

A. F. Angadi

Vs

Y. S. Hirannayya

Civil Appeals Nos. 174 and 175 of 1967

(C.A. Vaidialingam, K.K. Mathew JJ)

23.11.1971

JUDGMENT

MATHEW, J. -

1. These two appeals, by special leave, are from the common judgment passed by High Court of Mysore on June 16, 1966, confirming the order of the District Court, Bangalore, allowing an application for execution of the compromise decree passed on June 24, 1959, in appeal from the decree in O.S. 85 of 1949-50 of that court.

2. The appellant was the defendant in the suit and the respondent the plaintiff. As matter in controversy between the parties in the appeal turns upon the construction of the compromise decree, it is necessary to set out its terms -

(i) The defendant agrees to receive from the plaintiff a lakh of rupees paid as consideration for the sale of the property No. 44, Mahatma Gandhi Road, Bangalore, together with stamp charges of Rs. 3,300/- (rupees three thousand and three hundred only) with interest at six per cent. per annum of the above two sums from March 10, 1947 up-to-date together with Rs. 7,000/- (rupees seven thousand only) deducted by the Corporation minus the rent received, viz., Rs. 22,500/- (rupees twenty-two thousand and five hundred only) and give up all rights to the said property. The plaintiff will be entitled to the materials lying on the premises.

(ii) The period of time fixed for the payment by the plaintiff to the defendant of this amount stated above is till January 1, 1960.

(iii) The plaintiff agrees to deposit the amount in court for payment to the defendant.

(iv) On failure of the plaintiff to deposit the amount in court by January 1, 1960 his suit now in appeal will be dismissed with costs throughout.

(v) It is agreed by the parties that time is the essence of the contract and no further extension of time would be allowed and the dismissal of the suit with costs would be automatic.

3. The respondent applied for challan on December 22, 1959 to deposit the amount and a challan was issued to him on December 24, 1959, the last working day before the court closed for Christmas holidays. December 31, 1959 and January 1, 1960, were holidays. Neither the lower courts nor the banks were open on these days. The respondent made the deposit on January 2, 1960 and sought to enforce his right under the decree by compelling the appellant to execute the conveyance in terms of

the compromise decree by filing execution case No. 25/1960. The appellant also filed execution case No. 45 of 1960 for cost on the basis that the suit stood dismissed as per the provision in the decree on the failure of the respondent to deposit the amount by January 1, 1960. These two petitions were heard together, and the court passed an order holding that the respondent had made the deposit in substantial compliance with the decree and allowing execution case No. 25 of 1960 and dismissing execution case No. 45 of 1960. Against this order, the appellant filed appeals 33 and 54 of 1960 before the High Court of Mysore. A Division Bench of the High Court, by its judgment, dated June 16, 1966, dismissed the appeals with costs.

4. The short question for consideration in these appeals is whether the deposit made by the respondent on January 2, 1960 was within the time specified in the compromise decree and would enable him to compel the appellant to execute the sale deed in accordance with the provisions of the compromise decree.

5. It was argued on behalf of the appellant that the respondent had practically six months' time to deposit the amount, that he should not have waited for the last day of the period allowed to him by the decree to deposit the amount and if he was not diligent to deposit the amount earlier, he must suffer the consequences if the court happened to be closed on the last day on which he should have made the deposit. Counsel said that there is a distinction between a case where under a decree an act has to be performed by a party on a day certain and a case where the party has the liberty to perform the act within a certain time or by a certain day; that in the former case, if the act cannot be performed by reason of circumstances beyond his control, he will be relieved against the consequences of his default by reason of the maxim *Lex non cogit ad impossibilia* (the law does not compel a man to do that which he cannot possibly perform) if he performs the act at the next available opportunity, but where he has to perform the act within a certain period or on a certain date, as in this case, the law will not take notice of the circumstance that the act became incapable of performance by reason of circumstances beyond his control on the last day of the period. Whether there is any logical or reasonable basis for making the distinction, we are clear that in this case the respondent had the right or, perhaps, more accurately, the liberty to deposit the amount in court till and including January 1, 1960. In Halsbury's Laws of England, Vol. 37, 3rd Edition, Page 96, it is observed :

"Subject to certain exceptions, the general rule is that, when an act may be done or a benefit enjoyed during a certain period, the act may be done or the benefit enjoyed up to the last moment of the last day of that period."

