

(2005) 04 KL CK 0019
In the High Court Of Kerala
Case No : C.R.P. No. 333 of 2004

Sukumaran

APPELLANT

Vs

Anthony

RESPONDENT

Date of Decision : 04-04-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 23 Rule 3, 2(2)
Contract Act, 1872 — Section 73 , 74
Transfer of Property Act, 1882 — Section 55

Citation : (2005) 2 KLT 919

Hon'ble Judges : R. Bhaskaran, J

Bench : Single Bench

Advocate : R.D. Shenoy and S. Vinod Bhat, for the Appellant; A.K. Chinnan, Susal A. Chinnan and K.I. Sageer, for the Respondent

Final Decision : Dismissed

Judgement

R. Bhaskaran, J.—This revision is filed by the judgment-debtors 1 and 2 in E.P.No.707 of 2001 in O.S.No.875 of 1992 on the file of the Subordinate Judge's Court, Thrissur. The 1st respondent is the decree-holder and 2nd respondent is the third judgment-debtor. The order under challenge is passed by the Execution Court holding that the Execution Petition to execute the compromise decree is perfectly maintainable and posting the case for settlement of proclamation. According to the revision petitioners, if the revision is to be allowed, the Execution Petition can be dismissed as not maintainable. Therefore, this revision is also maintainable.

2. Though the order under challenge does not disclose the necessary details for a proper understanding of the case, the facts narrated in the revision memorandum as well as in the counter affidavit filed by the 1st respondent disclose certain undisputed facts. Since the argument of the learned Senior Advocate Shri. R.D. Shenoy is restricted to a pure question of law, this revision can be disposed of on the basis of the admitted facts and the legal contentions

raised.

3. The 1st respondent in the revision who was the decree-holder in O.S.No. 875 of 1992 owned an extent of 6.07 Ares of land in Guruvayoor Town with a four storied building used as a lodge. He had availed of a loan from the South Indian Bank for construction of the lodge. Subsequently, he sold the property to the judgment-debtors for a sale consideration of Rs. 17,50,000/-. Out of the above-said amount Rs. 9,95,000/- was to be paid to the Bank by the judgment-debtors. The sale deed was dated 11.10.1991. On the same day, another agreement was executed between the parties whereunder the judgment-debtors undertook to get back the document of title in respect of other items of properties given as collateral security to the Bank by the decree-holder within six months from 11.10.1991 and if breach was submitted, the judgment-debtors should pay a sum of Rs. 300/- per day to the decree-holder. The judgment-debtors could not repay the loan to the Bank and get back the documents from the Bank within the period of six months and the decree-holder therefore filed O.S.No. 875 of 1992 claiming an amount of Rs. 22,200/- calculating at the rate of Rs. 300/- per day from 11.4.1992 to 23.6.1992 the date of suit. When the suit came up for trial, the parties filed a compromise petition as I.A.No. 3552 of 1992 on 4.9.1992 as per which an application for amendment of plaint was also filed and the judgment-debtors agreed for a decree to be passed at the rate of Rs. 300/- per day with proportionate interest from the date of suit till the date of getting release of collateral securities. It was also agreed that for the purpose of taking back the collateral securities, the judgment-debtors required only one month's time. But the judgment-debtors could not repay the loan and get release of the collateral securities within one month and the Bank filed O.S.No. 1197 of 1992 to recover the debt.

4. Subsequently, the decree-debtor also filed an E.P. to execute the compromise decree and to get Rs. 9,86,100/- calculated at the rate of Rs. 300/- per day from the date of plaint upto 31.7.2001 and interest at the rate of 18% together which the amount shown in the Execution Petition was Rs. 11,66,055/-.

5. Before filing the present Execution Petition, E.P.No. 160 of 1994 was filed on 31.3.1994 to realise Rs. 2,19,378/- and the Execution Court allowed proclamation for sale. It is seen from the counter-affidavit filed in this revision that Rule 66 notice was ordered on 28.10.1995 and paper publication was effected for service to the 3rd defendant. No objection was raised regarding the validity of the decree. Thereafter, the Court proceeded to attach and sell the property. According to the decree-holder, the Execution Petition happened to be dismissed on 25.5.1996 due to a clerical mistake committed by the advocate's clerk. Similarly, in another E.P. filed as E.P.No. 320 of 1996 the 3rd judgment-debtor avoided service of notice and paper publication was effected. Due to the absence of the counsel for the decree-holder that E.P. was dismissed for default. It was thereafter that the present E.P. was filed. In the order under challenge, the Execution Court has stated that the records disclosed that former E.Ps. were

dismissed for default and the executability of the decree was not challenged in those E.Ps. On a perusal of the memorandum of revision, it is seen that there is no averment that the observation of the Execution Court in that respect is wrong.

