

Deepchand Mini Vs. Ticamchand Mini

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Court : Kolkata

Decided On : Jun-12-1973

Reported in : AIR1974Cal222,78CWN478

Judge : S.C. Deb, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 47; ;[Contract Act, 1872](#) - Section 74

Appeal No. : Suit No. 1346 of 1965

Appellant : Deepchand Mini

Respondent : Ticamchand Mini

Advocate for Def. : P.K. Das and ;Sarbani Roy, Adv.

Advocate for Pet/Ap. : P.K. Roy, Adv.

Judgement :
ORDER

S.C. Deb, J.

1. In order to appreciate the questions involved in this specially assigned application it is necessary to set out below the material portion of the compromise decree dated March 22, 1968 passed in this suit which was filed by the plaintiff

respondent claiming Rs. 16,204/-, with interim interests and costs against the petitioner defendant.

'It is ordered and decreed that the defendant do pay to the plaintiff the sum of Rs. 10,000/-. And in the event of the defendant paying to the plaintiff the sum of Rs. 8,000/- in the following manner, it is further ordered and decreed that the plaintiff shall accept the same in full settlement of his claim in this suit.

(1) Rs. 2,000/- on or before the 22nd day of March, 1968.

(2) The balance sum of Rs. 6,000/- by quarterly instalments of Rs. 375/- each, the first of such instalments to be paid on or before the 15th day of July, 1968 and the subsequent instalments to be paid by the 15th day of every three months thereafter. And it is further ordered and decreed that in default of payment of any two instalments the plaintiff shall be at liberty to execute the decree for the balance of the decretal amount then remaining due. And it appearing that the defendant has paid to the plaintiff the first payment of Rs. 2,000/- through Mr. S. M. Chowdhury, Attorney for the plaintiff, it is further ordered and decreed that the said payment be recorded in the register of this suit.'

2. Now, T will briefly state the facts in a few following paragraphs.

3. The defendant having failed to pay the fourth quarterly instalment which fell due on April 15, 1969 an Order was passed giving him leave to deposit the said amount into this Court without prejudice to the rights, if any, of the plaintiff and in terms of the said order he duly deposited the said amount on June 13, 1969 and it was withdrawn by the plaintiff without prejudice to his rights, if any.

4. Before the ninth instalment became due, the plaintiff by his solicitor's letter dated June 24, 1970 informed the defendant's Solicitors that he would receive the subsequent instalments if they were paid by the defendant to him through the Post Office as he was then residing at Bhimasar in the State of Rajasthan whereas the defendant was residing at Tripura. In terms of that offer the defendant paid the ninth instalment to the plaintiff through the Post Office and then the plaintiff refused to accept the tenth instalment though posted by the defendant on its due

date on the plea that the said amount was tendered to him by the Post Office after October 15, 1970.

5. The eleventh instalment became due on January 15, 1971 and the defendant could not pay it to the plaintiff and then, with their consent, an order was passed giving leave to the defendant to pay through his solicitors the tenth and the, eleventh instalments to the plaintiff through his solicitor without prejudice to the contentions of the plaintiff namely that Rs. 10,000/- has become payable to him by the defendant in view of the defaults made by the defendant in payment of the fourth and the eleventh instalments on their respective due dates and that the plaintiff was entitled to execute the decree for the balance of the decretal amount of Rs. 10,000/-.

6. In terms of the said order the defendant paid and the plaintiff accepted the tenth to thirteenth instalments and thereafter, the plaintiff's Solicitor refused to accept the fourteenth instalment and this Court made an order directing the defendant to deposit the said instalment and the subsequent instalments into this court and accordingly the defendant duly deposited the fourteenth instalment in time. Then, on November 5, 1971, the defendant received a notice from the Court of District Judge, Bikaner and from that notice he came to know that the plaintiff has got the decree transmitted to that Court for execution. In these circumstances, he made this application on November 24, 1971 for the following Orders:--

'(1) that the payment of the fourth instalment in the decree herein due on 15th April 1969 and paid on 13th June, 1969 as also the eleventh instalment due on 15th January 1971 and paid on 9th February 1971 be condoned;

(2) that upon payment of two further sums of Rs. 375/- due on 15th January 1972 and 16th April 1972 the plaintiff do enter up to the full satisfaction of the decree;

(3) that injunction be granted restraining the plaintiff not to proceed with further execution of the decree passed herein;

(4) such further order or orders be made or directions be given as to this Hon'ble Court may think fit and proper;

(5) that satisfaction be entered up in records of this suit in respect of payment of Rs. 5,250/- already made from time to time.'