If the respondent had the right or liberty to deposit the amount in court on January 1, 1960, under the compromise decree the fact that he did not choose to make the deposit earlier would not affect his right or liberty to deposit the amount in court on January 1, 1960. In *Fateh Khan and Another v. Chhajju and Others*, [AIR 1931 Lah 386] an argument similar to the one addressed by counsel for the appellant was advanced but was not countenanced by the court. That was a case where a pre-emptor was unable to deposit the purchase money in court on the last day of the period allowed by the decree; the period expired when the court was closed for the vacation and he deposited the amount on the re-opening day. It was argued that the decree allowed the pre-emptor a period of time within which to deposit the amount, that he could have deposited the amount earlier, the he should not have waited till the last day of the period and that if the last day happened to be a holiday, he can take no advantage of that circumstance. The court repelled the argument by saying that if the argument is accepted it will have the effect of curtailing the days allowed to him by the decree without any reason.

6. It was next contended for the appellant that it was open to the respondent to pay the amount to the appellant either on December 31, 1959, or January 1, 1960, and that he should not have waited till the 2nd to deposit the amount in court. Counsel submitted that under Order 21, Rule 1, the respondent could have paid the amount to the appellant on January 1, 1960, or earlier, that he should not have waited till the 2nd to deposit the amount in court and if the last day of the period happened to be a day on which the court was closed, that is not a circumstance which would relieve the respondent from his obligation to pay the amount within the time specified. In support of this argument counsel referred to *Kunj Bihari and Others v. Bindeshri Prasad and Others*, [ILR 1929 All 527] *Rohshan Lal v. Ganpat Lal*, [AIR 1958 All 199] *Indal v. Chaudhary Ram Nidh*, [AIR 1946 Oudh 156] and *Ram Kinkar Singh and Another v. Smt Kamal Basini Devi*. [AIR 1938 Pat 451] *Kunj Behari and Others v. Bindeshri Prasad and Others* (supra), was a case where an instalment decree provided that the first instalment was payable on a certain date; the date specified expired during the vacation of the court and the amount was deposited in court on the re-opening day. It was held that the judgment debtors had the power to make the payment direct to the decree-holder, that depositing in court was not the only course open to them and so they could not take advantage of the fact that the court was closed on the specified date and the payment made by them was not made in time. The other cases cited are to the same effect. The principle underlying these decisions is that when the judgment-debtor has the option to pay the decree amount to the decree-holder or to deposit it in court, he cannot choose one of them and act in a manner so as to prejudice the rights of the other party. Although under Order 21, Rule 1, it is open to a judgment debtor to pay the amount direct to the decree-holder or to deposit in court, he cannot choose the alternative when that will prejudice the decree-holder.

7. Even here there is a conflict of opinion among the High Courts. In *Chatpalli Suryaprakasa Rao v. Poliseti Venkataratnam and Others*, [AIR 1938 Mad 523] the compromise decree there in question provided that the decretal amount should be paid in certain yearly instalment on certain fixed date in each year. The decree further provided that in case of default of two successive instalments the whole amount would be recovered. The decree-however did not provide to whom the money was to be paid. The judgment debtor failed to pay the first instalment. On a day previous to that on which the second instalment was due he obtained a challan. The day on which the instalment was due being a holiday, he paid the instalment next day in the Bank. It was held by the Madras High Court that the judgment-debtor did not commit default in payment of the second instalment and consequently there was no default of two successive instalments. This is also the view that was taken in *Premchand Bhikabhai v. Ramdeo Sukdeo Marwadi*. [AIR 1949 Nag 141]. It is not necessary to resolve the conflict of opinion on this aspect; as we are concerned with a decree which specifically provided that the respondent should deposit the amount in court. He had, therefore, no option to pay the same to the appellant and the appellant, perhaps, would have been within his right if he refused a tender of the amount to him. The parties, for obvious reasons, agreed that the amount should be deposited in court and that was made a rule of the court and, therefore, the principle of the decision in *Kunj Behari and Others v. Bindeshri Prasad and Others*, (supra) and the other cases cannot be applied here.

