs. Smith*, 45 Phil., 990). And here such is not the situation. Thus, Mr. Dempsey, a high official of appellant, testified that appellant made deliveries of logs in the months of June, July, August, 1959, and even in October, 1959, in spite of the causes which appellant said have affected the operation of its log production. Again, in Mr. Dempsey's letter dated October 27, 1959, he stated that appellant has "an excess of one million or more board feet of logs per month," and in an application filed with the Central Bank for a \$500,000.00 loan from a Japanese entity Mr. Dempsey admitted that Lianga agreed to supply the Japanese buyers 200,000,000 board feet of logs during a five-year period. And during the trial, counsel for appellant admitted that appellant sold to other Parties a portion of its log production even if it failed to deliver the logs committed to appellee. These facts eloquently support the finding of the court a quo on the matter.

One of the causes for the suspension of the agreement alleged by appellant was the demand for the renegotiation of prices provided in paragraph 2 of the agreement. Another reason advanced is the establishment of a veneer Plant for the purpose of increasing the log production. But these two matters are not among the various causes of suspension enumerated in paragraph 8 of the agreement. The suspension, therefore, of the contract on these causes is not justified.

III. This issue refers to the portion of paragraph 2 of the agreement which provides that " 'current market price' shall, if producer requests, be subject to renegotiation every sixty (60) days during the term of this agreement; except that such renegotiation shall take place where firm, long-term orders solicited by DISTRIBUTOR shall have been accepted by producer."

Appellant contends that under the above provision it has the right to demand a renegotiation of the prices at any time during the existence of the contract, the only exception being when there has been a fixed, long-term orders that had already been solicited and accepted and that pending such renegotiation the operation of the contract shall be deemed suspended. And such demand having been made, appellant says it has the right to suspend the operation until the renegotiation has been made. But this contention is based on a wrong premise. The exception regarding long-term orders solicited and accepted refers to renegotiation and not to suspension. As already indicated elsewhere, this right of renegotiation, although expressly admitted is not however one of the causes by which appellant could suspend the operation of the contract. Apparently, the reason why appellee did not heed the demand is that appellant has not been able to indicate that it could obtain better prices than what appellee had secured in selling its logs for sometime.

IV. This issue refers to the alleged right of appellant to use its log production for barter arrangements. The pertinent provision is: "It is further understood that this agreement in no manner affects the existing and future barter arrangements that producer has and will have covering logs." As may be seen, this provision refers to the right of appellant to use its logs for barter purposes, but not to make use of them for other purposes as the one indicated by it. Hence, appellant's claim that it has a right to convert its logs into lumber and low grade veneer and to make these objects of barter arrangements does not come within the purview of the agreement.

V. This issue refers to that portion of the agreement which requires appellant to make available to appellee 2,000,000 board feet of logs monthly beginning September, 1959. Appellant claims that its obligation under this provision is only potestative and not compulsory, and this claim is based upon the fact that in preparing the provision in question the words "shall reserve" and "first board feet" which appear in a similar contract with Basilan Lumber Company which was taken as basis were eliminated thereby revealing the intention to make the, availability of the 2,000,000 board feet only optional or dependent upon the will of appellant. :

This claim may be correct if interpreted in the sense, that appellant may take the 2,000,000 board feet from any of the logs that may be produced by it, which may be either the first ones or the subsequent ones, but is untenable in the sense that by such elimination the availability was made dependent upon the exclusive will of appellant. If such were the intention such would have been made to appear therein. No such intention appears. The most that can be said is that the provision is ambiguous and the ambiguity should be resolved against appellant whose counsel has been consulted in the preparation of the contract. The claim, furthermore, would make the fulfillment of the contract dependent upon the exclusive will of appellant which our law abhors (Article 1308, New Civil Code). ;

The contention that the availability of the additional. 2,000,000 board feet is subject to the fulfillment of two conditions, namely, the acquisition of the Surigao logging equipment, and the lending of P95,000.00 for purchase of equipment and spare parts, cannot also be entertained, not only because said alleged precedent conditions do not appear in the agreement, but also because they were merely discretionary in the sense that they are subject to whatever negotiation the parties may undertake thereon, as already stated elsewhere. We have already adverted to that the provision requiring the availability of the additional 2,000,00 board feet of logs calls for a counter obligation on the part of appellee to sell, export and dispose of the same under the same terms and conditions it bound itself to undertake in connection with prior production of logs.