7. After making this application the defendant deposited the amounts of the last two remaining instalments into this Court and it is admitted fact that the total sum so paid or deposited by the defendant is Rs. 8,000/-. While this application was being heard the defendant's Solicitors searched the records of this suit and came to know that the plaintiff has obtained an ex parte Order dated December 3, 1970, for transmission of this decree to the Court of the District Judge, Bikaner, for execution. Hence, the defendant has made another application for setting aside of the said ex parte Order dated December 3, 1970 and for recalling the decree from the executing Court.

8. While these two applications were being heard one after the other, the Court of District Judge, Bikaner, returned the decree to this Court with a certificate of non-satisfaction of the decree. In these circumstances, the learned Counsel Mr. P. K. Roy, appearing for the plaintiff, has conceded before me that this Court has jurisdiction to hear this application and that this compromise decree is an agreement between the parties as contended by the learned Counsel Mr. P. K. Das appearing with the learned Counsel Miss Sarbani Roy for the defendant.

9. Now, Mr. Das made these contentions at the very outset. The compromise decree has created a right in favour of the defendant to liquidate the decretal amount of Rs. 10,000/- by payment of Rs. 8,000/- in instalments. This right of the defendant is liable to be forfeited on his failure to pay any two instalments and on the forfeiture of such right the defendant is liable to incur an additional liability for Rs. 2,000/- being the difference of Rs. 10,000/- and Rs. 8,000/-. This additional liability for Rs. 2,000/- and the default clause are penal provisions and they were inserted in terrorem for securing the due payment of Rs. 8,000/- and therefore this Court should relieve the defendant from these penal or forfeiture clauses for, according to him, the time for payment of those instalments is not of the essence of the contract between the parties.

10. In support of the above contentions Mr. Das placed strong reliance on the decisions in the cases of Ram Gopal Mookerjee v. Samuel Masseyk. reported in

(1859-61) 8 Moo Tnd App 239 (PC); Kandarpa Nag v. Banwari Lal Nag, reported in 33 Cal LJ 244 = (AIR 1921 Cal 356 (2)); Suren-dra Nath Banerjee v. Secy, of State for India in Council, reported in 24 Cal WN 545 = (AIR 1920 Cal 716); Biswanath Kundu v. Sm. Subala Dassi. reported in : AIR1962 Cal272 ; Mukhi Devi Khaitan v. Auto Cars, an unreported judgment, D/- 26-5-1967 of our Court of Appeal in Appeal No. 265 of 1966 (Cal); Jadabendra Nath Mishra v. Smt. Manorama Debya, reported in : AIR1970 Cal199 ; Seton v. Slade, reported in (1802) 32 ER 108; and Mahanth Ram Das v. Ganga Das, reported in : [1961]3SCR763 .

11. Mr. Das concluded this branch of his argument by saying that this is a fit and proper case where this Court should grant relief to the defendant against these clauses. I gave leave to Miss Roy to argue the case during the absence of Mr. Das and she approached the case in a different way from Mr. Das as stated later on and apart from the above decisions cited by Mr. Das she also placed strong reliance on Halsbury's Laws of England (3rd Edn,) Vol. 14, Articles 1147 and 1148 at pages 620 to 621 and also on Storey's Equity Jurisprudence (14th Edn.) Articles 1725 to 1732 at pages 341 to 350 in support of their respective submissions.

12. Mr. Roy, on the other hand, firstly contended that the condonation of delay in payment of those two instalments would amount to an extension of time to pay those two instalments resulting in a variation of the compromise decree and therefore this Court has no jurisdiction to condone the delay without the consent of the plaintiff. In support of this contention he relied on the decision of the Supreme Court in the case of C. F. Angandi v. Y. S. Hirannayya, reported in : [1972]2SCR515 . But Mr. Das, in my opinion, rightly pointed out that the Supreme Court, as appears from the summary of that decision, was not concerned with the power of the Court to grant relief against any penal or a forfeiture clause and therefore, that case is not an authority on the questions involved before me.

13. Mr. Roy also placed reliance on a decision of the Nagpur High Court in the case of Vyankatrao Laxmanji v. Shamrao Ganpatrao, reported in AIR 1952 Nag 185, but Mr. Das, in my opinion, rightly distinguished that case by saying that there the time for payment, under the compromise decree, was of the essence of the

contract between the parties and therefore, that court had no power to extend the time to pay the instalments without the consent of the decree-holder. Further, the questions with which I am concerned here were not invoked in that case and therefore, that decision is not on the point. Furthermore, question of extension of time to pay those two instalments can never arise because, as said earlier, the defendant, though out of time, has paid those two instalments to the plaintiff.

