SUPREME COURT OF INDIA

Maya Devi

Vs.

Lalta Prasad

C.A.No.2458 of 2014

(K.S.Radhakrishnan and Vikramajit Sen JJ.)

19.02.2014

JUDGMENT

K. S. RADHAKRISHNAN, J.

1. Leave granted.

2. The appellant herein filed an Objection Petition under Order 21 Rule 58 CPC, when the decree obtained by the respondent in Civil Suit No.407 of 2007 was sought to be executed. Suit was filed for the recovery of an amount of Rs.3,40,000/- with interest, which was sought to be realized, on the property covered by an agreement for sale dated 3.11.2003 between the judgment debtor and decree holder. The appellant claimed that she became the absolute owner of the suit property by virtue of a registered General Power of Attorney dated 12.5.2006 and that she has been in actual physical possession of the suit property. The Petition was contested by the decree holder/respondent stating that the applicant/objector had no legal right, title or interest and that the execution of the General Power of Attorney and its registration would not confer any ownership right in favour of the appellant/objector. Reliance was also placed on the judgment of this Court in Suraj Lamp and Industries Private Limited Through Director v. State of Haryana & Anr. (2009) 7 SCC 363. The Executing Court vide its order dated 23.7.2010 dismissed the Objection Petition filed by the appellant. Aggrieved by the same, the appellant preferred Execution First Appeal No.23 of 2010 before the High Court of Delhi at New Delhi. The High Court also placed reliance on the judgment of this Court in Suraj Lamp and Industries Private Limited (supra) and dismissed the appeal holding that the documents relied upon by the appellant

would not confer ownership or possession over the property in her favour. The High Court also vide its order dated 24.1.2011 upheld the order of the Executing Court. Aggrieved by the same, this appeal has been preferred by the appellant.

3. Shri Rajesh Kumar, learned counsel appearing for the appellant submitted that the ratio laid down by this Court in Suraj Lamp and Industries Private Limited (supra) was wrongly applied by the Executing Court as well as the High Court. Learned counsel submitted that in the final judgment which is reported in Suraj Lamp and Industries Private Limited (2) Through Director v. State of Haryana & Anr. (2012) 1 SCC 656, this Court has clarified the position that the judgment would not affect the validity of sale agreements and powers of attorney executed in genuine transactions and that the judgment would operate only prospectively. Learned counsel also submitted that the alleged agreement executed between the respondent and one Prem Chand Verma on 3.11.2003 was a collusive one, subsequently created, to get over the registered Power of Attorney executed on 3.6.1982 between the appellant and wife of Prem Chand Verma, viz. Nirmal Verma. Learned counsel also pointed out that Civil Suit No.407 of 2007 was preferred by the respondent herein against Prem Chand Verma based on the deed of agreement dated 3.11.2003 created for the said purpose. Referring to the above-mentioned judgment, learned counsel further pointed out that Prem Chand Verma did not contest the Suit and he was declared ex-parte and a decree was passed in favour of the respondent. Learned counsel pointed out that the decree was obtained by collusion and practicing fraud on the Court and the Executing Court has committed an error in rejecting the Objection filed by the appellant herein, so also by the High Court by not appreciating the facts in the correct perspective.

4. Shri K. Krishna Kumar, learned counsel for the respondent, submitted that both the Executing Court and High Court have correctly applied the principles laid down in Suraj Lamp and Industries Private Limited (supra). Learned counsel pointed out that any process which interferes with regular transfers under deeds of conveyance properly stamped, registered and recorded in the registers of the Registration Department, is to be discouraged and deprecated and the Executing Court has rightly declined to give its seal of approval to General Power of Attorney, Agreement for Sale, etc. dated 12.5.2006.

5. I am of the view that the Executing Court as well as High Court have committed a grave error in not properly appreciating the objections filed by the Appellant. We are in this case concerned with the question whether we must give credibility to the registered General Power of Attorney executed on 12.5.2006 between Nirmal

Verma and the appellant or on the alleged Agreement for Sale executed on 3.11.2003 between the respondent and Prem Chand Verma, husband of Nirmal Verma. Further, we have to examine the manner in which Civil Suit No.407 of 2007 was decreed without contest by Prem Chand Verma, husband of Nirmal Verma.

