

(1967) 08 CAL CK 0022

In the Calcutta High Court

Case No : Appeal from Appellate Order No. 126 of 1961

Commissioners for the Port of Calcutta

APPELLANT

Vs

Basumati Bag

RESPONDENT

Date of Decision : 01-08-1967

Acts Referred:

Civil Procedure Code, 1882 — Section 375

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 7, Order 21 Rule 12(2), Order 21 Rule 32, Order 23 Rule 3, 148

Contract Act, 1872 — Section 55

Registration Act, 1908 — Section 23

Citation : (1968) 1 ILR (Cal) 47

Hon'ble Judges : Laik, J;A.C. Sen, J

Bench : Division Bench

Advocate : J.K. Sen Gupta and Rabindra Nath Bhattacharyya, for the Appellant;P.N. Mitter, Purna Chandra Basu and Ambica Ch. Bhattacharyya, for the Respondent

Final Decision : Dismissed

Judgement

Laik, J.—I agree with the opinion of my learned brother that the appeal should be dismissed with costs.

2. This case has certain features of its own. It arises out of application for execution, levied by the Respondent's predecessor-in-interest, Sm. Prafulla Bala Pakhira, on November 10, 1959, against the Appellant, the Commissioners for the Port of Calcutta, under the provisions of Order XXI, Rule 32 of the Code of Civil Procedure, of a compromise decree, passed in a suit filed by the Appellant, initially on December 23, 1953, and thereafter refiled on February 13, 1954, in the Court of the learned Munsif, Howrah. To this suit for eviction from the disputed tank and for damages the defence, inter alia, was that the tenancy was being held for over 50 years and the monthly rent of Rs. 36 was raised to Rs. 105 and the Defendant has acquired a non-evictable right. In the said execution petition Sm. Prafulla Bala prayed, inter alia, for attachment and sale of the

disputed tank on the ground that the Appellants, viz., the Port Commissioners, did not honour the term of that part of the compromise decree, namely, by executing and registering the lease of the tank in her favour inspite of her fulfilling the terms and conditions of the said compromise decree.

3. To this execution, the Appellants filled a petition of objection, giving rise to Miscellaneous Case No. 2 of 1960, inter alia, stating that the payments as agreed to in the compromise petition were not made by the lady within the stipulated time and accordingly she was not entitled to have any indenture of lease of the tank with its bank, executed and registered by the Post Commissioners. The miscellaneous case was allowed by the learned Munsif. Prafulla Bala preferred an appeal therefrom. It was allowed by the learned Subordinate Judge. In other words, the Appellants' application u/s 47 of the Code was dismissed and the execution case, started by the Respondent's predecessor, was directed to proceed. The instant second Miscellaneous Appeal, at the instance of the Port Commissioners, is directed against the said appellate order.

4. To avoid repetition I leave out very many other facts and the points which have been given and answered in great details by my learned brother.

5. The main point for consideration raised was as to whether there was any default by Prafulla Bala in making payment according to the compromise decree, which default, according to the Court of Appeal below, admittedly occurred. This again touches the construction of the compromise petition which in para. 2 directs payment by Sm. Prafulla Bala of

a sum of Rs. 3,076 within six months from the date of the decree by two equal instalments, viz., Rs. 1,538 within three months from the date of the decree and the balance Rs. 1,538 within the next following three months.

6. The petition of compromise was filed on January 19, 1957. By order No. 38 the Court directed the Port Commissioners, the Plaintiffs, to pay the court fees on the ascertained sum of Rs. 3,076 which was paid on February 18, 1957. By order No. 41 of the said date the terms were recorded, but the decree was signed by the learned Judge on February 27, 1957.

7. Paragraph 3 of the compromise petition provides the payment of current wasilat by the Defendant (Prafulla Bala) at the rate of Rs. 236 per month from the month of January, 1957. The records of the suit and the different execution cases would show that on February 7, 1957, that is, before the order recording the compromise was passed, the sum of Rs. 236 was deposited by the lady, which was withdrawn by the Port Commissioners later. Similarly there was a payment order of Rs. 236 on July 8, 1957, in favour of the learned Advocate for the Plaintiffs, out of the monthly deposits of Rs. 236 at least upto September, 1960, appearing on the challans filed. The Defendant (Prafulla Bala) paid the total sum of Rs. 3,076 by August 20, 1957, as stipulated in para. 2 of the petition as quoted above but not in two exactly equal instalments; in other words, the default according to the Port Commissioners occurred in the payment

of the first instalment of Rs. 1,500 instead of Rs. 1,538 on May 25, 1957, and that the balance sum of Rs. 1,576 was not paid on or before August 18, 1957, but on August 20, 1957, that is, not within six months from the date of the order, recording the compromise, which should be taken as the date of the decree.