14. It was then contended by Mr. Roy that this Court, having fixed the time for payment with the consent of the plaintiff, has no jurisdiction to condone the delay under Section 148 of the Code of Civil Procedure against the wishes of the plaintiff. He cited the case of *Hukumchand v. Banshilal*, reported in : [1967]3SCR695 , in support of this contention but in that case the time was fixed not by the Court but by the Statute as pointed out by our Division Bench in : AIR1970 Cal199 (Supra) relied on by Mr. Das and that Statute was the Code of Civil Procedure in my reading of that decision of the Supreme Court and hence, that decision of the Supreme Court cannot lend any aid to the contention of Mr. Roy.

15. Mr. Roy then cited the decision of our Court of Appeal in the case of *Nanlal M. Varma (Gunnies) and Co. (P) Ltd. v. Gordhandas Jerambhai*, reported in : AIR1965 Cal547 , in support of his contention that this Court has no jurisdiction to condone the delay in payment of those two instalments for, according to him, the instant suit is no longer alive in view of the fact that the compromise decree has since been drawn up, completed and filed in Court. It has been held by our Court of Appeal in that case that the Court below had no power to set aside the order of dismissal of the suit passed under Rule 35 of Chapter 10 of the Rules of the Original Side of this Court for the said order of dismissal of the suit was drawn up, completed and filed in court.

16. But here I am concerned with a decree which is fully alive for the purpose of Section 47 of the Code of Civil Procedure and, further, in that case the Court of Appeal was not at all concerned with the question of jurisdiction of the Court in the matter of granting relief against a penal or a forfeiture clause by condoning the delay in payment of the instalments and therefore, that decision is not an authority

on these questions involved before me.

17. But at the same time I agree with Mr. Roy that the Court has no power to vary the terms of a compromise decree without the consent of all parties to it. This general rule is however, subject to a few exceptions recognised by the Courts of Equity. I am concerned at the present moment with one of those exceptions namely that where a penal or a forfeiture clause has been inserted in terrorem in a compromise decree the Courts of Equity are immediately invested with the jurisdiction of granting relief against such provisions by extending the time for payment of money without the consent of the decree-holder provided, however, the time for payment is not of the essence of their contract.

18. The contention of Mr. Roy was that the decisions and the authorities cited on behalf of the defendant are no longer good law in view of the said decision of the Supreme Court in : [1967]3SCR695 . (Supra) but it is not a proper reading of that case (Sic) is the decision of our Division Bench in : AIR1970 Cal199 (Supra). Furthermore, this contention of Mr. Roy is against the law laid down by the Supreme Court in : [1961]3SCR763 (Supra) and in the case of Fateh Chand v. Bal Kishan Das : [1964]1SCR515 (Infra) and hence, it is without any merits. These cases cited and the authorities relied on by the Counsel for the defendant, in my opinion, firmly hold this field and the able argument of Mr. Roy has failed to oust this equitable jurisdiction of this Court.

19. It was contended by Mr. Roy that the equitable jurisdiction cannot be invoked in this case for, according to him the timely payment of those instalments was of the essence of the contract before me in view of the fact that those payments were to be made on the dates specified in the compromise decess which also provided for the consequence of default in payment of any two instalments. But he overlooked, as rightly pointed out by Miss Roy, that practically in every contract time for payment of money is fixed by the parties and yet the Court does not invariably regard such time to be of the essence of the contract between the contracting parties. Mr. Das took over from her and argued that though the default clause has an important bearing on this question but it is not-conclusive as held by Sir Ashutosh Mnkherjee in the case of Kandarpa Nag v. Banawari Lal Nag, 33 Cal

LJ 244 at pages 250, 251 of the report -- (AIR 1921 Cal 356 (2)) (supra) in the following terms:

'On the other hand, as we have seen time has not been deemed to be of the essence of the contract, when the agreement is for the payment of money on a prescribed date, whether upon default of payment on that date money or land is forfeited.'

20. It was, on the other hand, contended by Mr. Roy that the above observations of Mukherjee, J., have no application in the instant case before me, for, according to him, no money is liable to be forfeited under this compromise decree and therefore, in view of the said default clause it should be held that the time for payment of those instalments was of the essence of the contract between the parties.

21. But it was contended by Miss Roy that the compromise decree unmistakably reveals the intention of the parties not to regard the timely payment of those instalments to be the primary importance of their bargain and therefore in view of the decision of the Supreme Court in the case of Gomathina-yagam Pillai v. Palaniswami, reported in : [1967]1SCR227 , it must be held that the timely payment was not of the essence of their bargain. In that case, at page 280 of the report, the Supreme Court said as follows :

'The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regard the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observation of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay its foundation. Prima facie, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law the contract has not been literally performed by the

plaintiff as regards the time limit specified.