6. The registered Power of Attorney was executed by none other than the wife of Prem Chand Verma and the appellant herein on 12.5.2006 in respect of the property in question for a sale consideration of Rs.70,000/-, which was received by Nirmal Verma in cash in advance and she acknowledged the same before the Sub-Registrar, Delhi. On the same day, Nirmal Verma, wife of Prem Chand Verma. handed over physical vacant possession of the land and building situated thereon and from 12th May, 2006 onwards, the appellant is in possession of the above-mentioned property.

7. We are, in this case, therefore, concerned with the legal validity of a General Power of Attorney executed by none other than the wife of Prem Chand Verma against whom a decree has been obtained by the respondent without any proper contest and the court proceeded against him ex-parte. These facts speak for itself. Evidently, the collusive decree was obtained by the respondent to get over the registered Power of Attorney executed in favour of the appellant and, it is in this perspective, we have to understand and apply the ratio laid down by this Court in Suraj Lamp and Industries Private Limited (2) (supra).

8. Paragraph 27 of the judgment of this Court in Suraj Lamp and Industries Private Limited (2) (supra) reads as follows:

> "27. We make it clear that our observations are not intended to in any way affect the validity of sale agreements and powers of attorney executed in genuine transactions. For example, a person may give a power of attorney to his spouse, son, daughter, brother, sister or a relative to manage his affairs or to execute a deed of conveyance. A person may enter into a development agreement with a land developer or builder for developing the land either by forming plots or by constructing apartment buildings and in that behalf execute an agreement of sale and grant a power of attorney empowering the developer to execute agreements of sale or conveyances in regard to individual plots of land or undivided shares in the land relating to apartments in favour of prospective purchasers. In several States, the execution of such development agreements and powers of attorney are already regulated by

law and subjected to specific stamp duty. Our observations regarding "SA/GPA/will transactions" are not intended to apply to such bona fide/genuine transactions."

9. In the above judgment, it has been stated that the observations made by the Court are not intended to in any way affect the validity of sale agreements and powers of attorney executed in genuine transactions. I am of the view that the Power of Attorney executed on 12.5.2006 in favour of the Appellant by the wife of Prem Chand Verma is a genuine transaction executed years before the judgment of this Court. Facts will clearly indicate that the Agreement for Sale dated 3.11.2003 was created by none other than the husband of Nirmal Verma, who had executed the General Power of Attorney and possession was handed over to the Appellant. That being the fact situation, in my view, the Objection filed by the Appellant under Order 21 Rule 58 in execution has to be allowed. I, therefore, hold that the Executing Court can execute the decree in Civil Suit No.407 of 2007, but without proceeding against the property referred to in registered Power of Attorney dated 12.5.2006.

10. The appeal is allowed, as above, and the impugned orders are set aside. There shall, however, be no order as to costs.

JUDGMENT

VIKRAMAJIT SEN,J.

11. I have perused the judgment of my learned and esteemed Brother Radhakrishnan, and I entirely and respectfully agree with his conclusion that the appeal deserves to be allowed. My learned Brother has succinctly analysed the sterling judgment in Suraj Lamp and Industries Private Limited vs State of Haryana (2009) 7 SCC 363, which has been rendered by a Three- Judge Bench of this Court. I completely concur with the view that since General Power of Attorney (GPA) in favour of the Appellant was executed and registered on 12.05.2006, it could not be impacted or affected by the Suraj Lamp dicta. Furthermore, a reading of the order of the Executing Court as well as of the High Court makes it palpably clear that both the Courts had applied the disqualification and illegality imposed upon GPAs by Suraj Lamp, without keeping in mind that the operation of that judgment was pointedly and poignantly prospective. This question has been dealt with by my esteemed Brother most comprehensively.

12. What strikes us as a perverse, certainly misplaced or inconsistent approach, is that if the Appellant does not possess any title to the property predicated on the GPA executed in her favour by Smt. Nirmal Verma (the wife of the Judgment Debtor Shri Prem Chand Verma), this legal infirmity would inexorably invalidate the title of Smt. Nirmal Verma herself, thereby denuding any titular claim of her husband, the Judgment Debtor, and rendering the property impervious to the subject execution proceedings. Additionally, there is not even a semblance of a right in favour of the Judgment Debtor whose wife was not even impleaded in the suit or in the execution. The impugned judgment notes this contention but fails to address it. The evidence of the Decree Holder has not been filed and therefore the judicial records were summoned from the High Court.