6. After the present E.P. was filed, the judgment-debtors filed objections to the Execution Petition. It is contended that the decree is beyond the scope of the plaint and there is no legal sanction for payment of Rs. 300/- till the indefinite period. It is also stated in the objection that Order 20, Rule 12(c)(iii) is to be referred in this connection. It is also contended that a collateral security could not be got released due to the non-co-operation of the plaintiff. No letter of acknowledgment was given by the plaintiff to the Bank as agreed. Therefore, the Bank filed a suit for realisation of the amount and the security could not be released.

7. As already noted, the Execution Court held that such contentions were not raised in the earlier Execution Petition. There is no legal impediment for executing the compromise decree and it was found that the Execution Petition was maintainable.

8. In this revision, it is contended that the compromise decree can be attacked on all pleas which can be argued against a contract. It is further contended that in the absence of proof of actual damage caused to the decree-holder, mere agreement before the trial Court to pay the amount and a decree passed thereunder will not enable the decree-holder to execute the decree unless the decree-holder proves actual damage and his only remedy is to file an independent suit and not to execute the decree. The further contention is that since the parties stipulated one month period as the time limit within which the documents are to be obtained back, the compromise decree has to be construed in such a way that the period for which compensation can be claimed is only for that one month. According to the learned senior counsel any other interpretation will make the compromise decree itself illegal and the decree has to be read in such a way if possible as to see that the decree is validly passed and that can be done only if the scope of the decree is restricted to one month period for payment of compensation.

9. The learned counsel for the 1st respondent on other hand contended that the parties entered into a compromise at the time of trial of the suit allowing the plaintiff to amend the plaint and claim at the rate of Rs. 300/- per day till the collateral security is got released by the judgment-debtors fully knowing its implications. The valuable property in Guruvayoor Town with a multi-storied building was given to the judgment-debtors for which a portion of the consideration alone was paid to the decree-holder. The balance was retained with the judgment-debtors for discharging the liability of the Bank and getting release of the documents relating to collateral security. The decree-holder is an Abkari contractor and he has got various other liabilities. For discharging those liabilities, the title deeds produced before the Bank as collateral security have to be obtained back as otherwise the decree-holder will be incurring huge loss. He

was not able to get a solvency certificate and when the judgment-debtors were attempting to sell the property, the suit was filed and an attachment of the property before judgment was obtained. It is at that time, the compromise was entered into and the suit was decreed. On account of the default committed by the judgment-debtors, in discharging the liability to the Bank with the amount which was reserved with them at the time of sale of the property. The Bank had initiated proceedings before the Debt Recovery Tribunal and the Tribunal issued sale proclamation. Subsequently, the Tribunal closed the matter recording a settlement. But the Bank has challenged the same before this Court by filing Order P.No. 32465 of 2002 stating that there was no settlement. This Court directed the Bank to file a Review Petition before the Tribunal and such a petition was filed. The Tribunal has allowed the petition and allowed the Bank to realise the balance amount as per sale proclamation. Challenging that order, revision petitioners filed W.P.No. 33491 of 2004. Though this Court directed the deposit of the entire balance amount within a week, they did not deposit the amount. The parties assessed the loss which will be suffered by the decree-holder on account of the delay in getting release of the collateral securities of the decree-holder at Rs. 300/- per day. According to the learned counsel for the decree-holder the amount of Rs. 300/- per day can be obtained from the rent of one or two rooms in the lodge out of 34 rooms and it is not a big amount. But for the sale of the lodge to the judgment-debtors the decree-holder would have sold it to any other person and he would have got the entire amount with which it was possible to repay the bank loan, got back the collateral securities and repay the other loans due from the decree-holder. It was taking into account all these facts that both sides agreed to fix the damages at Rs. 300/- per day.