The Trial Court relied upon three circumstances in support of its conclusion that time was of the essence of the contract of sale : (i) though no time was prescribed by the oral agreement, in the agreements in writing dated April 4, 1959 and April 15, 1959 there were definite stipulations fixing dates for performance of the contract; (ii) that the second and the third agreements contained clauses which imposed penalties upon the party guilty of default; and (iii) that appellants 1 and 2 were in urgent need of money and it was to meet their pressing need that they desired to effect sale of the property. But the agreements dated April 4 and April 15 do not express in unmistakable language that time was to be of the essence and existence of the default clause will not necessarily evidence such intention.' (Underlines are for emphasis)

22. The law on the subject has been laid down by the Supreme Court and hence I will now go to the compromise decree for resolving the conflicting contentions made by the respective Counsel. The very first thing to be noticed here, in this connection, is that the decree does not say that those instalments must either be paid punctually or within the time mentioned therein. The expression 'in default of payment of any two instalments' used in the decree, therefore, in my opinion, refers not to the time but to the defaults as rightly contended by Miss Roy. The said expression is the key to open the unmistakable intention of the parties for the plaintiff has no right to execute the decree for the balance amount, if any, until there is a failure on the part of the defendant to pay any two instalments and it is only upon such failure that the balance of the decretal amount, if any, can be ascertained at all. Why I have used the expression 'if any' is sufficiently indicated later on and hence I do not intend to elaborate it here.

23. Now, there may be only one default and that default may relate to the first instalments but the plaintiff is bound to wait until the defendant makes another default which may relate to the last instalment. The very chance that there may be defaults in relation to the first and the last instalments and the fact that the plaintiff was bound to wait until the last default was made by the defendant in my opinion, clearly revealed the true intention of the parties and that intention is that they have

given secondary importance to the timely payment of those instalments and therefore such time cannot be regarded to be of the essence of their contract.

24. In this view of the matter I am not impressed by the contention of Mr. Roy and hold that the time for payment of those instalments was not of the essence of the contract between the parties as contended on behalf of the defendant.

25. It was then argued by Mr. Roy that a concession was granted by the plaintiff to the defendant to pay the decretal amount of Rs. 10,000/- by instalments of Rs. 8,000/- and therefore it cannot be said that the default clause is in the nature of a penalty in view of the decision of the Bombay High Court in the case of Burjorji Shapurji v. Dr. Madhavlal Jesingbhai, reported in ILR 58 Bom 610 = (AIR 1934 Bom 370). But, as rightly pointed out by Miss Roy, there the two compromise decrees expressly provided that defendants must pay Burjorji Rs. 27,000/- within 15 days and on such payment being made Burjorji would forego the balance of the decretal amount 'by way of concession' to the defendants and hence that decision had no application to the facts and circumstances of the instant case before me.

26. Mr. Roy then cited the case of Emperor v. Puran Mal, reported in AIR 1948 All 403 - (49 Cri LJ 686), but it was criminal case and it does not even touch this question involved before me. Mr. Roy also relied on a decision of the Patna High Court in the case of Firm Kari Poddar Ramphal Poddar v. Harisankar Mills, reported in : AIR1957 Pat542 , in support of his above contention. But in that case the compromise decree expressly said that the respondents would remit the balance of the decretal amount on payment of a smaller sum mentioned in the compromise decree and hence that decision is of no assistance to Mr. Roy who then placed strong reliance on a decision of the Rajasthan High Court in the case of Chimana v. Chunnilal, reported in , but there the compromise decree did not contain any penal clause and there the plaintiff granted a concession to the defendants to pay a smaller sum in satisfaction of a larger sum which was actually due and payable by the defendants to the plaintiffs as held by the Learned Judges of that Court.

27. The terms of the compromise decrees in all those cases are not in pari materia with the terms of the compromise decree in the instant case before me as pointed

out by Miss Roy and therefore as shown earlier those decisions do not lend any assistance to the contentions of Mr. Roy and hence I overrule his contention. It was then contended by Mr. Roy that the compromise decree permitted the defendant only to purchase a benefit namely the benefit to get rid of his liability to pay Rs. 10,000/- by paying Rs. 8,000/- in instalments and the defendant can only purchase this benefit by paying those instalments in strict compliance with the terms of the compromise decree. It being an admitted fact that the defendant has failed to pay two instalments, Mr. Roy argued that the defendant has not been able to purchase this benefit and therefore he cannot get any relief in view of this law laid down in Halsbury's Laws of England (3rd Edition, Vol. 14) at page 621 in Article 1149 in the following terms :

'Where money is actually payable, or to become payable a provision may validly be made for diminishing the amount or making it payable by instalments, or allowing other concessions to the debtor upon stipulated terms; and if the debtor complied with the terms he is entitled to the benefit of the provision. He must purchase the benefit by strict compliance with the terms; and if he is in default, the full debt is payable and he cannot claim relief as against a penalty. * * * * where a debt is made payable by instalments, a stipulation that on non-payment of any instalment the entire debt shall become due is not in the nature of a penalty.'

