
(1960) 09 MP CK 0040
In the Madhya Pradesh High Court
Case No : M.C.A. No. 59 of 1958

Tarachand Shivlal and another	Vs	APPELLANT
Chandiram Ganga Sahai and another		RESPONDENT

Date of Decision : 02-09-1960

Acts Referred:

Contract Act, 1872 — Section 74

Citation : (1960) MPLJ 1379

Hon'ble Judges : Shiv Dayal Shrivastava, J

Bench : Single Bench

Advocate : M.L. Gupta, for the Appellant;

Final Decision : Allowed

Judgement

Shiv Dayal, J.

This second appeal arises out of the execution of a compromise decree in a suit which was brought for the recovery of Rs. 4,850. According to the compromise the Defendants were to pay Rs. 1,900 only but of which they paid Rs. 100 in cash; they promised to pay Rs. 1,800 in four instalments of Rs. 450 each on the following dates:

1st April and 1st July of 1954

1st April and 1st July of 1955

This was followed by a clause providing that in case of default in payment of any two consecutive instalments, the Plaintiffs would be entitled to a further sum of Rs. 500. The dispute in this second appeal is only with regard to this amount of Rs. 500. The Courts below have held that the decree-holders were entitled to recover the amount of Rs. 500 because it was in the form of a concession and not penalty.

In a case of this nature it is to be found out what the primary contract between the parties was. Here the sum which was agreed to be paid by the Defendants to

the Plaintiffs was fixed at Rs. 1,900. The payment of Rs. 500 over and above the agreed sum was undoubtedly introduced for the purpose of securing the performance of the contract; it does not appear to be an integral part of the contract. It does not appear from the terms of the compromise decree that the stipulation was by way of reasonable compensation. It would have been a different matter if the parties had agreed at Rs. 2,400, and a concession of Rs. 500 had been allowed to the Defendants. The stipulation was put in order to operate in terrorem so as to drive the Defendants to pay on the specified dates. It is also clear that time was not of the essence of the contract because the instalments did not carry any interest and, further more, the decree-holders received payment of over due instalments out of time. It may also be remembered that the suit was for Rs. 4,850 and the Plaintiffs agreeing to recover only Rs. 1,900 shows that the rights were doubtful. For all these reasons the stipulation to pay Rs. 500 over and above Rs. 1,900 was in the nature of a penalty. It is settled law that the executing Court can give relief against such penalty. I am supported in my view by the decision in *Chinnaswami v. Cheru* AIR 1953 T. C. 464.. Observations in *Union of India v. Vasudeo Agarwal* AIR 1960 Pat. 87. become opposite. Penalty differs from stipulated damages within the meaning of Section 74 of the Contract Act. The essence of liquidated damages is a genuine pre-estimate of damage which is agreed upon, while the essence of a penalty is a stipulation in terrorem of the offending party.

The learned District Judge has relied on a decision in *Chimma v. Chunni-lal and Anr.* AIR 1967 Raj. 378. In my opinion that case is distinguishable. There the suit was for a larger amount, but a compromise was struck at Rs. 1,700 to be paid on certain specified dates with a stipulation that in the event of default of payment of any instalment on the stipulated date, the decree-holders would be entitled to recover the entire amount sued for. From these terms it appears that in fact the Plaintiff's whole claim was admitted, but a concession was given to the Defendant. I have already said that here only Rs. 1,900 were agreed to be paid as the agreed amount and it follows that the stipulation to pay Rs. 500 in default was a penalty.

This appeal is, therefore, allowed, the judgment of both the Courts below are set aside and it is held that the decree-holders are not entitled to recover Rs. 500 under the exigibility clause. Since the judgment-debtors did not pay the instalments in time I do not allow them costs. Both parties Shall bear their own costs throughout.