8. In my opinion, there is no default in payment of the sums mentioned in the compromise terms, though the Court of Appeal below assumed erroneously that there was admittedly a default. Some of my reasons besides those of my learned brother are as follows:

9. The governing intention of the parties as to the date of the decree appears to be clear. Reading the compromise petition, including its schedule as a whole, the overall period was that of six months as provided for, and that was from the date of the signing of the decree and not from the date of the order recording the compromise, which was itself dependant on the further fact of payment of the deficit court fees by the Port Commissioners and which date could not be known to the Defendant. Secondly, the accepted idea of the date of the decree is the date when the Judge signs the decree, following the Full Bench decision of this Court in *Bani Madhab Mitter v. Matungini Dassi* ILR (1886) 13 Cal. 104 (F.B.) and not following the fiction that the date of the decree is the date when the judgment is pronounced as in the CPC and for the purpose of limitation in the Limitation Act. It is the current notion or daily practice between the non-lawyer contracting parties that the date of the decree is the date when the Judge signs. Thirdly, the provision of payment by two equal instalments was principally made for the benefit of the Defendant and the short payment of Rs. 38 in the first payment as instalment could not be taken as a default. Fourthly, the first payment within the period of three months was only a mode of payment. Accordingly when there is no default, no question of condonation arises. Even assuming that there was a default, I refer to the reasonings given by my Lord and accept the conclusions on the points of condonation and relief against forfeiture.

10. On the argument that the instant execution case is not maintainable but there should have been a separate suit, the answer is found in the judgment delivered by B.K. Mukherjea, J. as his Lordship then was, in *Rabindra Nath Roy Chowdhury v. Dharendra Nath Roy Chowdhury* (1939) 43 C.W.N. 1007 and in the latest Supreme Court decision in *Haji T.J. Abdul Shakoor and Others Vs. Bijay Kumar Kapur and Others*, .

11. Accordingly, the Appellant's application u/s 47 of the Code was rightly dismissed. The execution would proceed.

A.C. Sen, J.

12. The present appeal is directed against an order passed by the lower Appellate Court dismissing the objection filed by the Appellant, namely, the Commissioners for the Port of Calcutta, u/s 47 of the Code of Civil Procedure.

13. The facts may be briefly stated. The Commissioners for the Port of Calcutta instituted a suit for eviction from a tank against one Prafulla Bala Pakhira, predecessor-in-interest of the Respondent before us, on February 13, 1954, and the said suit was at first registered as Title Suit No. 46 of 1954, in the Second Court of Munsif, Howrah, and thereafter renumbered as Title Suit No. 195 of 1954, on December 11, 1954, on being transferred to the First Additional Court of the Munsif, Howrah. The Plaintiff also claimed damages tentatively valued at Rs. 250. An undertaking was given in para. 5 of the plaint to pay such excess court fees as might be required after assessment of the mesne profits.

14. The parties to the suit filed a petition of compromise on January 19, 1957, praying that the suit be decreed and finally disposed of in terms of the compromise. The learned Munsif passed the following order that very day:

Petition of compromise filed by the parties. It appears from the terms of the solenama that the parties have fixed the sum of Rs. 6,086-0-0 as agreed amount of mesne profits.... The Plaintiff has paid the court fees on the sum of Rs. 250 which was assessed as tentative value as mesne profits. Plaintiff to pay Rs. 480 on the sum of Rs. 5,836 out of Rs. 6,086-0-0 by 28.1.57. Sheristadar to submit his report on perusal of solenama.

The next order is dated January 28, 1957, and it runs thus:

Court fees not paid. Plaintiff files a petition praying for time for payment of court fees. Prayer is allowed to 18.2.57 for payment of court fees....

The deficit court fees were paid on February 18, 1957, whereupon the learned Munsif passed the following order.... Petition of compromise filed by the parties on 19.1.57 is put up. The terms of the solenama are legal and let them be recorded. The plaint is sufficiently stamped. It is

ordered,

the suit be and the same is decreed in terms of the solenama which do form part of the decree.

15. The decree was, however, sealed and signed on February 27, 1957.

16. As the decision of the present appeal rests primarily upon an interpretation of the various clauses of the petition of compromise filed on January 19, 1957, the said petition is reproduced below:

The Plaintiffs and the Defendant have compromised this suit on the following terms:

TERMS OF THE SOLENAMA

(1) The Plaintiffs will get a decree for eviction and khas possession and wasilat at the rate of rent till 30.8.55, and at the rate of Rs. 236 from 1.9.55 with cost against the Defendants.

(2) The Defendant shall pay the sum of Rs. 3,076 as per schedule below due to the Plaintiff within six months from the date of decree by two equal instalments, viz., Rs. 1,538 within three months from date of the decree and balance Rs. 1,538 within the next following three months.

(3) The Defendant shall pay current wasilat at the rate of Rs. 236 per month from the month of January, 1957, by the 7th of each succeeding month.

(4) In case the Defendant pays the sum of Rs. 3,076 within six months from this date as per instalments above fixed and the current wasilats regularly and makes no default in payment of any of these dues the decree will not be executable against the Defendant for her eviction and khas possession by the Plaintiff and the Defendant will, in that case, continue to possess the suit property as a tenant under the Plaintiff on a monthly rental of Rs. 236 and a fresh lease from month to month on this rental and other usual terms and benefits of rebate etc. will be executed and registered by the parties at the cost of the Defendant. In case of default in payment of any of the said dues the entire decree will become at once executable for eviction, khas possession and wasilats.