10. The learned senior counsel for the revision petitioners contended that there is a charge created u/s 55 of the Transfer of Property Act and the property will be always liable to be proceeded with and therefore, the decree-holder will not be in any way prejudiced. But the compromise provided for reimbursement of the loss sustained by the decree-holder on account of the delay in getting back the title deeds produced as collateral security and mere existence of charge to proceed against the property in the hands of the purchaser is no answer for the claim of the decree-holder for loss sustained otherwise on account of the delay in getting back the collateral security by discharging the entire balance loan amount with interest.

11. The question to be considered in this Civil Revision Petition is whether the order passed by the Execution Court allowing execution proceedings to proceed is justifiable or not.

12. According to the learned senior counsel appearing for the revision petitioners, the compromise decree can be attacked on all pleas which can be urged against a contract and merely because the agreement has been approved by Court while passing a compromise decree, it will not get any validity if it is otherwise invalid. It is therefore, contended that to make the decree legally valid,

its scope has to be restricted to one month period before which the judgment-debtors undertook to get back the title deeds in respect of the collateral security furnished by the decree-holder to the Bank. In support of the above contention, the learned counsel relied on the Full Bench decision of the Allahabad High Court in *Habib Mian and Another Vs. Mukhtar Ahmad and Another*, . The majority view of the Full Bench was that a compromise decree is a creature of the agreement on which it is based and it is subject to all the incidents of such agreement and that it is a contract with the command of a Judge super added to it and in construing its provisions the fundamental principles governing the construction of contracts are applicable. It is also held that one of the cardinal principles in the construction of contracts is that the entire contract must be taken as constituting an organic synthesis, embodying provisions which balance in the sum of reciprocal rights and obligations.

13. Order 23, Rule 3 of the CPC reads as follows:

"3. Compromise of suit -- Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, the compromise or satisfaction is the same as the subject matter of the suit.

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.

Explanation.-- An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (Act 9 of 1872), shall not be deemed to be lawful within the meaning of this rule".

It is clear from a reading of the above rule that the subject matter of the agreement or compromise need not necessarily be the same as the subject-matter of the suit. This also is made clear by the Supreme Court in *Byram Pestonji Gariwala Vs. Union Bank of India and others*, . It is held in that decision as follows:

"After amendment of 1976, a consent decree, as seen above, is executable in terms thereof even if it comprehends matters falling outside the subject-matter of the suit, but concerning the parties".

14. In this case, the petition to record compromise also has mentioned about simultaneous filing of an application for amendment of plaint. The Scheme of Order 23, Rule 3 is to avoid multiplicity of litigation and to enable the parties to

settle their disputes once and for all. A compromise decree may not be binding on one of the parties if it was obtained by fraud, misrepresentation, misunderstanding or mistake. But the burden to prove that the decree is vitiated by such factors is on the persons who says that the decree is unenforceable. In *Silver Screen Enterprises Vs. Devki Nandan Nagpal*, , the Supreme Court held that the Court is bound to enforce an agreement if the factum and validity of the agreement are not disputed. The Explanation to Order 23 Rule 3 makes it clear that it is only those agreements or compromise which are void or voidable under the Indian Contract Act which are to be considered as not lawful agreements for the purposes of the rule.

15. Section 74 of the Indian Contract Act says that when a contract is broken if a sum is named in the contract as the amount to be paid in cases of breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage is caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Therefore, the burden to establish that a clause in the decree is in the nature of penalty and is unenforceable u/s 74 of the Contract Act is on the judgment-debtors. There cannot be any dispute that on account of the delay in getting back the collateral securities on payment of the entire debt due to the Bank the decree-holder will be put to serious loss as he may not be able to raise any further loan for his business or to discharge the existing loans by sale of the other properties as the title deeds are with the Bank. Both the parties were aware of their rights and liabilities and with open eyes they have entered into a compromise. Even accepting the argument of the learned counsel for the petitioners it is only in case a clause in the agreement is penal in nature, that the compromise decree will become unenforceable. The argument of the learned counsel for the petitioners that the payment of damages should be restricted to 1 month after the expiry of six months as he had undertaken to get the collateral securities released before that month is not sustainable since no such restriction is discernible from the compromise decree. Though in the order under challenge, it is stated that no such contention was raised in the earlier Execution Petitions which were dismissed for default, there is no ground raised in the CRP with respect to that observation. Still I will consider as to how far the main contention of the learned counsel for the revision petitioner is sustainable.