VI. Appellant avers that Exhibit K, dated February 3, 1960, and Exhibit I, dated February 12, 1960, are letters supposed to have been written to Karl Nathan, vice-president of appellee and were dated after the filing of the instant complaint thereby giving the impression that they are mere self-serving evidences. The signatures of said letters were not identified. Appellant did not even have a chance to cross-examine the alleged senders thereof, and even if opportune objection was interposed to their admission, the trial court admitted them as part of Mr. Freider's testimony. This is now assigned as error.

Exhibit K is a letter purporting to have been sent by Daiil Enterprises, Co., Ltd. in Seoul, Korea on February 3, 1960 to Mr. Karl Nathan of appellee complaining of the small quantity of logs shipped by appellant in spite of the assurance that Daiil Enterprises "could count on substantial amount of supply from Lianga area in addition to the usual sources of supply." Exhibit L is a letter purporting to have been sent by Tong Myung Timber Lumber Company in Pusan, Korea on February 12, 1960 to Mr. Karl Nathan of appellee complaining of the latter's decreasing supply of logs in spite of its promise "to supply us with 1,000 MBF or more per month from either Milbul or Lianga." These letters apparently were presented evidence to show that appellee had orders of logs from that are covered by the contract but which were not met because of the failure of appellant to supply them.

There is merit in appellant's contention it appearing that these exhibits were not properly identified and apparently were received after appellee had conceived filing the instant complaint. Under Section 21 of Rule 132 of our Rules of Court, "before any private writing may be received in evidence, its due execution and authenticity must be proved." And the rule is that when there is no proof as to the authenticity of the writer's signature appearing in a private document, such private document should be excluded (*Paz vs. Santiago*, 47 Phil, 334; *Alejandro vs. Reyes*, 53 Phil., 973). Verily, the court a quo erred in admitting said exhibits as part of appellee's evidence.

Regarding the actual damages awarded to appellee, appellant contends that they are unwarranted inasmuch as appellee has failed to adduce any evidence to substantiate them even assuming *arguendo* that appellant has failed to supply the additional monthly 2,000,000 board feet for the remainder of the period agreed upon in the contract Exhibit A. Appellant maintains that for appellee to be entitled to demand payment of sales that were not effected it should have proved (1) that there are actual sales made of appellee's logs which were not fulfilled, (2) that it had obtained the best price for such saks, (3) that there are buyers ready to buy at such price stating the volume they are ready to buy, and (4) appellee could not cover the sales from the logs of other suppliers. Since these facts were not proven, appellee's right to unearned commissions must fail.

This argument must be overruled in the light of the law and evidence on the matter. Under Article 2200 of the Civil Code, indemnification for damages comprehends not only the value of the loss suffered but also that of the profits which the creditor fails to obtain. In other words, *lucrum cessans* is also a basis for indemnification. The question then that arises is: Has appellee failed to earn profits because of appellant's breach of contract, and in the affirmative, is there here basis for determining with reasonable certainty such unearned profits?

Appellant's memorandum (p. 9) shows that appellee has sold to Korea under the contract in question the following board feet of Jogs, Breareton Scale:

Months

Board Feet

From June to August 1959 3,007,435

September, 1959

none

October, 1959

2,299,895

November, 1959 801,021

December, 1959

1,297,510

Total

7,405,861

The above figures tally with those of Exhibit N. In its brief (p. 141) appellant claims that in less than six months' time appellee received by way of commission the amount of P117,859.54, while in its memorandum, appellant makes the following statement:

"11. The invoice F.O.B. price of the sale through plaintiff-General is P767.798.82 but the agreed F.O.B. price was P799.319.00; the commission at 13% (F.O.B.) is P117,859.54. But, as there were always two prices—Invoice F.O.B. price and F.O.B. price as per contract, because of the price difference amounting to P31.920.18, and the same was deducted, from the commission, the commission actually paid to plaintiff-General is only P79,580.82."