(5) The Defendant will pay the entire cost of the suit within 15 days from the date of the decree to be passed on this compromise and in default the Plaintiffs will be entitled to execute the decree for eviction, khas possession and wasilat and the said cost and Defendant will get no renewal of lease.

SCHEDULE

Wasilat due from November, 1953 to August, 1955 at Rs. 105 per month- Rs. 2,310-0-0

...September, 1955 to December, 1956 at Rs. 236 per month- Rs. 3,776-0-0

Total dues of the Plaintiff: Rs. 6,086-0-0

Less paid by Defendant by instalments Rs. 3,010-0-0

Balance to be paid by the Defendant to the Plaintiff Rs. 3,076-0-0

So the parties pray that the suit be decreed and finally disposed of in terms of this compromise which may be made part of the decree.

Dated, Howrah, 19.1.57.

Read over and explained to the Defendant.

Sd. Balai Chandra Banerjee

17. The schedule gives the calculation by means of which the amount of Rs. 3,076-0-0 mentioned in the second clause was ascertained.

18. On March 6, 1957, the judgment-debtor, Sm. Prafulla Bala Pakhira, filed a petition praying for permission to deposit Rs. 236 as instalment money. The learned Munsif passed the following order:

She may deposit at her risk.

19. On April 24, 1957, the Defendant, Sm. Prafulla Bala Pakhira, filed a petition praying for permission to deposit the sum of Rs. 648-4-6 towards costs on condoning delay in depositing the said amount on the grounds stated therein. The learned Munsif passed the following order in the suit file:

The ground mentioned in the petition is not supported by the fact that the Petitioner has earlier deposited sums according to the terms of the compromise decree. Hence her prayer for condoning delay is rejected. She may, however, deposit the amount entirely at her own risk.

20. On May 25, 1957, the Defendant filed another petition with challan praying to deposit Rs. 1,500 in terms of the solenama. She was permitted to deposit entirely at her own risk.

21. On August 20, 1957, the Defendant filed another petition with challan praying for permission to deposit Rs. 1,576 in terms of the solenama. She was permitted to deposit entirely at her own risk.

22. The Plaintiffs applied on April 12, 1958, for the execution of the decree passed on compromise, and the execution case was registered as Title Execution Case No. 21 of 1958 in the First Additional Court of the Munsif of Howrah. In column 7 of the application for execution the following sums were claimed:

(1) Wasilat in arrears upto December, 1956.... Rs. 3,076

(2) Monthly wasilat at the rate of Rs. 236 from February, 1957 to March, 1958.... Rs. 3,304

(3) Decretal costs.... Rs. 648-14-6

(4) Subsequent wasilat upto the date of khas possession.

(5) Execution costs.

23. In column 10 the Plaintiff decree-holder prayed for the possession of the disputed tank and for the recovery of the decretal dues including the costs of execution.

24. In column 11, meant for indicating the mode in which the assistance of the Court is required, it was stated that, as moneys had not been paid or deposited in accordance with the terms of the compromise decree, khas possession of the property mentioned in the schedule might be delivered to the decree-holder after evicting the judgment-debtor; that the unrealised decretal amount and the cost of execution might be paid to the decree-holder; that the moneys irregularly deposited by the judgment-debtor in the main suit might be transferred to the credit of the decree-holder and paid to him; and that the balance of the unrealised amount might be realised by the attachment and sale of the property of the judgment-debtor.

25. On April 25, 1952, the learned Munsif passed an elaborate order pointing out the defects in the application for execution. The relevant portion of the order is quoted below:

Now, under Order 21, Rule 12(2) of the CPC the Plaintiff decree-holder is not entitled to get mesne profits for an unascertained period under the solenama unless a final decree is passed after enquiry. So from column 7 of the execution petition the items Nos. 2 and 3 should be deleted. Moreover, the judgment debtor has deposited certain amounts in favour of the Plaintiff. So, the Plaintiff can pray for an execution for that amount which remains after the deduction of the amount already in deposit. So item No. 1 of the column 7 of execution application should also be corrected accordingly.

The decree-holder cannot proceed with simultaneous execution for decretal dues as well as for recovery of possession. Either he must pray for khas possession first and thereafter for the decretal dues or for the decretal dues and thereafter for recovery of khas possession. If the decree-holder wants to get khas possession first for the defaults made, he must so mention in the column 10 of the execution petition.

Column 11 of the execution application should be corrected accordingly. Moreover, there is no provision to get the amount transferred lying in deposit in the name of the decree-holder. If he requires that amount he may at any time withdraw it.

26. The learned Munsif asked the decree-holder to amend the execution application in the light of the observations made by him. The decree-holder filed a petition on May 10, 1958, praying for the amendments of the execution petition and the learned Munsif allowed the amendment by order No. 3 dated May 10, 1958. The execution petition was amended by deleting the first four items in column 7, by stating in column 10 that the decree holder prays first for recovery of possession and thereafter for the recovery of the decretal dues including costs of execution and by deleting the prayer for the transfer and payment of the amounts irregularly deposited by the judgment-debtor in the main suit.