13. The Statement of the Respondent/Decree Holder reads thus:-

> "Ex. No. 224/2009
>
> DHW-1: Sh.Lalta Prasad, S/o Sh. Naubat Ram, aged 58 years, R/o 1908, Gali Mata Wali, Chandni Chowk, Delhi-6.
>
> ON S.A.
>
> I, hereby, tender my affidavit in my evidence. The same be read as part and parcel of my statement. My affidavit is Ex. DHW- 1/A(running in 2 pages) which bears my signatures at point A and B on page 1 & 2.
>
> XXXXXX by Sh. Pradeep Chaudhary Adv. for objector.
>
> I have passed 11th standard. The affidavit Ex. DHW-1/A was prepared in the office of my counsel. My counsel has explained me contents of the same to me before I signed the same. Whatever I stated to my counsel was incorporated in Ex. DHW-1/A. The Agreement with Prem Chand Verma was entered on 11.11.2003. I had seen original documents of the property at that time in possession of Prem Chand Verma. He also gave me some copies of the same.
>
> Remaining cross-examination of the witness is deferred till 12.00 P.M.
>
> RO&AC

BRIJESH KUMAR GARG

ADJ CENTRAL-18

DELHI/ 29.01.10

DHW-1: Sh.Lalta Prasad, recalled for his further cross-examination at 12.50 P.M.

ON S.A.

XXXXXX by Sh. Pradeep Chaudhary Adv. for objector.

I have no knowledge that Smt. Maya Devi had purchased the suit property from Smt. Nirmal Verma. The documents filed by the objectors are forged and fabricated documents. I have no knowledge that Smt. Nirmal Verma purchased the suit property from one Sh. Rajender Kumar.

Sh. Prem Chand Verma was my friend for the last about 30 years. It is correct that Sh. Prem Chand Verma had already expired on 7.10.2008. It is wrong to suggest that Sh. Rajender Kumar was the owner of the property and he sold the property to Nirmal Verma from whom Smt. Maya Devi purchased the suit property. It is wrong to suggest that Sh. Prem Chand Verma was never the owner of the suit property. It is wrong to suggest that I have filed a false affidavit and I am deposing falsely in the court today.

RO&AC

BRIJESH KUMAR GARG

ADJ CENTRAL-18

DELHI/ 29.01.10"

It discloses that the Decree Holder has failed altogether to disprove the title of the Appellant, and he has maintained that the Defendant/Judgment Debtor was the owner, which is admittedly not the actual legal position. If the Decree Holder has been defrauded by the Defendant/Judgment Debtor, largely because of the former's careless disregard to conduct a title- search,

he must face the legal consequences; they cannot be transferred/imposed upon a third party to its detriment. In the wake of the Decree Holder/Plaintiff denying the title of Smt. Nirmal Verma, the Courts below erred in proceeding against her property.

14. Both the Courts below have preferred the view that the Appellant, who has been in possession from the date of the execution of the registered GPA in her favour, has been introduced into the scene in order to defeat the interests of the Respondent, which is a perverse approach for reasons that shall be presently explained. The documents purportedly in favour of the Respondent/Decree Holder are unregistered and the alleged payment made by him to Shri Prem Chand Verma is in cash. Therefore, there is no justification for favouring the view that the alleged transaction between Shri Prem Chand Verma and the Respondent/Decree Holder was genuinely prior in time to the execution of the registered Power of Attorney in favour of the Appellant Smt. Maya Devi by Smt. Nirmal Verma, and the former simultaneously and contemporaneously was put into possession of the property by the latter.

