

MohiuddIn Vs. Mt. Kashmiro Bibi

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Court : Allahabad

Decided On : Jan-10-1933

Reported in : AIR1933All252

Appellant : Mohiuddin

Respondent : Mt. Kashmiro Bibi

Judgement :

Mukerji, Ag. C.J.

1. Two questions have been referred to the Full Bench and they have been formulated as follows: (1) Does Section 74, Contract Act, apply to a compromise decree and whether it is open to a Court executing such decree to go behind it so as to interfere, with a stipulation by way of penalty contained in the compromise? (2) If Section 74, Contract Act, does not apply, can the principle underlying that section be extended to a decree passed on a compromise containing a stipulation by way of penalty?

2. The facts of the case as stated in the order of reference are as follows. There was a suit on a mortgage bond for Rs. 7,000, carrying interest at 1 percent per mensem compoundable every six months. In a suit being instituted on the bond, a sum of Rs. 22,170-9-6 was claimed. The defendant contested the suit but ultimately the parties entered into a compromise by which a decree was made for Rupees 11,500, payable by yearly instalments of Rs. 1,100. These instalments

were to be paid on the 30th June of each succeeding year commencing with 30th June 1920. It was provided that in case of default in payment of any one instalment the entire decretal amount remaining unpaid would become immediately payable and the decree-holder would be entitled to interest at the rate of 2 per cent per mensem, from the date of the decree. A decree followed in terms of the compromise. The judgment-debtor paid certain instalments and a sum of Rs. 3,800, remained unpaid. This, the decree-holder sought to recover with interest at 2 per cent per mensem from the date of the decree as stipulated in the compromise.

3. The judgment-debtor objected to the execution on the ground that the stipulation as to payment of interest at 2 per cent per mensem was in the nature of a penalty and it could not be enforced against him. The first point that we have to decide is whether Section 74 applies to the circumstances like the present. Section 74 in terms applies to the case of a contract and begins by saying, 'when a contract has been broken' Two views have been urged before us. One view is that a decree based on a compromise, in spite of the fact that it is a decree, is in substance, a contract and therefore Section 74 should be applied to a consent decree. The other view that has been urged before us is that, whether it is based on a contract or not, a decree is a decree after all and no Court executing a decree can go behind it. There seems to be an apparent conflict between these two views and we have to find out which view we have to accept. If we consider the nature of a compromise decree we shall be able to arrive at a satisfactory conclusion. Order 23, Rule 3 deals with a compromise decree. It says:

where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise...the Court shall record such agreement, compromise...and shall pass a decree in accordance therewith so far as it relates to the suit.

4. It will be noticed that the Court has to do two things when a compromise is produced before it. It has to find out whether the compromise or agreement is a lawful one, and the second is to pass a decree in accordance with the agreement or compromise. Beyond finding out whether the agreement or compromise is

lawful or not, the Court is left with no choice in the matter. An agreement which contains a penal clause is not necessarily an unlawful compromise and in the case of the stipulation contained in the compromise already quoted, there was nothing unlawful. A party may very well agree that in case of default of payment on a due date, he would pay a certain rate of interest not only from the date of default but from a date prior to that, namely from the date of the decree. As we have said, there is nothing unlawful in this agreement. Thus, an agreement like this must be recorded by the Court and a decree must be passed in terms of the compromise or agreement. By Section 96, Civil P.C, an appeal is allowed against a decree, but: none is allowed against a decree passed on compromise. Sub-section (3) says:

no appeal shall lie from a decree passed by the Court with the consent of parties.