27. On July 21, 1958, the judgment-debtor filed a petition u/s 47, Code of Civil Procedure, whereupon Misc. Case No. 53 of 1958 was started. In the said petition u/s 47 the judgment-debtor stated that the entire dues covered by the decree having been paid in terms of the decree the decree was not executable. In para. 5 of the said petition the judgment-debtor asserted that after liquidating the decretal dues she had become a tenant under the decree-holders at a monthly rent of Rs. 236. She further submitted that as the decree-holders neglected to perform their part of the contract by granting a lease of the disputed property even though she applied for such specific performance she was entitled to possess the property in suit although no lease had been executed. In the last paragraph she expressed her belief that the higher authorities for the

Commissioners for the Port of Calcutta were not in the know of the filing of the execution case because she had been assured by the officers of decree-holders that the lease would be effected shortly.

28. It may be noted that in the said petition of objection the judgment-debtor did not ask for the specific performance of the agreement to lease contained in the compromise decree.

29. On December 11, 1958, the judgment-debtor, Prafulla Bala Pakhira, filed a petition praying for the withdrawal of the Misc. Case No. 53 of 1958 on the ground that she had in the meantime instituted a suit for declaration and specific performance of the agreement to lease. She was allowed to withdraw the miscellaneous case. The order passed by the learned Munsif on that day runs thus:

Heard learned lawyers. Prayer is allowed. The Petitioner is allowed to withdraw the Misc. Case. She is to pay Rs. 4 as costs to the O.P.D.H. to take steps by 22.12.58.

30. The said suit for declaration and the specific performance of the agreement to lease out the disputed property on the basis of the compromise decree was filed on October 10, 1958, and the said suit was registered as the Title Suit No. 419 of 1958 in the Court of the Second Munsif, Howrah. We shall deal with the further developments of this suit after finishing the chapter on the Title Execution Case No. 21 of 1958 initiated by the decree-holder.

31. On July 29, 1960, the judgment-debtor filed another application u/s 47, Code of Civil Procedure, in Title Execution Case No. 21 of 1958, and on such application Misc. Case No. 53 of 1960 was started on August 9, 1960. Her case was that she had complied with all the conditions mentioned in the solenama. It was stated in para. 2 of the petition that she had already deposited more than thirteen thousand rupees in Court and that the decree-holder had withdrawn some of the money deposited. She contended that by the said withdrawal the decree-holder had forfeited all claims for executing the decree. She asked for the rejection of the Execution Case also on the ground that the property in suit being a jalkar had vested in the State of West Bengal with the result that the decree-holders had no locus standi to maintain the application for recovery of possession. This misc. case, namely Misc. Case No. 33 of 1960, was taken off from the peremptory list as per order date February 25, 1961.

32. Title Suit No. 419 of 1958, filed by the judgment-debtor on October 10, 1958, was dismissed by the learned Munsif on September 8, 1959, on the ground that the suit was beyond the pecuniary jurisdiction of the Court as well as on the ground that the suit was barred u/s 47 of the Code of Civil Procedure.

33. The judgment-debtor preferred an appeal being Title Appeal No. 342 of 1959 in the Court of the District Judge, Howrah, against the decree in Title Suit No. 419 of 1958. The appeal was allowed. The decree and the finding of the learned

Munsif that the suit was hit by Section 47, Code of Civil Procedure, was set aside and the plaint was returned to the judgment-debtor for presentation to the proper Court.

34 Thereafter, the judgment-debtor, namely Prafulla Bala Pakhira, filed the plaint after amending the cause title and the prayer portion in the Second Court of the Munsif, Howrah, on March 21, 1960, and it was registered as Title Suit No. 121 of 1960 of that Court. It was a suit for declaration and injunction and the claim was valued at Rs. 100. The decree-holders as Defendants contended, inter alia, that the suit was hit by Section 47 of the Code of Civil Procedure. The learned Munsif accepted the contention of the decree-holders Defendants and dismissed the suit on contest on March 20, 1961. The relevant portion of his judgment is quoted below:

In the result, I am of opinion that the suit is barred by Section 47, CPC and, in this view of the matter, I am constrained to dismiss the suit.

35. In the meantime, on November 10, 1959, the judgment-debtor applied for the execution of that part of the compromise decree which was in her favour and on that application was started Title Execution Case No. 36 of 1959. The judgment-debtor prayed for the attachment and sale of the disputed tank under Order 21, Rule 32, Code of Civil Procedure, because the decree-holders failed to execute and register the deed of lease as per terms contained in the compromise decree.

36. On January 20, 1960, the decree-holders, namely the Commissioners for the Port of Calcutta, filed a petition u/s 47, Code of Civil Procedure, to show that the execution case started by the judgment-debtor was not maintainable. The said petition of objection was registered as Misc. Case No. 2 of 1960 in the Court of the First Additional Munsif at Howrah. The decree-holders contended that the application of the judgment-debtor for execution of the decree was barred by res judicata in view of the fact that the judgment-debtor opposite party raised self-same contention by way of objection u/s 47, Code of Civil Procedure, against the decree-holders, objectors' prayer for khas possession in execution of the self-same compromise decree in Title Execution Case No. 21 of 1958, still pending in that Court, but allowed the objection registered as Misc. Case No. 53 of 1958 to be dismissed for non-prosecution on December 13, 1958. They further contended that the judgment-debtor opposite party having failed to pay the various decretal dues in terms of the compromise decree, was not entitled to have any deed of lease executed and registered by the decree-holders objectors. In para. 4 of the petition of objection it was stated that the judgment-debtor opposite party having got her Misc. Case No. 53 of 1958 dismissed and her Title Suit No. 419 of 1958 for specific performance of the compromise decree now sought to be executed being dismissed on contest and she having preferred Title Appeal No. 342 of 1959 against the order of dismissal, she was estopped from seeking execution of the compromise decree.