It appears, therefore, that during the period of June to December, 1959, in spite of the short delivery incurred by appellant, appellee had been earning its commission whenever logs were delivered to it. But from January, 1960, appellee has ceased to earn any commission because appellant failed to deliver any log in violation of their agreement. Had appellant continued to deliver the logs as it was bound to pursuant to the agreement it is reasonable to expect that it would have continued earning its commission in much the same manner as it used to in connection with previous shipments of logs, which clearly indicates that it failed to earn the commissions it should earn during this period of time. And this commission is not difficult to estimate. Thus, during the seventeen remaining months of the contract, at the rate of at least 2,000,000 board feet, appellant should have delivered thirty-four million board feet. If we take the number of board feet delivered during the months prior to the interruption, namely, 7,405,861 board feet, and the commission received by appellee thereon, which amounts to P79,580.82, we would have that appellee received a commission of P.0107456 per board feet. Multiplying 34 million board feet by P.0107456, the product is P365,350.40, which represents the *lucrum cessans* that should accrue to appellee. The award, therefore, made by the court *a quo* of the amount of P400,000.00 as compensatory damages is not speculative, but based on reasonable estimate.

We believe, however, that the amount of P100,000.00 awarded to appellee as exemplary damages is somewhat excessive it appearing that appellant in suspending the operation of the contract has not acted in a wanton, oppressive or malevolent manner to deserve such a heavy punishment within the purview of the law (Article 2232, new Civil Code). The most that can be said is that appellant, to suit its purpose, has availed of certain misstatements or half truths as reflected in the declarations of Mr. Dempsey, one of its high officials, in an attempt to justify its desistance from the contract. While this is reprehensible, it is not a wanton or malevolent perversion of the truth. Hence, the award should be mitigated, and in our opinion the amount of P50,000.00 is a reasonable exemplary penalty.

We also find reasonable the amount awarded by the court *a quo* as attorney's fees considering the importance of this litigation and the amount of time and effort therein involved. This is justified under Article 2208 of the Civil Code.

The other issues raised being merely a sequel to those we have heretofore discussed, further consideration thereof

is unnecessary.

Wherefore, the decision appealed from is hereby modified by awarding to appellee only the amount of P50,000.00 as exemplary damages. In all other respects, the decision is affirmed, with costs.

Bengzon, C. J., Concepcion, Reyes, J. B. L., Paredes, Regala and Makalintal, JJ., concur.

RESOLUTION

November 28, 1964

Bautista Angelo, J.:

Defendant seeks the reconsideration of our decision rendered on August 31, 1964 on the grounds that the amount of P400,000.00 awarded to plaintiff as *lucrum cessans* is not justified considering the evidence available; that assuming the agreement entered into between the parties to be valid, defendant is not guilty of breach thereof because its obligation to supply the monthly two million board feet for the remainder of the period of the agreement was not mandatory but conditional, aside from the fact that it had the right to suspend the operation of the agreement under the proviso contained in paragraph 8 thereof; that the request of defendant for the renegotiation of the prices of logs which was refused by plaintiff was a right expressly granted to it in paragraph 2 of said agreement; and that the award of exemplary damages and attorney's fees to plaintiff is unjustified.

Defendant, in addition, filed a motion for new trial based on a new evidence which allegedly could not have been discovered during the trial consisting of a contract executed between the plaintiff and the Basilan Lumber Company and of a record of the export of logs of the latter company during the years 1960 and 1961 which allegedly tend to show that even if additional quantity of logs were made available by defendant to plaintiff during the remaining period of the contract, the latter would not have been able to sell said logs, plus another record tending to show that plaintiff reported to the government as commission received from the sale of 7,405,861 board feet of defendant's logs in the year 1959 the sum of P66,036.86 which merely represent 8% of the 13% commission agreed upon between plaintiff and defendant to bolster its claim that 5% of said commission should be deducted from the *lucrum cessans* that may be awarded to plaintiff.

Plaintiff opposed the motion for reconsideration and new trial on the ground that no new point has been raised therein but that it would only unduly delay the disposition of the case. To this opposition defendant filed a reply and a counter-manifestation.

As a basis for the actual damages awarded to plaintiff we stated in our decision that "whenever logs were delivered to plaintiff, plaintiff earned the commission. Had defendant continued to deliver the logs plaintiff could have continued earning its commission in much the same way as in previous shipments." Defendant's counsel now finds this premise erroneous because it assumes facts not in accordance with the mode of implementation of the agreement in question. It is claimed that, according to said mode, a sale must always precede the supply or delivery of logs. If no sale is made by plaintiff, defendant does not have to supply or deliver any quantity of logs. The commission is earned only on sales made. If there is no sale there is no commission. So, counsel concludes, it is erroneous to assume that had the operation of the agreement continued plaintiff would have earned its commission on the basis of the 34 million board feet called for during the remaining period of the agreement.