16. In *Moti Lal Banker Vs. Mahraj Kumar Mahmood Hasan Khan*, , it was held that a compromise entered in an execution proceedings by which the execution is postponed on the undertaking given by the judgment-debtor to pay interest at a rate higher than the decretal rate of interest is enforceable in the execution proceedings.

17. A Constitution Bench of the Apex Court in *Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd.*, , had occasion to consider the consequences of a breach of contract in which a sum was specified

as liquidated damages. It was held as follows:

"Where parties name in a contract reduced to writing a sum of money to be paid as liquidated damages they must be deemed to exclude the right to claim an unascertained sum of money as damages. The contention of learned counsel is that the words "not less than" appearing before "Rs. 6,000" in Clause 14 clearly bring in Clause 10 and therefore entitle the appellant to claim 10% of the estimated profits for the unexpired period by way of damages. But if we accept the interpretation, it would mean that the parties intended to confer on the Managing Agents what is in fact a right conferred by Section 73 of the Contract Act and the entire clause would be rendered otiose. Again the right to claim liquidated damages is enforceable u/s 74 of the Contract Act and where such a right is found to exist no question of ascertaining damages really arises. Where the parties have deliberately specified the amount of liquidated damages there can be no presumption that they at the same time intended to allow the party who has suffered by the breach to give a go-by to the sum specified and claim instead a sum of money which was not ascertaining or ascertainable at the date of the breach".

In *Kumar Sudhendu Narain Deb Vs. Mrs. Renuka Biswas and others*, , the Supreme Court held as follows:

"8. Now coming to the substituted preliminary decree, even though by consent, there is no denying the fact that the seal of adjudication gets affixed to it. The Court passing it has formally expressed the terms itself under its own authority, even though at the suggestion of the parties. It conclusively determines the right of the parties with regard to the matters in controversy valid in the suit till the stage of passing of the preliminary decree".

18. A clause in a compromise decree in a partition suit to pay certain quantity of areca per year for several years for equalisation of shares with option to pay the amount in lump sum 25 years after the decree was found to be valid and enforceable in *Sham Bhat v. Krishna Bhat* 1986 KLT .27 Case No. 47. It was held in that case that merely because the compromise provided for supply of areca for several years it cannot be said that the Court had no jurisdiction or power to grant decree in terms of the compromise. It was also held that it could not be said that what the Court had done was impermissible as the parties agreed to certain terms postulated in the compromise petition and as the Court accepted the same it was futile to contend that the decree suffered from any infirmity. Again in *V.N. Sreedharan v. Bhaskaran* 1986 KLT 102 : 1985 KLJ 961, the executability of a compromise decree came up for consideration before K.T. Thomas, J. as His Lordship then was. It was held that executability was one of the incidences of a decree, whether it is a compromise decree or otherwise. Unless a right to execute a decree is restricted either expressly or by necessary implication, the executable character of a decree is not lost. It was held that there was no necessity for the decree to embody in it a clause empowering the initiation of execution proceedings in the event of non-satisfaction of it or non-

fulfilment of any condition or non-compliance of any term therein. The contention that a compromise decree is not the result of an adjudicatory process and therefore the same is not a decree was not accepted by this Court. It was held that though on a compromise petition when Court passes a decree, the adjudicatory powers of the decree have to be exercised and hence such a decree falls within the ambit of Section 2(2) of the Code.

19. Chapter II of the Indian Contract Act, contains provisions relating to voidable contracts and void agreements. So long as there is no contention that the compromise is vitiated by any one of the grounds enumerated in that Chapter of the Contract Act, the Court has to enforce a compromise decree. Therefore there is no bar attached to the compromise decree and the order of the execution Court is perfectly valid. When the parties submitted before Court and agreed to pass a decree in terms of the compromise specifying the liquidated damages, and a decree is passed in terms of the agreement, the judgment-debtor cannot later turn round and contend that the damages agreed to was penal in nature in view of the decision of the Constitution Bench of the Supreme Court in *Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd.*, .

20. Though there was an objection in the Execution Court that the decree-holder had not given the letter of acknowledgment as agreed to in the compromise, that contention was not pursued before this Court and therefore I am not considering that aspect. In view of the above discussion, I find no merit in the revision and it is dismissed without any order as to costs.

Order on I.A.No. 1028 of 2004 in CRP No. 333 of 2004-C

Dismissed.