37. The learned Munsif by his order No. 20 dated June 21, 1960, allowed the Misc. Case No. 2 of 1960 on a consideration of the following two points:

- (1) whether the execution case started by the judgment debtor opposite party was barred by res judicata;
- (2) whether the judgment-debtor opposite party was entitled to the execution of the lease in terms of the compromise decree.

38. On the question of res judicata the learned Munsif found in favour of the judgment-debtor opposite party, but on the other question he found against the judgment-debtor opposite party and allowed the Misc. Case No. 2 of 1960. He took the view that time was of the essence of the contract. He found that the judgment-debtor opposite party failed to deposit the instalments mentioned in Clause 2 of the petition of compromise forming part of the decree in due time as per the terms of the solenama decree. He thought that such failure enabled the decree-holders Petitioners to avoid the contract. He, therefore, held that in view of the objection by the decree-holders Petitioners, the judgment-debtor opposite party was no longer entitled to enforce the decree in her favour for having the deed of lease executed. He overruled the contention on behalf of the judgment-debtor opposite party that the delay in payment might be condoned in exercise of the power given by Section 148, Code of Civil Procedure. He gave the following reason:

the said section applies in cases where the dates are fixed by the Court and has no application in case of a compromise decree in which case dates cannot be extended unless the parties to the solenama agrees to the same. Thus Section 148, Code of Civil Procedure, also cannot give the opposite party any protection.

39. The decree-holders Petitioners contended that there were further breaches of the condition of solenama in respect of the deposit of wasilat, but the learned Munsif confined himself to the two deposits mentioned in Clause 2 of the petition of compromise.

40. The judgment-debtor opposite party preferred an appeal being Misc. Appeal No. 205 of 1960 in the Additional Court of the Subordinate Judge, Howrah, against the decision of the learned Munsif in Misc. Case No. 2 of 1960. The lower Appellate Court allowed: the appeal on contest. It seems the question of res judicata was not raised by the decree-holders before the lower Appellate Court. The main and only contention on behalf of the decree-holders Respondents was that the judgment-debtor Appellant could not maintain the execution case as she had defaulted in payment of the several amounts as mentioned in Clause 4 of the compromise petition. Why the appeal was allowed will appear from the following extract from the judgment of the lower Appellate Court:

Even in the case of consent decree the Court has jurisdiction to condone defaults complained of. The case of Kondarpa Nag v. Banawari Lal Nag (1920) 33 C.L.J. 244 clearly explains this principle of law. In my view it would be...inequitable to

find for the Respondent relying strictly on the letters of the compromise.... I condone the defaults. Therefore,

ordered

that the Misc. Appeal be allowed on contest.

41. It is against this decision of the lower Appellate Court that the present appeal before us is directed.

42. Mr. Sen Gupta, on behalf of the Appellants, at first contended that the judgment debtor Respondent was not entitled to ask for the specific performance of the agreement to lease by executing the compromise decree, because the said agreement was not in relation to the subject-matter of the suit in which the compromise decree was passed; her remedy lay in filing a suit to enforce the agreement. He, however, ultimately abandoned the point, because the suit instituted by the judgment-debtor, namely, Title Suit No. 121 of 1960 of the Second Court of the Munsif, Howrah, for declaration and injunction was dismissed on the ground that the suit was barred by Section 47 of the Code of Civil Procedure. He conceded that execution was the proper remedy for the enforcement of the agreement to lease contained in the compromise decree.

43. Apart from concession, there is little scope for doubt having regard to the principles laid down in *Munshi Ram Vs. Banwari Lal*, and *Abdul Shakoor v. Bijai Kumar Kapur* Supra cited on behalf of the judgment debtor Respondent that execution of the compromise decree is the proper and only remedy for the enforcement of the agreement to execute a lease contained in the said compromise decree, because the said agreement being the consideration for the decree for eviction suffered by the judgment-debtor Respondent, was in relation to the suit for eviction instituted by the decree-holders Appellants.