5. Thus, not only a Court of original jurisdiction but also the appellate Court is debarred from looking into the terms of the compromise which is lawful but contains a penal clause. The result of the compromise decree is that the Court is precluded from coming to any conclusion of its own and it has to accept a lawful compromise arrived by the parties. This is the function of the Court before which a compromise is produced. In executing such a decree, the Court gives effect to the terms arrived at by the parties, although these terms have not been formulated by the Court itself. If a question should arise as to the satisfaction or discharge of such a decree, the matter can be considered only by the Court executing the decree and not in a separate suit: vide Section 47, Civil P.C. The question now is, whether the Court executing the decree, in deciding whether the decree has been satisfied or not, can say that the payment of a certain amount of money which does not contain any penal interest or which contains only a part of the penal interest, is sufficiently good for the discharge of the decree. If, for example, in the case before us, the Court may choose to say that instead of 2 percent interest, 1 per cent interest would be a reasonable amount to be paid in the circumstances of the case, it may call upon the judgment-debtor to pay that amount of the interest and no more. If the Court chooses to act like that, and on receipt of the amount thus found due, it declares that the decree has been satisfied,, it does so, declare as a Court executing the decree and does not, in making the declaration in any way, go against the terms of the decree.

6. Section 74 applies in terms to a contract, but, in the case of a compromise decree, what is there before the Court but a contract pure and simple? I have already stated that the Court has not exercised its mind at all in selecting how the case should terminate. In making the decree the Court has not exercised its judgment at all. If that is so, I fail to see how the decree ceases to be a contract when, essentially, it is a matter of contract and. nothing else. Section 74, Contract Act, does not say that the relief to be granted under it is confined to a suit. Therefore in executing the compromise decree, there is nothing in Section 74 which prevents a Court from applying that section to the case before it. Thus, on general principles, and on the language of the law, I am clearly of opinion that the answer to question I should be given in the affirmative.

7. Coming to authorities, I shall first consider the cases decided in this Court. There are two cases which are directly applicable and the earlier is *Raghunandan v. Ghulam Alauddin* AIR 1924 All 689. The judgment on the point is rather short. The fact was that on the compromise decree an agreement had been made to pay interest at 3 per cent per mensem in case of default of payment on a particular date. Two learned Judge? of this Court held that the interest however hard the terms, must be paid, because the Court could not go behind the terms of the decree. Their Lordships professed to follow a case of the Calcutta High Court, namely, *Kalipada Sarkar v. Hari Mohan Dalai* (1917) 44 Cal 627. But the facts of that case were entirely different. In that case, the plea had been taken that one of the parties was not properly represented in the suit and therefore the decree could not be executed against him. That was a matter which could not be taken cognizance of by the Court under Section 47, Civil P.C. The question could be raised only by a separate suit. The Calcutta case therefore was no authority for the view expressed by the two learned Judges of this. Court in *Raghunandan v. Ghulam Alauddin* AIR 1924 All 689. The other case in this Court is *Kishen Prasad v. Kunj Behari* : AIR1926 All278 . It must be admitted at the outset that the opinion expressed there was a. obiter, because the actual decision of the case was not based upon the opinion expressed. Nonetheless, two Judges of this Court (including myself) came to the conclusion that Section 74, Contract Act, applied to a compromise decree. I pointed out in my judgment in that case, that the Court embodying the terms of a decree had no discretion to use and was bound to

record the contract as it stood if that contract happened to be lawful. The question of Section 47 was not raised in that case and was not considered. But I have already expressed the opinion that the plea of penalty can be properly raised within the purview of Section 47, Civil P.C.

8. Coming to other Courts, the Lahore High Court in two cases has accepted, the view that the terms of a compromise decree can be interfered with in execution. The earlier case is *Chhunna Mal v. Hanuman Bakhsh* A.I.R. 1927 Lah. 659, and the latter case is *Jwala Ram v. Mathra Das* A.I.R. 1931 Lah. 696. In Bombay, the opinion was at one time entertained that a compromise decree, being a decree, no plea could be taken that it contained a penal clause which should be relieved against. This view was taken out of an execution proceeding, but it arose out of a regular suit, but the principle applied. If the terms of the compromise were sacrosanct, they could not be interfered with even in a subsequent suit. Their Lordships of the Bombay High Court in the Full Bench case doubted the correctness of the principle on which the case in 10 Bom. 435 had been decided. In Madras, the view has been uniformly taken that in execution of a decree the executing Court could see whether the compromise contained any penal clause or not. The latest case on the point is *5. R. Jaya Rao v. Venkatanarayana* : AIR1925 Mad264 . In Calcutta, the same view has been taken not only in suits but also in execution proceedings. *Surendra Nath v. Secy. of State* AIR 1920 Cal 716, was the case of an execution of a decree and *Ganesh Chandra v. Chandra Mohan* : AIR1925 Cal199 was the case of a suit. The Patna High Court, in *Jitendra Nath v. Mt. Jasoda Sahitn* A.I.R. 1926 Pat. 122, has agreed with the Bombay case in *Shirakuli v. Mahablya* (1886) 10 Bom 435 already referred to and holds that in a Court executing the decree the plea that there was a penal clause in the agreement could not be entertained.