28. Miss Roy, however, in my opinion, rightly contended that the above Article postulates a prior agreement between the parties under which a larger sum is either 'actually payable' or 'to become payable' by one party to the other party and they have adjusted it by a subsequent agreement which is sought to be enforced by the other party and therefore this Article can have no application in the instant case before me for no such case has been set up by the plaintiff in his affidavit-in-opposition. Further, it is a mixed question of law and the fact and hence I am unable to accept the contention of Mr. Roy that the compromise decree permitted the defendant only to purchase a benefit as contended by him.

29. I also accept the contention of Miss Roy, namely that the above Article, in any event, cannot have any application i'or we in India are not concerned with the refinements and subtleties of the Common Law of England but with the principles

embodied in Section 74 of our Contract Act as laid down by the Supreme Court in the case of *Fatch Chand v. Balkishan Dass*, reported in : [1964]1SCR515 of the report, in the following terms :

'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. * * * * 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.'

30. It is neither permissible nor it is expedient to lay down any hard and fast rule for determining the question as to whether a stipulation for payment of a sum of money in default of payment of another sum of money is in the nature of a penalty as laid down in ILR 58 Bom 610 = (AIR 1934 Bom 370) (supra); : AIR1957 Pat542 (supra) and (supra) and in the above Article of Halsbury's Laws of England cited by Mr. Roy. Any such attempt, in my opinion, will cramp the jurisdiction of the Court of Equity to unveil the veil worn by many a clever man. They may say this or that but their words cannot prevail over the true nature of their transactions is a principle which is beyond dispute.

31. It was then contended by Mr. Roy that the Court's power to grant relief against penal and forfeiture clauses is solely confined to the cases of forfeiture of land and they have no application to the cases of forfeiture of money but the opinion of Sir Ashutosh Mukherjee in 33 Cal LJ 244 = (AIR 1921 Cal 356 (2)) (supra) and the opinion of S. C. Ghose, J. in Appeal No. 265 of 1966, D/- 26-5-1967 (Cal) (supra) do not support his contention and therefore it is without any merits. Moreover, Section 74 of our Contract Act is directly against his contention and in : [1964]1SCR515 of the report, the Supreme Court has laid down the law on the subject in the following terms :

'In our judgment the expression 'the contract contains any other stipulation by way of penalty' (used in Section 74) comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or

delivery of the property in future or for forfeiture of right to money or other property already delivered.' (The words in bracket are supplied by me).

32. It was then argued by Mr. Roy that the plaintiff has agreed to forego Rupees 2,000/- out of the decretal amount of Rupees 10,000/- on condition that the defendant would pay him Rs. 8,000/- in the manner stated in the compromise decree and therefore the defendant has no right to compel the plaintiff to forego Rs. 2,000/- without paying him Rs. 8,000/- in terms of the decree. It was also contended by him that the decree does not contain any clause empowering the plaintiff to forfeit any sum whatsoever in default of payment of any instalments by the defendant and it also does not confer any right on the defendant, not to speak of its forfeiture. Hence, according to him, the compromise decree does not contain any penal or forfeiture clause or a provision in terrorem and therefore, the authorities cited by the Counsel for the defendant do not assist the defendant in any way but I am not impressed by his contentions in view of these submissions made by Miss. Roy.

33. It was contended by her that the defendant was entitled to pay the amount of those two instalments at any time because the time for payment of those instalments was not of the essence of the contract between the parties and the decree did not empower the plaintiff to ignore the untimely payment of the quarterly instalments of Rs. 6,000/-. She urged that the decree enjoined the plaintiff to accept Rs. 8,000/- if paid by the defendant and therefore this obligation of the plaintiff has conferred a corresponding right on the defendant to get rid of his liability under the compromise decree by payment of Rs. 8,000/- instead of Rupees 10,000/- and this right of the defendant is liable to be forfeited by non-payment of any two instalments and upon the forfeiture of such right the defendant is liable to incur an additional liability for Rs. 2,000/- being the difference of Rs. 10,000/- and Rupees 8,000/- and hence these clauses are in the nature of penalties.