15. There can be no gainsaying that when the probative value of documents is to be assessed, specially those dealing with the creation of any interest in property or its transfer, of a value exceeding Rs.100/-, obviously documents which have been duly registered regardless of whether or not that was legally mandatory, would score over others. A perusal of the judgment shows that whether the sum of Rs.1,70,000/- allegedly paid by the Plaintiff in Suit No.407 of 2007, namely, Shri Lalta Prasad to Shri Prem Chand Verma was in cash or through a traceable Bank transaction or through a registered acknowledgment has not been cogitated upon. Proof of payment by the Plaintiff to the Defendant/husband of the previous owner of the property has not been adjudicated upon. It is not controverted that the Appellant Smt. Maya Devi has been in possession of the property in question from May, 2006. A reading of the judgment by which the Suit was decreed for a sum of Rs.3,40,000/- does not shed any light on the circumstances which made the Plaintiff wait to initiate legal action till after the property was sold and its possession delivered to the Appellant. I, therefore, disbelieve the genuineness of the so-called “Deed of Agreement for Earnest Money” allegedly executed almost three years earlier on 03.11.2003. And, I would rather discount the veracity of the document dated 3.11.2003, then looking upon the Power of Attorney and other documents executed in favour of the Appellant Smt. Maya Devi by Smt. Nirmal Verma as mala fide. What is important is that it is not disputed that the title and possession of the property which has been brought within the sweep of the

execution proceedings, was never held in any capacity by the Defendant/Shri Prem Chand Verma, but by his wife, Smt. Nirmal Verma. To give even a semblance of a case to the Plaintiff Lalta Prasad, the Deed of Agreement for Earnest Money should have been between the Plaintiff/Decree Holder/Respondent and Smt. Nirmal Verma.

16. The Trial Court had framed the following issues in Suit No.407/2007, from which subject of proceedings emanates:

> "(1) Whether the plaintiff is entitled for the suit amount? If so to what sum? OPP
>
> (2) Whether the plaintiff is entitled for the interest? If so at what rate and for which period? OPP
>
> (3) Relief."
>
> The Trial Court having accepted the payment of Rs.1,70,000/- without insisting on any proof, did not go into the question whether a covenant stipulating that double the amount of earnest money would be payable in the event the contract was not performed, is legal in terms of the Indian Contract Act. The imposition and the recovery of penalty on breach of a contract is legally impermissible under the Indian Contract Act. As regards liquidated damages, the Court would have to scrutinize the pleadings as well as evidence in proof thereof, in order to determine that they are not in the nature of a penalty, but rather as a fair pre-estimate of what the damages are likely to arise in case of breach of the contract. No evidence whatsoever has been led by the Plaintiff to prove that the claim for twice the amount of earnest money was a fair measure or pre- estimate of damages.

17. The pronouncements of the Constitution Bench in Sir Chunilal V. Mehta & Sons Ltd. vs Century Spinning and Manufacturing Co. Ltd. AIR 1962 SC 1314, and later in Fateh Chand vs Balkishan Dass AIR 1963 SC 1405, hold the field, making it unnecessary to refer to any other precedent for an enunciation of the law, except to appreciate the manner in which the opinion of the Constitution Benches have been applied to the factual matrix in later cases. With the number and volume of precedents increasing exponentially each year, reference to all decisions make arguments excruciatingly lengthy and judgments avoidably prolix. The first important judgment of this Court on the question of Sections 73 and 74 of the

Contract Act is that of the Constitution Bench in Chunilal V. Mehta. The two significant issues which arose were firstly, as to what would constitute a substantial question of law requiring the grant by the High Court of a Certificate to appeal to this Court, and secondly, the quantum of damages that can be awarded in that case owing to the breach of the subject contract. It is the second question which is relevant for the present purposes. The admitted position was that the contract had been wrongfully breached by the Defendant. A clause in the compact between the parties stipulated that in these circumstances, the Plaintiff would be entitled to receive from the Defendant "as compensation or liquidated damages for the loss of such appointment a sum equal to the aggregate amount of the monthly salary of not less than Rs.6000/- which the Firm would have been entitled to receive from the Company, for and during the whole of the then unexpired portion of the said period of 21 years if the said Agency of the Firm had not been determined." The Plaintiff had initially claimed a sum of Rs.50 Lakhs which was subsequently reduced by way of amendment of the plaint to Rs.28,26,804/-. The Constitution Bench opined that "when parties name 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. …. Again the right to claim liquidated damages is enforceable under 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 ascertained or ascertainable at the date of the breach". This precedent prescribes that if a liquidated sum has been mentioned in a contract to be payable on its breach, then if damages have actually been suffered, the said liquidated amount would be the maximum and upper limit of damages awardable by the Trial Court.