8. The question then arises as to what is the principle which should be applied in a case where a party of a consent decree is given time to do an act within a specified day or by a specified day and fails to do it on the ground of impossibility of performance on the last day specified but does it on the next practicable day. This question arose for consideration in *Muhammad Jan v. Shiam Lal*. [ILR 1924 All 328]. There a decree in a pre-emption suit gave the plaintiff a period of one month within which on deposit the purchase money in order to obtain the benefit of the decree in his favour, and the period expired on a date on which the court was closed for the vacation and the plaintiff made

the deposit on the day on which the court re-opened. Piggott, Lindsay and Sulaiman, JJ. held that the deposit was in time under the terms of the decree. They said that there is a generally recognised principle of law under which parties who are prevented from doing a thing in court on a particular day, not by an act of their own but by the Court itself, are entitled to do it at the first subsequent opportunity. The Court quoted with approval the decision in *Shooshee Bhusan Rudro and Another v. Gobind Chunder Roy*, [ILR 1891 Cal 231] where it was observed that the broad principle is that although the parties themselves cannot extend the time for doing an act in court, yet if the delay is caused not by any act of their own, but by some act of the court itself - such as the fact of the court being closed - they are entitled to do the act on the first opening day. In *Sambasiva Chari v. Ramasami Reddi*, [ILR 1899 Mad 179] the Madras High Court held that there is a generally recognised principle of law under which parties who are prevented from doing a thing in Court on a particular day, not by any act of their own, but by the Court itself, are entitled to do it at the first subsequent opportunity. We have already referred to *Fateh Khan and Another v. Chhajju and Others* (supra) where the Lahore High Court applied this principle to a pre-emption decree. *Mayor v. Harding*, [(1867) 2 QB 410] is a case in point. In that case the appellant had applied to justices to state a case under the Summary Jurisdiction Act, 1857. He received the case from them on Good Friday, and transmitted it to the proper court on the following Wednesday. It was held that he had complied sufficiently with the requirement of the Act directing him to transmit the case within three days after receiving it as it was impossible for him to transmit the case earlier than he did because of the closure of the offices of the Court from Friday till Wednesday. Mallor, J., dealt with the matter as follows :

"Here it was impossible for the appellant to lodge his case within three days after he received it. As regards the conduct of the parties themselves, it is a condition precedent. But this term is sometimes used rather loosely. I think it cannot be considered strictly a condition precedent where it is impossible of performance in consequence of the offices of the court being closed, and there being no one to receive the case. The appellant lodged the case on Wednesday, that is, he did all that it was practicable for him to do."

In Halsbury's Laws of England, Vol. 37, 3rd Edition, Page 97, Para 172, it is observed :

"172. The fact that the last day of a prescribed period is a Sunday or other non-judicial day does not as a general rule give the person who is called upon to act an extra day; it is no excuse for his omission to do the act on some prior day.

This general rule does not hold good where the effect of it would be to render performance of the act impossible. This would be the case if the whole of the prescribed period consisted of holidays, in which case the act may lawfully be done on the next possible day.

Again the general rule does not hold good where the last day is a Sunday and the act to be done is one the performance of which on a Sunday is prohibited by the Sunday Observance Act, 1677, or where the act has to be done, not by the party only, but by the court or by the party in conjunction with the court. In such cases the act may, when the last day limited for the performance of it happens to be a day when the court or its office is closed, be done on the next practicable day."

We think that the second exception to the general rule stated in the passage and in effect followed in

the rulings cited above must apply to the facts here.

9. But counsel for the appellant argued that the compromise decree provided that on default of the respondent to deposit the amount in court on January 1, 1960, there was to be an automatic dismissal of the suit by virtue of clause (v) thereof and the execution court had no right to alter or modify the terms of the decree and hold that the deposit made on January 2, 1960 shall be deemed to be a deposit made on January 1, 1960, and order the execution of the decree on that basis.

10. A Court executing the decree shall execute it as it stands. It cannot modify or vary the terms of the decree. No exception can be taken to that general principle. But the execution court has the right to construe a decree in the light of the applicable provisions of law and if in this case on a construction of the decree in the light of the applicable provision of law, it found that the deposit made by the respondent on January 2, 1960, was according to law a deposit in compliance with the terms of the decree, then the execution Court was not varying the terms of the decree but executing the decree as it stood after considering the effect of the deposit in the light of the relevant law.