34. She pointed out that the recitals of the compromise decree shows that the plaintiff's claim in this suit was for Rupees 16,204/- and though the decretal amount was not for Rs. 16,204/- and yet the decree says that 'in the event of the

defendant paying to the plaintiff the sum of Rs. 8,000/- in the following manner the plaintiff shall accept the same in full settlement of his claim in this suit' and therefore, she contended that it should be held that Rs. 8,000/- is wholly unconnected with Rs. 10,000/- for the decree enjoined the plaintiff to accept Rs. 8,000/- 'in full settlement of his claim in this suit' and not in full settlement of Rs. 10,000/- In support of this contention she further pointed out that the decree says that 'in default of payment of any two instalments the plaintiff shall be at liberty to execute the decree for the balance of the decretal amount then remaining due' but at the same time the decree does not say that Rupees 8,000/- is to be paid towards Rs. 10,000/- and therefore, Rs. 8,000/- has been exclusively set apart for the payment of Rupees 16,204/- being the claim made by the plaintiff in the plaint.

35. Why Rs. 8,000/- was not to be paid towards the decretal amount of Rupees 10,000/-? Why the plaintiff was not enjoined to accept Rs. 8,000/- towards the decretal amount of Rs. 10,000/? Why Rs. 8,000/- was to be paid towards Rs. 16,204/- being the plaintiff's claim in the suit though no decree for that amount was passed? She posed these questions with emphasis and with greater emphasis contended that these omissions and commissions unmistakably indicate that the default clauses and the additional liability for payment of Rs. 2,000/- are in the nature of penalties and the stipulation for payment of Rs. 10,000/- has been inserted in terrorem for securing the payment of Rs. 8,000/- and hence this Court, in exercise of its equitable jurisdiction, should relieve the defendant against these penal and forfeiture clauses and also against the provision in terrorem inasmuch as the timely payment of those instalments is not of the essence of the contract between the parties.

36. Mr Roy, on the other hand, contended that the decree should not be read in the way it has been presented by Miss Roy. He argued that this Court should ignore the imperfect phraseology used by the parties in the compromise decree and this Court should only look into the substance and not to its form. According to him, the expression 'the balance of the decretal amount then remaining due' refers to the decretal amount of Rs. 10,000/- because no decree for Rs. 16,204/- was passed and therefore, it should be held that Rs. 8,000/- was not set apart for the payment of Rupees 16,204/- but for the payment of the decretal amount of Rs.

10,000/-.

37. It is true that the Court should look into the substance of the compromise decree and not to its form but that does not mean that the Court should rewrite their contract by imputing an intention which is totally absent in their mind. In the case of *Monypenny v. Monypenny*, reported in (1861) 9 HLC 114, Lord Wensleydale, at page 146 of the report, says this :

'.....the question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in that deed; a most important distinction in all cases of construction and the disregard of which often leads to erroneous conclusion.'

In *Re. Meredith, ex parte, Chick*, reported in (1879) 11 Ch D 731 at p. 739 of the report, Brett, L. J. says this :

'I am disposed to follow the rule of construction which was laid down by Lord Dcnman and Baron Parke.....They said that in construing instruments you must have regard, not to the presumed intention of the parties, but to the meaning of the words which they have used.'

In the case of *Smith v. Lucas*, reported in (1881) 8 Ch D 531 at p. 542 of the report. Sir George Jessel M. R. said :

'One must consider the meaning of the words used, not what one may guess to be the intention of the parties.'

And in the case of *Beard v. Moira Colliery Co. Ltd.*, reported in (1915) 1 Ch 257 at p. 268 of the report, Swinfen Eady, L. J. said :

'In the construction of deeds, ordinary words should be given their plain and ordinary meaning.'

38. 'Tn this state of the law, in my opinion, the contentions of Miss Roy cannot be brushed aside. No decree was passed for Rs. 16,204/- as claimed in the plaint and yet on the defendants paying Rs. 8,000/- the plaintiff's claim in the suit namely Rupees' 16,204/- and not the decretal amount of Rs. 10,000/- was liable to be

satisfied is their contract and therefore there is no nexus between Rs. 10,000/- and Rs. 8,000/- and similarly it must be held that there is no nexus between Rs. 16,204/- and Rs. 10,000/-. Those omissions and commissions spoken of by Miss Roy are of the highest importance for they irresistibly lead to the conclusion that the clause 'in the event of the defendant paying to the plaintiff a sum of Rs. 8,000/- in the following manner, it is further ordered and decreed that the plaintiff shall accept the same in full settlement of his claim in this -suit' cannot be reconciled with the clause 'in default of payment of any two instalments the plaintiff shall be at liberty to execute the decree for the balance of the decretal amount then remaining due.'