18. The judgment of the Constitution Bench one year later, in Fateh Chand concerns award of damages of the 'liquidated' sum even though actual damages may have been less. In that respect it is the converse of the factual matrix that existed before the earlier Constitution Bench in Chunilal V. Mehta. J.C. Shah, J (who authored Fateh Chand) along with Chief Justice B.P. Sinha were members of both Constitution Benches. Whilst the aspect of the liquidated damages being in the nature of a penalty or in terrorem did not arise in Chunilal V. Mehta, It did so in Fateh Chand where the complaint was that the Plaintiff, namely, Fateh Chand had agreed to sell an immovable property for Rs.1,12,500/- of which Rs.1000/- had been received/paid as earnest money. The Agreement envisaged payment of a further sum of Rs.24,000/- and it stipulated that if the vendee failed to get the Sale

Deed registered thereafter, then the sum received i.e. Rs.25,000/- would stand forfeited. Fateh Chand alleging a breach of the Agreement, sought to forfeit the sum of Rs.25,000/- which was found to be impermissible in law. It was in those circumstances that the Constitution Bench opined as follows:

> "10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by S. 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of tile case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.
>
> 11. Before turning to the question about the compensation which may be awarded to the plaintiff, it is necessary to consider whether S. 74 applies to stipulations for forfeiture of amounts deposited or paid under the contract. It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that S. 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be

forfeited. In our judgment the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon Courts by S. 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the Court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture."

After reading the entire evidence that had been recorded, the Constitution Bench found that the value of the property had not depreciated and, therefore, no damages could be awarded.

19. This is also the manner in which this facet of the law has been enunciated in England, as is evident from the following passage from Halsbury's Laws of England (4th edn Reissue, 1998) Vol 12(1), para 1065 which reads as follows:-

"1065. Liquidated damages distinguished from penalties.- The parties to a contract may agree at the time of contracting that, in the event of a breach, the party in default shall pay a stipulated sum of money to the other. If this sum is a genuine pre-estimate of the loss which is likely to flow from the breach, then it represents the agreed damages, called 'liquidated damages', and it is recoverable without the necessity of proving the actual loss suffered. If, however, the stipulated sum is not a genuine pre- estimate of the loss but is in the nature of a penalty intended to secure performance of the contract, then it is not recoverable, and the plaintiff must prove what damages he can. The operation of the rule against penalties does not depend on the discretion of the court, or on improper conduct, or on circumstances of disadvantage or ascendancy, or on the general character or relationship of the parties. The rule is one of public policy and appears to be sui generis. Its absolute nature inclines the courts to invoke the jurisdiction sparingly. The burden of proving that a payment obligation is penal rests on the party who is sued on the obligation".

20. The position that obtains in the United States, obviously because of its Common Law origins and adherence, is essentially identical as is evident from these extracted paragraphs of Corpus Juris Secundum, Volume 25A (2012):

> 192- Liquidated damages are a specific sum stipulated to and agreed upon by the parties in advance or when they enter into a contract to be paid to compensate for injuries in the event of a breach or nonperformance of the contract. 196-In examining whether a liquidated-damages provision is enforceable, courts consider whether the damages stemming from a breach are difficult or impossible to estimate or calculate when the contract was entered and whether the amount stipulated bears a reasonable relation to the damages reasonably anticipated. 198-Liquidated damages must bear a reasonable relationship to actual damages, and a liquidated-damages clause is invalid when the stipulated amount is out of all proportion to the actual damages. 200- A penalty is in effect a security for performance, while a provision for liquidated damages is for a sum to be paid in lieu of performance. A term in a contract calling for the imposition of a penalty for the breach of the contract is contrary to public policy and invalid. This position also finds elucidation in the following paragraph from American Restatement (Second) of Contracts 1981:-
>
> "356. LIQUIDATED DAMAGE AND PENALTIES
>
> (1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof or loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty."

21. Returning to the facts of the present case, the so called Deed of Agreement for Earnest Money inasmuch as it postulates the payment of twice the sum received ought not to have been decreed as firstly, the contract itself could not have been specifically enforced since the Defendant was devoid of title; and secondly, the Plaintiff had not proved that he had suffered any damages and facially the stipulated sum was in the nature of a penalty.