Counsel predicates his argument on something which plaintiff was precisely prevented from doing. It is true that a sale must always precede the supply or delivery of logs and the commission is earned only on sales made. But, how could plaintiff conclude sales when defendant has stubbornly refused to continue with the operation of the contract in spite of the warning given to it by plaintiff? Had the operation not been stopped, plaintiff would have

undoubtedly continued the flow of sales in pursuance of the agreement. But defendant prevented this for reasons of its own.

The question of whether the obligation to supply the additional monthly two million board feet during the remaining period of the agreement is mandatory or conditional, or whether defendant had the right to suspend its operation as a consequence of its request for renegotiation of prices, are matters that have already been discussed in our main decision. We do not need to repeat here the discussion we have made thereon. We only need to emphasize that, since defendant is guilty of breaking the agreement for reasons purely of its own, in disregard of its express covenant, it held itself liable for all consequential damages that may result from such breach, whether foreseen or unforeseen, and one of the items that may be considered in determining said damages is the failure to realize whatever profits could have been earned during the remaining life of the agreement.[1] It is not, therefore, proper to base such damages purely on transactions that had been accomplished in the past and ignore those that could have been accomplished in the future. As the law says, in case of fraud or bad faith, "the obligor shall be responsible for all damages that may be reasonably attributed to the non-performance of the obligation" (Article 2201, new Civil Code).

But we agree with counsel that the commission paid by plaintiff to Frinat International in the sale of logs of defendant should be deducted from the award made in its favor. But what is the rate of such commission? The record does not appear clear on this matter. On one hand, it shows that the 5% commission earned by Frinat International, as sub-agent, was paid by defendant as an additional commission, as may be gathered from defendant's brief (pp. 6, 70, 85, 88, 141 and 197). On the other hand, plaintiff itself admitted that it does not in all cases receive the whole 13% commission because in cases where plaintiff's officials could not personally contact the buyers or conclude sales with them, plaintiff has to pay a commission of 2% to a subagent (appellee's brief pp. 21 and 85). The most that can be said, therefore, is that what plaintiff had paid in its previous sales in the form of commission to Frinat International was 2% and not 5% as claimed. This is the most that can be deducted from the 13% commission corresponding to Plaintiff.

As already stated in our main decision, the commission earned by plaintiff based on actual sales effected during the first seven months was P.0107456 per board foot. The total board feet which under the terms of the agreement defendant was obligated to deliver for the next 17 months is 31 million board feet. Multiplying 31 million board feet by P.0107456, the product is P365,360.40. deducting therefrom the 2% commission that corresponds to Frinat International, which amounts to P56,207.70, the balance is P309,142.64, which should be the *lucrum cessans* to which plaintiff is entitled.

Under Article 2210, interest may be allowed upon damages awarded for breach of contract, in the discretion of the court. Considering the circumstances of this case, we do not deem it justified to further charge interest on the damages herein involved. The exemplary damages and attorney's fees awarded in the decision are in our opinion proper and so further discussion thereof is unnecessary.

With regard to the motion for new trial, the contract with Basilan Lumber Company alleged to be newly discovered evidence is not really so for it could have been presented during the trial. As a matter of fact, the original of said contract was already presented as Exhibit O and claimed in the brief to have been the basis of the agreement in question.

The claim that plaintiff' turned down offers for distribution from other companies does not necessarily prove that even if defendant had continued to make available the 2 million board feet monthly plaintiff could not have been able to sell the same, because at the time of the execution of the agreement plaintiff' was also the distributor of other companies, like the Basilan Lumber Company, Martha Enterprises, Selective Philippine Lumber Company,

and it complied with its commitments with said entities.

Wherefore, we hereby modify our decision rendered on August 31, 1964 in the sense of awarding to plaintiff the sum of P309,142.64 as *lucrum cessans*, affirming said decision in all other respects. The motion for new trial is denied.

Concepcion, Reyes, J. B. L., Barrera, Paredes, Regala, Makalintal, Bengzon, J. P. and Zaldivar, JJ., concur.

[1]Algara vs. Sandejas, 27 Phil., 284; Borromeo vs. Manila Electric Railrond and Light Co., 44 Phil., 165; Hirks vs. Manila Hotel Co., 28 Phil.. 32fi; Sorvet vs. Eisenberge & Company (Phil.) Inc. L-10741, March 29, 1958.

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