39. The decree enjoined the plaintiff to accept Rs. 8,000/- if paid by the defendant and therefore, the defendant has a corresponding right to compel the plaintiff to accept Rs. 8,000/- in full settlement of the plaintiff's claim in the suit namely Rupees 16,204/- but this right of the defendant was liable to be forfeited by his non-payment of any two instalments and on the forfeiture of such right he was liable to incur an additional liability for Rs. 2,000/- being the difference of Rs. 10,000/- and Rs. 8,000/- though there is no nexus between these two sums. Hence, in my opinion, the alternative contentions of Miss. Roy must prevail over the contentions of Mr. Roy.

40. In the premises, I hold that the compromise decree created a right in favour of the defendant including its forfeiture and the impugned clauses are penal provisions and they were inserted in terrorcm as contended on his behalf. The timely payment of the instalments is not of the essence of the contract and therefore the equitable jurisdiction of this Court in the matter of granting relief against penal and forfeiture clauses and the provisions in terrorom should be exercised in this case and in exercise of that jurisdiction. I relieve the defendant against those provisions by condoning the delay in payment of those two instalments.

41. Now, the eleventh instalment was to be paid by the defendant on January 15, 1971, to the plaintiff through the Post Office in terms of the said letter dated June 24, 1970. The case of the defendant for nonpayment of this instalment in lime is

that his illness prevented him from sending it on its due date to the plaintiff. He has however, subsequently paid this instalment to the plaintiff in terms of the said Order dated February 9, 1971. set out earlier.

42. In these circumstances, Miss. Roy invoked the Maxim 'lex non cogit ad impossibilia' discussed at page 171 in Broom's Legal Maxim, and contended that illness is an accident as stated therein and, therefore, this Court has jurisdiction to grant relief to the defendant against this accident irrespective of any question as to whether the compromise decree contains any penal or forfeiture clause or a provision in terrorem inasmuch as the timely payment of the instalments is not of the essence of the contract between the parties. In support of this contention she also relied on the decision of the Supreme Court in : [1961]3SCR763 (supra), cited by Mr. Das, at pages 883-884 of the report where the Supreme Court has said this :--

'How undesirable it is to fix time peremptorily for a future happening which leaves the Court powerless to deal, with events that might arise in between, it is not necessary to decide in this appeal. * * * * Such procedural Orders though peremptory (conditional decrees apart) are in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a Court from taking note of events and circumstances which happen within the time fixed. For example, it cannot be said that, if the appellant had started with the full money ordered to be paid and came well in time but was set upon and robbed by thieves the day previous, he could not ask for extension of time, or that the Court was powerless to extend it. Such orders are not like the law of the Medes and the Persians. Cases are known in which Courts have moulded their practice to meet a situation such as this and to have resorted a suit or proceedings, even though a final order had been passed. We need cite only one such case, and that is Lachmi Narain Marwari v. Balmakund Marwari, ILR 4 Pat 61 = (ATR 1924 PC 198)."

43. Miss. Roy also placed strong reliance at pages 118-119 of Storey's Equity Jurisprudence, Vol. I including the law discussed in the foot-notes of these pages. She also relied on page 184 of the 2nd Volume of this book including the relevant

44. Mr. Roy did not dispute these legal principles but contended that they have no application for, according to him, the instant decree is a conditional decree and the defendant was not at all ill. But, in my opinion. Miss Roy has rightly contended that this compromise decree cannot be called a conditional decree because there is no nexus between Rs. 8,000/- and the decretal amount of Rs. 10,000/- and because no effect can be given to the default clause for Rs. 8,000/- was not to be paid towards the decretal amount of Rs. 10,000/- and for that reason the balance of the decretal amount cannot be ascertained even if there is any default in payment of instalments. Now, I would like to say here that Mr. Roy, in my opinion, has rightly contended that no explanation has been offered by the defendant for non-payment of the fourth instalment on its due date and Mr. Das has also admitted this position. Hence, the defendant cannot take the advantage of the principles relied on by Miss Roy so far as the fourth instalment is concerned.

45. As to the non-payment of the eleventh instalment it was contended by Mr. Roy that this Court should not accent the truth of the alleged illness of the defendant in the absence of a supporting affidavit of the doctor. He further contended that the plaintiff has denied this alleged illness of the defendant but I cannot rely on his denial because he was residing at Rajasthan whereas the defendant was lying bedridden at Tripura.