22. In Phulchand Exports Limited Vs O.O.O. Patriot 2011(10)SCC 300, the Appellant (Seller) entered into a contract with the Respondent (Buyer) relating to the sale/purchase of 1000 MT of Indian polished rice for a total consideration of

INR 12,450,000/-. The Seller loaded the rice 16 days late and the Vessel freighted by the Sellers left port (Kandla) 38 days later than the contractually stipulated time of departure. The specified destination, the port of Novorossiysk, Russia, was to be the first port of discharge, and even in this regard there is a finding that the Vessel on which the shipment had been consigned was not sailing directly to the said port, leave aside Novorossiysk being its first port of call. The ship suffered an engine failure which resulted in its requiring salvage operations near Turkey, and the entire cargo on board, including the subject consignment of rice was sold pursuant to Admiralty proceedings to compensate the cost of the rescue of the Vessel. The Insurance Company maintained that the lien of the cargo to compensate the costs of the rescue of the Vessel was not covered in the policy. Arbitration proceedings under the aegis of the International Court of Commercial Arbitration at the Chamber of Commerce and Industry of the Russian Federation culminated in the passing of an Award which directed the sharing of the price of the rice consignment equally between the parties. In the Award it has been opined that the Buyer had failed to forward the shipping documents and the Insurance Certificate to the Seller and thus was equally blameworthy. The defence of the Seller was that the goods had passed to the Buyer, who had already paid the entire sale price on negotiation of documents by the Seller with the concerned Bank. This Court held that despite the fact that it was a CIF contract, the consignment having been belatedly boarded on the Vessel, which Vessel thereafter sailed later than the time agreed upon by the parties, and which Vessel did not have the contracted destination Novorossiysk as the first port of call, could not have been in conformity with the contract, and hence the goods could not be viewed as having passed to the Buyer thereby shifting to it the liability of the lost shipment. The other question that was raised was whether the stipulation in the contract envisaging the reimbursement of the consideration received by the Seller in the event of non-performance of the contract was in the nature of a penalty. It was in this context that Sections 73 and 74 of the Contract Act came to be considered. This Court held that the clause requiring the refund of the price of the Rice consignment could not be viewed as a penalty which is not legally recoverable in India and therefore the Award was impervious to jural interference as it was not against the public policy of India even in terms of the interpretation given in ONGC Ltd. vs Saw Pipes Ltd. (2003) 5 SCC 705.

23. After recording that the opinion of the two Constitution Benches still hold the field, I have nevertheless mentioned Phulchand Exports only for adverting/clarifying that views of this Court have remained constant till now. I must immediately clarify that it would require a Bench larger than a Five-Judge

Bench to alter the legal position from what has been enunciated in Chunilal V. Mehta and Fateh Chand. The decisions of smaller Benches are relevant only for the purpose of analysing the verdict in a particular case on the predication of the elucidation of the law laid down by the Constitution Benches. This would include an oft-quoted decision in Maula Bux vs Union of India, 1969(2)SCC 554, as well as UOI vs Raman Iron Foundry, 1974(2)SCC 231, and BSNL vs Reliance Communication Ltd., 2011(1) SCC 394, etc.

24. Now I come to the next aspect of the case. The Execution proceedings were initiated by the Respondent/Decree holder on 27.10.2007 under Order XXI Rule 11 of the Code of Civil Procedure ('CPC' hereinafter). It transpired that Attachment Orders came to be passed. The application dated 3.7.2008, being Objections under Order XXI Rule 58 read with Section 151 CPC was preferred by the Appellant Smt. Maya Devi pleading, inter alia, that the Decree Holder had wrongly scheduled her property in the Execution Application; that she was the absolute and real owner thereof having purchased it on 12.05.2006 from Smt. Nirmal Verma, wife of Prem Chand Verma (Judgment Debtor); that she has no other connection or concern with the Judgment Debtor or with his wife in any manner whatsoever. The Appellant, therefore, respectfully prayed that her aforesaid property may kindly be released from the Schedule. Plaintiff/Decree Holder Shri Lalta Prasad, Respondent before us, countered by pleading that the Objections had been filed at the behest of the Judgment Debtor to avoid the satisfaction of the decree; that the Appellant/Objector was not the absolute and real owner of the suit property; that the duly registered General Power of Attorney executed by Smt. Nirmal Verma was forged and fabricated; that Smt. Nirmal Verma was none else than the wife of the Judgment Debtor. The Appellant has supported her stance by filing her own affidavit. In the Execution proceedings, the Plaintiff/Decree Holder/Respondent in cross-examination of the Appellant has only suggested that the documents were fabricated in collusion with Smt. Nirmal Verma. How this was possible, since they are duly registered documents, is difficult to comprehend. The other question put in cross-examination was that Smt. Nirmal Verma was never the owner of the property; and that Smt. Maya Devi's Objections were filed at the behest of Smt. Nirmal Verma. All these suggestions had been denied. If Smt. Nirmal Verma had no title, the consequence would be that the property would revert to her predecessor-in- title, thereby placing the property beyond the pale of the Execution proceedings.