44. The next point for consideration is whether time was of the essence of the contract embodied in the decree passed on compromise. In Clause 2 of the petition of compromise the Defendant, namely the judgment-debtor Respondent, is required to pay the sum of Rs. 3,076 within six months from this date of decree. On Clause 4 of the said petition it is stated that if the Defendant pays the sum of Rs. 3,076 within six months from this date then she is entitled to certain benefit. The petition was filed on January 19, 1957, whereas the judgment on compromise was passed on February 18, 1957, and the decree was signed and sealed on February 27, 1957. It is not clear from what date the period of six months is to be counted. Then again, it is not clear what is meant by the expression "the date of the decree" occurring in Clause 2 of the petition of compromise Under Order XX, Rule 7, Code of Civil Procedure, the decree shall bear date, the day on which the judgment was pronounced. That may be so under the Code of Civil Procedure, but can it be said that the parties to the compromise too intended that the date of the decree would be the date of pronouncing the judgment? Our task is to ascertain the intention of the parties. It is difficult to hold that the parties had in mind the provision of the CPC that the

decree shall bear date, the day on which the judgment was pronounced when they entered into the compromise. According to the view expressed by a Full Bench of our High Court in *Bani Madhab Mitter v. Matungini Dassi Supra* a decree does not come into existence until it is signed. It is reasonable to hold that the parties to the compromise were under the same impression and by date of the decree they really meant the date on which the decree would be signed. Some light on this point is thrown by Clause 5 of the petition of compromise, wherein it has been stated that

the Defendant will pay the entire cost of the suit within 15 days from the date of the decree to be passed on this compromise.

Cost is ascertained after the judgment has been pronounced. Therefore in Clause 5 the date of the decree cannot be the date of pronouncing the judgment; it must necessarily mean the actual date of signing the decree, because no other date in between can be taken to be the date of the decree.

45. If the date of the decree in Clause 5 means the actual date of signing the decree, there is no reason why the same meaning should not be attributed to the expression "date of decree" in Clause 2. It may further be pointed out that the judgment could not be pronounced on January 19, 1957, when the compromise petition was filed inasmuch as the decree-holder failed to deposit the deficit court fees until February 18, 1957. Judgment was pronounced on that day after the deficit court fees had been paid. It is not clear whether the judgment was pronounced in the presence of the judgment-debtor Respondent. Under these circumstances a great injustice will be done to the judgment-debtor Respondent if the date of decree is taken to be the date of pronouncing the judgment and if time is taken to be of the essence of the contract.

46. If the date of decree in Clause 2 has not the same meaning as the date of decree in Clause 5, then this fact alone indicates that the parties to the agreement did not attach so much importance to time as to make it of the essence of the contract.

47. Proviso to Section 23 of the Indian Registration Act provides for the registration of a copy of a decree within four months from the day on which the decree was made. It is settled law that the day on which the decree was made is the day on which the decree was signed vide *Abdur Rahim v. Chhamiruddin* (1937) 41 C.W.N. 945. Hence the words "date of decree" may mean the date when the decree was signed for the purpose of registration. The meaning of those words, therefore, are not immutable. In the facts and circumstances of this case it may reasonably be held that those words in Clauses 2 and 5 of the compromise petition really refer to the date when the decree was signed, namely February 27, 1957. In any event, these words, namely "date of decree", admit of different interpretations. If the parties intended to make time essence of the contract they would have used more specific words. The use of the expression "date of decree" clearly indicates that the parties had no intention to make time

essence of the contract.

48. In Clause 3 of the petition of compromise it is stated that the Defendant shall pay current wasilat at the rate of Rs. 236 per month from the month of January, 1957, by the 7th of each succeeding month. It is not stated for how long wasilat at that rate is to be paid. From the order sheet of Title Suit No. 195 of 1954, in which the compromise decree was passed it appears that wasilat at the rate of Rs. 236 was paid regularly, that is to say, by the 7th of each succeeding month, from January, 1957 to July, 1957. As Clause 3 did not mention any definite period during which wasilat was to be paid, it cannot be said that the parties to the compromise intended to make time essence of the contract in respect of the payment of wasilat.

49. Mr. Mitter, appearing on behalf of the judgment-debtor Respondent, referred us to the principles laid down by the Privy Council in *Jamshed Khodaram Irani v. Burjorji Dhunjibhai Contractor* (1915) 20 C.W.N. 744, in support of his contention that in the instant case time could not be regarded as of the essence of the contract. In the case before the Privy Council the Plaintiff instituted a suit for the specific performance of an agreement to sell immovable property. The Defendant agreed in writing to sell a leasehold interest to the Plaintiff for Rs. 85,000, and the Plaintiff paid Rs. 4,000 as earnest. This agreement provided, by Clauses 1 and 2, that the title was to be made marketable, that the conveyance was to be prepared and received within two months from the date of the agreement, that on signing the document of sale Rs. 80,500 was to be paid, and after its registration the remaining Rs. 500. The 5th clause provided that on payment of Rs. 81,000, as provided by Clause 2, the document of sale was to be executed, but should the purchaser not pay the amount within the fixed period above-mentioned he was to have no right to the earnest money of Rs. 4000, and any claim of his was to be void, and the vendor was, after that date, to be at liberty to sell.

50. The suit was decreed by the trial Court but dismissed by the lower Appellate Court. The Privy Council allowed the appeal and restored the decree of the trial Court. In the opinion of the Privy Council, the question as to whether time was of the essence of the contract lay at the root of the controversy.

51. Viscount Haldane in delivering the judgment laid down the following principle:

The law applicable to the point is contained in Section 55 of the Indian Contract Act.... Their Lordships do not think that this section lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law, equity, which governs the rights of the parties in cases of specific performance of contract to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time....