Further, a medical certificate has been annexed with the affidavit-in-reply and this certificate was signed by the doctor in the presence of the defendant. The defendant, on oath, has said that he was seriously ill and his illness is clearly borne out and corroborated by the said medical certificate.

46. Moreover, Mr. Das offered to put the defendant and the said doctor into the witness-box for being cross-examined by Mr. Roy on the question of illness of the defendant but Mr. Roy did not accept this offer. In this view of the matter I overrule the contention of Mr. Roy and hold that that the defendant was seriously ill as stated by him in his petition and in his affidavit-in-reply.

47. Mr. Roy did not dispute that the illness is an accident. He also did not dispute the equitable jurisdiction of this Court in the matter of granting relief against an accident. The facts and circumstances conclusively show that this illness of the defendant prevented him from sending the amount of the eleventh instalment to the plaintiff as stated in the petition and in his affidavit-in-reply. Therefore, in exercise of this equitable jurisdiction I relieve the defendant against this accident by condoning the delay in payment of this instalment.

48. It was then contended by Mr. Roy that the delay in payment of the fourth instalment should not be condoned but even if I accept his contention yet the plaintiff cannot derive any benefit out of it. The time for payment of this instalment is not of the essence of the contract, and, therefore, to 'disregard' this delay will 'be to disregard nothing' as said by the Supreme Court in : [1967]1SCR227 (supra). In these circumstances it will be an idle formality to keep the defendant fastened to his bargain. Further, the default clause is in the nature of a penalty as held earlier and, therefore, the contention of Mr. Roy is without any substance. In this view of the matter, the delay in payment of the fourth instalment is also condoned.

49. The tenth instalment was due on October 15, 1970 and it was contended by Mr. Roy that the defendant did not pay it in time and therefore this application should be dismissed alone on the ground that no relief has been claimed by the defendant with regard to this instalment. But the plaintiff by his Solicitor's letter dated June 24, 1970, made the Post Office his agent for the purpose of receiving the subsequent instalments and he has received the ninth instalment in terms of this letter. Then on October 15, 1970, the defendant paid the tenth instalment to the Post Office but the plaintiff refused to accept the same on the plea that this amount was tendered to him by the Post Office after October 15, 1970. The payment to the Post Office was a payment to him and his refusal to accept it was wrongful.

He cannot, by his wrongful refusal, make the defendant a defaulter. Hence, there is no substance in the contention of Mr. Roy. I may also add here that the plaintiff has subsequently received this instalment in terms of the Order dated February 9, 1971 as stated earlier.

50. The next dispute relates to the recording of the payments made by the defendant. After paying Rs. 7,250/- the defendant made this application and during the pendency of this application he has deposited Rs. 750/- being the balance of Rs. 8,000/- into this court. It was contended by Mr. Roy that Article 125 of the Limitation Act, 1963, stands in the way of the defendant to have these payments recorded in the suit register but I am not impressed by his contention for these reasons.

51. It was admitted by Mr. Roy, that the plaintiff in his application for transmission of the decree for execution mentioned earlier has admitted that he has received all instalments due upto the ninth instalment. Mr. Roy also admitted before me that the plaintiff has received the amount of the tenth to thirteenth instalment and the defendant has deposited the remaining instalments into this court.

52. The decree has recorded the payment of Rs. 2,000/-. The plaintiff has certified the payment upto the ninth instalment in his said application for transmission of the decree for execution. He has received the amount of the tenth to thirteenth instalment under an Order of this Court and he has admitted this fact before me through his counsel. It is well established that no particular form of certification is necessary so long the fact of payment is admitted by the decree-holder. And the remaining instalments were paid into this Court and they are still lying here.

53. No other contention was made by Mr. Roy and hence this application must succeed. The plaintiff has already received Rs. 2,000/- as recorded in the decree. He has also received Rs. 5,250/- before this Notice of Motion was taken out on behalf of the defendant. During the pendency of this application the defendant has deposited into this Court Rs. 750/- being the amount of the last two instalments to the credit of this suit.

54. In these circumstances, there will be an order in terms of prayer (1) of the Notice of Motion. I further direct that the payment of Rs. 6,000/- being the balance of Rs. 8,000/- be recorded in the records of suit. There will be a further order recording the full satisfaction of the plaintiff's claim in the suit in terms of the above compromise decree. The plaintiff will be entitled to withdraw Rs. 750/- deposited into this Court. There will also be an injunction restraining the plaintiff from

executing this decree. The plaintiff shall pay the costs of this application to the defendant.

55. And here I conclude by expressing my gratitude to these three learned Counsel for the valuable assistance that they have rendered to me.

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