25. The following issues were framed in the Execution proceedings:-

(i) Whether the objector/applicant Smt. Maya Devi is the absolute owner of the disputed property No.X-20, Gali No.5, Brahampuri, Delhi? If so its effect? OP Applicant.

(ii) Whether the judgment and decree dated 6.10.2007 are executable against the objector Smt. Maya Devi?

OP DH."

Smt. Nirmal Verma had also participated in the Execution proceedings and had filed her affidavit dated 22.10.2008 by way of evidence, asseverating therein that she had sold the property to Smt. Maya Devi by executing a registered General Power of Attorney, Agreement to Sell, Affidavit, Receipt, Possession Letter, Will Deed, which were duly notorised on 12.05.2006. She further stated that she had purchased the property from Shri Rajinder Parshad by means of similar documentation all of which were handed over by her to Smt. Maya Devi at the time of selling of the said property. Very significantly, she stated that her husband Prem Chand Verma/Judgment Debtor had expired on 8.10.2008.

26. In this backdrop, it needs to be kept in prospective that Order XXI Rule 97 to Rule 101 of CPC envisage the determination of all questions in Execution proceedings and not by way of an independent suit. The Executing Court, therefore, was duty bound to consider and decide the Objections filed by the Appellant with complete care and circumspection. I regret to record that this has not been done. The Objections came to be dismissed on 23.7.2010 with brevity bordering on dereliction of duty, in the following manner:-

"…. It has been submitted by the counsel for the objector that the applicant is the absolute owner of the suit property by virtue of General Power of Attorney which was registered on 12.5.2006 and she is in actual physical possession of the suit property but the counsel for the DH has stated that the objector has no legal right, title or interest as the execution of the General Power of Attorney and its registration does not confer any ownership right in favour of the applicant/objector. The counsel for DH has also relied upon the judgment of the Hon'ble Supreme Court in case titled as Suraj Lamp and Industries Private Limited Vs State of Haryana and Another reported as (2009) 7 Supreme Court Cases 363."

27. A perusal of the above will show that the Executing Court ignored and overlooked the important submission of the Appellant stating that she was the absolute owner of the suit property and that she had no truck whatsoever either with the Judgment Debtor Shri Prem Chand Verma or his wife Smt. Nirmal Verma beyond purchasing the subject property from the latter. What has also escaped the attention of the Court is that Suraj Lamp has prospective operation, thereby rendering it inapplicable to the subject 2006 transaction. Secondly, if the General Power of Attorney in favour of the Appellant Smt. Maya Devi was bereft of legal efficacy, the ownership of Smt. Nirmal Verma would also be invalid, and sequentially the property would have no connection whatsoever with the Judgment Debtor since he had purportedly derived title only through a Will. Unfortunately, this is also the approach which has been preferred by the High Court in terms of the impugned order. The High Court has also wrongly applied Suraj Lamp and has also neglected to reflect upon the Appellant's plea that she is (i) the actual owner of the suit property having purchased it for valuable consideration, and (ii) being a third party not connected in any mala fide manner with the Judgment Debtor, and (iii) not having received prior notice of any action of late Shri Prem Chand Verma, was imperious to Execution proceedings. A miscarriage of justice, of monumental proportions, has taken place on an un-substantiated presumption that one of the assets of the Judgment Debtor had been illegally transferred to defeat the decree. The Appellant before us had no other recourse than to file Objections under Order XXI Rule 58 CPC.