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 regards 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 observance of the time limits prescribed in a fashion which is unmistakable... 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...the contract has not been literally performed by the Plaintiff as regards the time limit specified. This is merely an illustration of the general principle of disregarding the letter for the substance....

But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice.

52. Applying these principles to the agreement before us, namely, the agreement to execute the stipulated lease, we are of opinion that there is nothing in its language or in the subject-matter to displace the presumption that for the purposes of specific performance time was not of the essence of the contract. The Privy Council had to deal with a case of sale of immovable property. We are concerned with a lease of immovable property; but that does not in any way affect the equitable principles laid down by Viscount Haldane. Our analysis of the various clauses of the petition of compromise rather strengthens the presumption that time was not of the essence of the contract.

53. Out of Rs. 3,076 to be deposited as per Clause 2 of the petition of compromise, the judgment-debtor Respondent deposited Rs. 1,500 on May 25, 1957, and the balance of Rs. 1,576 on August 20, 1957. If date of decree is taken to be February 27, 1957, the entire sum of Rs. 3,076 was paid within the stipulated time, so also the two instalments, though in the first instalment the judgment-debtor, instead of paying Rs. 1,538, paid Rs. 1,500. In the second instalment she, however, paid Rs. 1,576 instead of Rs. 1,538. If date of decree is taken to be the date of judgment, then the judgment-debtor was a bit late in depositing the entire sum of Rs. 3,076 as well as the two instalments of Rs. 1,538 each, but the delay in our opinion is negligible. If the decree-holders thought that the instalments had not been paid in time, they could have given notice to the judgment debtor asking her to pay within a definite time. But they did nothing of the sort. Therefore, the decree-holders cannot say that as the judgment-debtor did not pay the two instalments in time, she cannot ask for the specific performance of the agreement to execute the lease.

54. Mr. Sen Gupta on behalf of the Appellants has drawn our attention to the following passage in the judgment of the lower Appellate Court:

Considering the question I do not feel quite justified in holding that for such defaults as have admittedly occurred the Appellant should be non-suited from her execution case.

The defaults in this passage refers to defaults in payment of the several amounts mentioned in Clause 4 of the compromise petition. Clause 4 refers to the two instalments of Rs. 1,538 each as well as the wasilat to be paid since January, 1957, by the 7th of the next succeeding month. According to the lower Appellate Court, defaults in respect of the various dues mentioned in Clause 4 of the compromise petition have admittedly occurred. Mr. Sen Gupta suggests that the judgment-debtor cannot ask for the specific performance of the agreement to lease by reason of such default. We cannot accept this suggestion. First of all, from the materials on record it is clear that the word "default" means irregular payment and not non-payment. Costs and the two instalments of Rs. 1,538 each have been deposited. As to wasilat, it is not the decree-holder's case that the wasilat in respect of any month since January, 1957, upto date has not at all been deposited. That being the position the wasilat in respect of any particular month may have been deposited after the 7th of the next succeeding month. But there is nothing on record to show for how many months there has been such delay and what is the extent of delay. Moreover, no notice has ever been served by the decree-holders complaining of the delay and asking payment within a definite time. As we have already found the parties did not intend to make time of the essence of the contract, the judgment-debtor can certainly ask for specific performance notwithstanding her failure to pay the sum of Rs. 3,076 and the wasilat within the dates fixed by Clause 4 of the petition of compromise.

55. In Clause 4 of the compromise petition the last sentence runs thus:

In case of default in payment of any of the said dues the entire decree will become at once executable for eviction, khas possession and wasilats.

Clause 5 appears to be more stringent, it runs thus:

The Defendant will pay the entire cost of the suit within 15 days from the date of the decree...and in default the Plaintiffs will be entitled to execute the decree for eviction khas possession and wasilat and the said cost and Defendant will get no renewal of lease.

In our opinion these stringent provisions in Clauses 4 and 5 do not in any way indicate that the parties intended that time should be of the essence of the contract. Mookerjee, Panton, JJ. pointed out in *Mahadeo Prasad Agarwala v. Narain Chandra Chakravarti* (1919) 24 C.W.N. 330, that an intention to treat time as essential cannot be inferred from the circumstances that the agreement to sell land not only specifies the day for completion but also contains an additional provision that, in the event of default on the part of the purchaser, the vendor will be at liberty to cancel the agreement and forfeit the earnest money.

56. Mr. Mitter, the learned Advocate for the judgment-debtor Respondent,

invoked another equitable doctrine, namely, that of relief against forfeiture, in support of his client's claim for specific performance of the agreement to lease. He referred to the case of *Surendra Nath Banerjee v. The Secretary of State for India* (1914) 24 C.W.N. 545. In that case the Plaintiff (decree-holder) sued the Defendant (judgment-debtor) for recovery of possession of a parcel of land within Barrackpore Cantonment. The suit was compromised. By the compromise the Defendant admitted the right of the Plaintiff and agreed to hold the land as a separate holding under the Plaintiff after executing a lease (agreement) within two months from the date of the compromise in a prescribed form. The agreement was to be executed subject to the terms of the petition of compromise, and that in default the terms would come to an end, and the Plaintiff would take khas possession of the land in suit by executing the decree that would be passed on the petition of compromise. A decree was passed on July 6, 1915.