9. On principle considered and on the majority of decided cases I am clearly of opinion that Section 74 does apply to the case of the compromise decree. In entertaining a plea that one of the terms of the compromise contains a penal clause, the Court executing the decree does not really go behind the decree, but it finds out, as it is entitled to find out, on payment of what amount the decree should be discharged. I would answer question 1 accordingly. In view of my opinion

entertained on question 1, question 2 does not arise, I would answer the reference accordingly.

King, J.

10. I agree that the first question should be answered in the affirmative.

Niamatullah, J.

11. I agree generally with the view expressed by the Hon'ble Acting Chief justice, but I would like to add a few observations of my own on the principal question which calls for decision in this reference. It seems to have been assumed by the learned Judges who decided *Raghunandan v. Ghulam Alauddin* AIR 1921 All 689, that if the Court executing the decree applies Section 74, Contract Act, to a compromise which has become merged in a decree, it must necessarily interfere with the decree itself. The argument of the learned Counsel for the respondent proceeded on the same assumption. In my opinion, Section 74, Contract Act, viewed in its proper perspective, does not involve any interference with the decree when applied to a compromise on which a decree is passed. Section 74 enacts the rule that

if a contract contains any stipulation by way of penalty, the party complaining of the breach is entitled to receive from the party who has broken the contract a reasonable compensation not exceeding the penalty stipulated for.

12. Parties to every contract containing a stipulation by way of penalty have rights and are subject to obligations mentioned in Section 74, which are part and parcel of every such contract which should be deemed to include a proviso, imported by Section 74, to the effect that the party complaining of the breach is entitled to reasonable compensation not exceeding the penalty but is not entitled to enforce the penalty stipulated for in the contract. Where such a contract is embodied in a compromise which is recorded under Order 23, Rule 3, Civil P.C, the decree should be deemed to be giving effect to the compromise with the legal incident arising from Section 74, namely, that the party complaining of the breach is not entitled to enforce the penal clause but is entitled only to reasonable

compensation not exceeding the penalty stipulated for.

13. What is reasonable compensation is to be determined whenever a dispute arises and the contract is sought to be enforced. The Court executing the compromise decree can only enforce covenants either expressly mentioned in the promise or therein implied from the legal incident attaching to the compromise on which the decree is based. In determining the compensation to which the party complaining of the breach of the contract is entitled the Court executing the decree is not going behind the decree. Its action may seemingly appear to amount to interference with the apparent tenor of the decree. In reality however far from interfering with the decree the Court is giving effect to it in accordance with its real legal import. In this view, I do not think it necessary to hold that the well-established rule that a Court executing the decree cannot go behind it admits in *Shirakuli v. Mahablya* (1886) 10 Bom 435. But in *Krishna Bai v. Hari Govind* (1907) 31 Bom 15, a Full Bench of that Court dissented from this view. It is true that the case before the Full Bench did not arise of exceptions or that an exception would be drafted on that rule if Section 74, Contract Act, be applied to a compromise which has become merged in the decree. Nor do I think for the reasons already stated, that there is any conflict between the aforesaid, rule and the view that, acting under Section 74, Contract Act, a Court executing a decree can relieve against the penal provision contained in the compromise. For these reasons I agree with the Hon'ble Acting Chief justice, in answering the first question referred to this Bench in the affirmative. I also agree that the second question does not arise.