28. Finally another aspect which has come to the fore, is the approach of the Trial Court in the adjudication of the suit. The plaint contains an averment that the suit property had already been sold. The Defendant Shri Prem Chand Verma, (his wife Smt. Nirmal Verma was not impleaded) had appeared in the Trial Court and filed his Written Statement in which, whilst admitting the documentation executed between the parties, he had denied that he had been served with any legal notice and set up the defence that he was entitled to forfeit the amount received by him because the Plaintiff/Decree Holder had failed to pay the balance sale consideration as envisaged in the Deed of Agreement for Earnest Money. After filing his Written Statement he stopped appearing, and the suit proceeded ex-parte. Significantly, the Deed of Agreement for Earnest Money as well as the Written Statement predicate Defendant's title on a Will, and in this context there is no evidence on record that it had taken effect because of the death of the Testator. In the event, as is to be expected, no appeal against the judgment and decree came to be filed, and, therefore, the decision was not tested before or scrutinized by the Appellate Court. The absence of the Defendant does not absolve the Trial Court

from fully satisfying itself of the factual and legal veracity of the Plaintiff's claim; nay, this feature of the litigation casts a greater responsibility and onerous obligation on the Trial Court as well as the Executing Court to be fully satisfied that the claim has been proved and substantiated to the hilt by the Plaintiff. Reference to Shantilal Gulabchand Mutha vs Tata Engineering and Locomotive Company Limited, (2013) 4 SCC 396, will be sufficient. The failure to file a Written Statement, thereby bringing Order VIII Rule 10 of the CPC into operation, or the factum of Defendant having been set ex parte, does not invite a punishment in the form of an automatic decree. Both under Order VIII Rule 10 CPC and on the invocation of Order IX of the CPC, the Court is nevertheless duty- bound to diligently ensure that the plaint stands proved and the prayers therein are worthy of being granted. .

29. I am fully mindful of the fact that the Appellant has not taken any steps for setting aside the ex parte decree against late Shri Prem Chand Verma. This is only to be expected since the Appellant/Objector has no reason to evince or harbour any interest in the inter se dispute between the Decree Holder and the Judgment Debtor. Indeed, if the Appellant had made any endeavour to assail or nullify the decree, it would be fair to conclude that she had been put up by the Judgment Debtor in an endeavour to defeat the decree. In these circumstances, my in-depth analysis of the law pertaining to decreeing what is essentially a penalty clause may, on a perfunctory or superficial reading, be viewed as non essential to the context. This, however, is not so. On a conjoint reading of Order XXI Rule 58 CPC and the fasciculus of Order XXI comprising Rules 97 to 104, it becomes clear that all questions raised by the Objector have to be comprehensively considered on their merits. In the case in hand, the decree from which the Execution proceedings emanate is not one for delivery of possession, but is a simple money decree. Order XXI proscribes the filing of a separate suit and prescribes that all relevant questions shall be determined by the Court. Objection under Order XXI should be meaningfully heard so as to avoid the possibility of any miscarriage of justice. It is significant in this regard that Rule 103 ordains that where any application has been adjudicated upon under rule 98 or rule 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise, as if it were a decree. I shall only advert to the decisions of this Court in Brahmdeo Chaudhary vs Rishikesh Prasad Jaiswal, (1997) 3 SCC 694, Shreenath vs Rajesh, (1998) 4 SCC 543, and Tanzeem-e-sufia vs Bibi Haliman, (2002) 7 SCC 50, where proceedings were under the aforesaid fasciculus of Order XXI comprising Rules 97 to 104, in which the Objectors had set up a title distinct or different from that of the Judgment Debtor and the Court had protected their interest. The Appellant before

us is a third party and has been brought into the lis by a side wind in that her property is sought to be attached with the intention of satisfying a decree in which she was not directly or intrinsically concerned.

> The Appellant/Objector who has approached the Court under Order XXI Rule 58 is more advantageously or favourably placed inasmuch as she is a third party so far as the decree is concerned, and her property is not the subject-matter of the decree. It is thus clear to me that the Courts below have in a hurried, if not prejudiced manner, rejected the Objections merely because of some sympathy towards the Decree Holder. The Objections deserved to be allowed without disturbing the decree, leaving all other remedies open to the Decree Holder/Respondent, including proceedings against the Estate of the Judgment Debtor.

30. I respectfully agree with my learned Brother that the Appeal deserves to be allowed and the impugned orders require to be set aside.