11. Counsel then contended that a compromise decree is nonetheless a contract, notwithstanding the fact that an order of Court is super-added to it and, a provision in a contract that an act shall be done within a certain period or by a particular day by a party is absolute. In other words counsel said that duties are either imposed by law or undertaken by contract and the ordinary rule of law is that when the law creates a duty and a party is disabled from performing it without any default of his own, the law excuses him, but when a party by his own contract imposes a duty upon himself, he is bound to make it good notwithstanding any accident by inevitable necessity. Counsel in this connection referred to the passage in Halsbury's Laws of England, Volume XIV, Page 622, Para 1151, which reads as under :

"1151. Where under a contract, conveyance or will a beneficial right is to arise upon the performance by the beneficiary of some act in a stated manner, or a stated time, the act must be performed accordingly in order to obtain the enjoyment of the right, and in the absence of fraud, accident or surprise, equity will not relieve against a breach of the terms."

12. Although a contract is not the less a contract because it is embodied in a Judge's order, or, as said by Parke, J. in *Wentworth v. Bullen*, [English Law Reports, 141, p. 769] 9B and C840, 850 "the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is super-added the command of a Judge", still we think it is something more than a contract.

13. The Judicial Committee, of the Privy Council in *Charles Hubert Kinch v. Edward Keith Walcott and Others*, [AIR 1929 PC 289] observed :

"An order by consent, not discharged by mutual agreement and remaining unreduced is as effective as an order of the court made otherwise than by consent and not discharged on appeal. A party bound by a consent order must when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose. The only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by an other order of the court; the second stands unless until it is discharged on appeal."

14. In *Govind Waman v. Murlidhar Shrinivas and Others*, [AIR 1953 Bom 412] the Bombay High Court held that a consent decree passed by a Court of competent jurisdiction cannot be treated on the same footing as a contract between the parties, that although it is true that before a court passes a consent decree, it can and should examine the lawfulness and validity of the terms of the proposed compromise, but when once that stage is passed and a decree follows, different considerations arise and therefore, where a compromise contains a term against alienating certain property and gives the other party right to its possession on such alienation, the decree is not a nullity in spite of the fact that the term is opposed to Section 10, T.P. Act. And the fact that it is contrary to law would not affect its binding character, unless it is set aside by taking proper proceedings. That different consideration would apply when a contract is embodied in a Judge's order is also clear from *Morris v. Barrel*. [English Law Reports, 141, p. 768]. In that case by a consent order it was provided that, upon payment of 341., the debt and costs as agreed, in instalments on May 23, on June 25, and on the 25th of every succeeding month until the whole is paid, all further proceedings in the case be stayed. The order further provided that, in case of default in any payment as aforesaid, the plaintiff be at liberty to sign final judgment for the said sum of 341., and issue execution for the amount unpaid. The first and two following instalments were duly paid. The 25th of October, the day on which the fourth instalment became payable, being a Sunday, the defendant called at the office of the plaintiff's attorney on Monday the 26th, and offered to pay it, but was told he was too late, and that judgment had been signed. No judgment, however, was signed until the following morning. The defendant took out a summons to set aside the judgment, on the ground that under the circumstances he had the whole of Monday to pay the money, and that the judgment signed after the money was offered was irregular. The Court held that the defendant had the whole of Monday to pay the money. One of the arguments advanced in that case was that as the Judge's order was a consent order, the principle governing contract must regulate the rights of parties and therefore the defendant was not excused from performing the contract by the accident of the day being a Sunday. In repelling this contention Erle, C.J., said :

"I desire not to be understood as giving any decision as to the rights of parties under a contract : but, in arriving at the conclusion I come to, I seek only to give effect to the duty which the law imposes upon a party who is directed by a Judge's order to pay money.... The defendant was ready and offered to pay it on Monday; but the plaintiff, conceiving that the offer came too late, declined to receive it, and on the following day signed the judgment for the balance due. Confining myself to the Judge's order and the remedy and duty thereon and to what ought to be the fair meaning and understanding of the instrument, I find no authority for saying that the defendant was bound to search for his creditor and pay him the money on the Sunday."

Crowder, J. said :

"This is not like the case of an ordinary contract; and I desire not to be understood as at all interfering with any of the cases which have been referred to with reference to contracts. The cases upon the construction of statutes are also founded upon an entirely different consideration."

15. We may also state that there is no evidence in this case that at the time when the compromise was entered into, either of the parties knew that December 31, 1959 or January 1, 1960, would be holidays.

16. In these circumstances we think the deposit made by the respondent on January 2, 1960, was in substance and in effect a deposit made in terms of the compromise decree and that the High Court was right in its conclusion. We dismiss the appeals but in the circumstances without any order as to costs.

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