57. After about two years the Plaintiff applied for the execution of the decree and prayed for khas possession. Notice having been served on the Defendant he wrote to the Plaintiff expressing his willingness to execute the agreement and asked for a draft copy of the agreement for his execution. The Court below overruled the objections of the Defendant, who thereafter appealed to the High Court. The High Court held that the Defendant should not be ejected for failure to execute the agreement within two months from the date of compromise decree and should be given some time to execute it.

58. Their Lordships gave the following reason in support of their decision:

In the present case that relation (of landlord and tenant) was created by the compromised decree.... That being so, the learned Judge is in error in refusing relief to the Defendant on the ground that the contract had crystallized into a decree. The time (two months) agreed upon for executing the agreement in the present case do not, having regard to the principles stated by the Judicial Committee in the case of *Jamshed v. Barjorji* Supra...appear to be of the essence of the contract, nor was time made essential by any notice given by the Plaintiff to the Defendant.

59. The learned District Judge in that case overruled the objections of the Defendant judgment-debtor as he was of opinion that the compromise decree having crystallized into a decree the executing Court could not go behind the decree. As against this opinion of the District Judge their Lordships expressed the following opinion: It is true that the Court in execution cannot go behind the decree, but it is open to the executing Court to consider what the rights of the parties, equitable or otherwise, are which follow from the contract embodied in compromise decree. The question whether the Court is precluded from exercising its equitable jurisdiction by granting relief against forfeiture contained in a consent decree whereby the status of landlord and tenant is established between the Plaintiff and Defendant was considered by a Full Bench of the Bombay High Court in the case of *Krishna Bai v. Hari Govind* ILR (1906) 31 Bom. 15. In dealing

with the question, the learned C.J. Sir Lawrence Jenkins pointed out that there can be no doubt that if the matter had rested in agreement the Court could have relieved; the right to relief would have been an incident of the agreement, and that it did not make any difference that the agreement was recorded and a decree passed in accordance therewith. The learned C.J. observed:

...the contract of the parties is not the less a contract and subject to the incidents of a contract, because there is superadded the command of a Judge and held that as u/s 375 of the CPC (Order 23, Rule 3 of the present Code), the decree was to be in accordance with the agreement, it cannot have altered the relations of the parties as they existed under the agreement, and as it was an incident of those relations that the right of forfeiture was subject to relief, that incident must still apply when those relations are established by a decree in accordance with the agreement.

60. In the instant case too, by the agreement embodied in the petition of compromise dated January 19, 1957, a relationship of landlord and tenant has been established between the Commissioners for the Port of Calcutta and Prafulla Bala Pakhira. The decree-holders are entitled to execute the compromise decree for recovery of possession if the judgment-debtor makes default in paying the dues mentioned in Clause 4 or the costs mentioned in Clause 5. These provisions are in the nature of forfeiture. The executing Court can, therefore, give relief against forfeiture even if it is held that she had defaulted in paying the dues or the costs as per agreement and pass an order directing the decree-holders to execute the stipulated lease in favour of the judgment-debtor.

61. Mr. Sen Gupta has lastly argued that as a consent decree can only be varied by consent, the delay made by the judgment-debtor in depositing the wazilat for some months and in depositing the costs cannot be condoned and relieved against except by consent. He referred to two cases in support of his argument, viz. (i) *Bhutnath Das v. Sahadeb Chandra Panja* (1958) 66 C.W.N. 645, and (ii) *Bokaro and Ramgur v. State of Bihar* (1964) 68 C.W.N. 1117. In our opinion these two cases have no application to the facts of the instant case. In the first case there was no decree by consent, and in the second case an order of injunction was granted on terms by consent and the order contained a default clause. It is in this context that their Lordships held that the Court has no jurisdiction to vary an order passed by consent, and relieve a party from the mischief of a default clause in an order of the Court. But nevertheless their Lordships granted substantially the same injunction afresh treating the application for condonation of delay as a fresh application for injunction. This argument, viz., that a consent decree can be varied only by consent was put forward by the decree-holder in the case of *Surendra Nath Banerjee v. Secretary of State for India* *Supra*. This argument was repelled by their Lordships and the reason is to be found in the following passage:

There is no doubt that a consent decree can be varied only by consent, but as pointed out by Sir Lawrence Jenkins, C.J. in *Krishna Bai v. Hari Gobind* ILR 31

Bom. 15 (F.B.) a compromise decree is u/s 375, CPC (Order 23, Rule 3 of the present Code), to be in accordance with the agreement, and it cannot have, therefore, altered the relations of the parties as they existed under the agreement, and as it is an incident of those relations that the right of forfeiture was subject to relief, that incident must still apply when those relations are established by a decree passed in accordance with the agreement.

62. In the instant case, too, the relationship of landlord and tenant has been created by the compromise and recognised by the decree. Therefore, the judgment-debtor can claim relief against penalty contemplated by the compromise petition as well as by the consent decree in case of the defaults referred to in Clauses 4 and 5 of the compromise petition. We, therefore, think that the lower Appellate Court was fully justified in condoning the defaults complained of.

63. In the result, the appeal is dismissed on contest with costs.