

ALLAHABAD HIGH COURT

Mahabir Prasad

Vs.

Peer Bux

Civil Revn. No. 684 of 1969. against order of J.S. Srivastava, Insolvency J.
Moradabad,

(S.N. Dwivedi, Satish Chandra, J. R.L. Gulati, Hari Swarup, H.N. Seth, Gopi
Nath and K.N. Seth, JJ.)

12.02.1969. 18.5.1972

JUDGMENT

Satish Chandra, J.

1. This seven Judge Full Bench has been constituted to consider the five Judge Full Bench decision of this Court in (1878-80) ILR 2 All 654 (FB) (Reference by the Board of Revenue, N.W.P.)

2. Mahabir Prasad, the applicant, made an application under Section 9, Provincial Insolvency Act, for declaration of Peer Bux, opposite party No.1, as an insolvent. It was alleged that Peer Bux had borrowed a sum of Rs. 4,000 from the applicant on 17-1-1967. He had agreed to supply 50 quintals of Rab at Rs. 80 per quintal in lieu of the borrowed sum. It was also agreed that in case of default Peer Bux would pay to the applicant the amount of profits at 50 per cent by way of damages. The transaction was evidenced by a deed of agreement and a receipt both dated 17-1-1967. Peer Bux did not supply the Rab as agreed and a sum of Rs. 4,000 was due from him. He had committed an act of insolvency by transferring his property.

3. On the deed of agreement dated 17th January, 1967, being produced in Court, Peer Bux filed an objection stating that the document was a bond and was inadmissible in evidence for lack of sufficient stamp duty. The learned Insolvency Judge upheld the objection. According to him the document was a bond. The applicant was directed to make good the deficiency in stamp duty and to pay the prescribed penalty. Aggrieved, the applicant came to this Court

in revision.

4. At the hearing of the revision reliance was placed upon a 5 Judge Full Bench of this Court in (1878-80) ILR 2 All 654 (FB) in support of the view taken by the learned Insolvency Judge. On behalf of the applicant it was urged that this Full Bench decision has been doubted in a number of subsequent decisions of this as well as other High Courts. The learned single Judge hearing the revision felt that it was desirable that the question be considered by a larger Bench. His opinion was endorsed by a Division Bench.

5. The document in question states that Peer Bux promises to sell 50 quintals of Rab at the rate of Rs. 80 per quintal to L. Mahabir Prasad. He has received Rs. 4,000 as an advance towards the price. He agrees that he will supply the Rab by March, 1967. In case of defaults in making the supply, he will pay 50 per cent of the profits by way of damages. The document was unattested.

6. Read as a whole the document represents a transaction of an agreement to sell Rab and an advance payment of its price. One of the terms or the transaction was that in default of supplying the agreed quantity of Rab the executant will pay damages at the rate of 50 per cent of the profits. In the document there is no express promise to pay back the sum of Rs. 4,000 which he had received as the advance price, in case the Rab was not supplied.

7. The question is whether this document is a bond or merely an agreement, within meaning of the Stamp Act.

8. Section 2(5) of the Stamp Act defines a 'bond' to include-

"(a) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;

(b) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and

(c) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another."

9. The document before us is unattested. So it is outside the purview of clauses (b) and (c). Clause (a) requires an obligation to pay money subject to the condition that the obligation shall be void if a specified act is performed or is not performed. The transaction ought to relate to so conditioned an obligation. The primary or the principal covenant ought to be to create an obligation to pay money defensible on the happening of the specified event. Clause (a) will not be applicable to a transaction where the obligation to pay money arises as a consequence of the commission of a breach of some other obligation. This clause will not apply where the obligation accrues on the non-performance of some stated act, because on the language of clause (a), on the non-performance of the specified act the obligation to pay money is to become void, not become enforceable. The sequence of events stipulated in clause (a) cannot be reversed in order to bring an instrument within its purview.

10. In the present case the obligation to pay money (in the form of 50 per cent of profits) was to arise if Peer Bux defaulted in supplying the agreed quantity of Rab. The agreement between the parties was that he will supply the Rab. In default he shall be obliged to pay money. The term providing for the consequence of default was not the principal covenant between the parties. It was a penalty clause which came into operation if the principal obligation was violated. The intention of the parties was not that if the Rab was supplied the obligation to pay money would as its consequence become void; in that event the obligation would not accrue or arise at all.

11. A 'bond' defined in Section 2(5) of the Stamp Act is assessable to duty under Article 15 of Schedule I-B of the Act. Under it the prescribed stamp duty is on a graduated scale depending upon the amount or value secured. Where the amount or value secured does not exceed Rs. 10/-the stamp duty is 35 naye paise. The duty increases with every slab of the amount or value secured by the bond, the last slab being for every Rs. 500/- or part thereof in excess of Rs. 1,000/- the duty is Rupees 11.25 nP. Read in the light of Article 15 the definition of 'bond' in Section 2(5) must mean an obligation to pay an ascertained sum of money. The phrase "a person obliges himself to pay money to another" ought to refer to an obligation to pay a stated or ascertained sum of money. The obligation in the present case was to pay 50 per cent of the profits. When the bond was executed no fixed amount of money could be said to have

been agreed as payable. In this view also the instrument in question could not be chargeable to duty as a bond under Article 15.

12. Article 15 applies to a bond as defined in Section 2(5) and, inter alia, not otherwise being provided for by the Act. Article 34 provides for an indemnity bond. For it the stamp duty payable is the same as on a security bond under Article 57. Article 57 provides for a security bond executed by way of security for the due execution of an office, or to account for money or other property received by virtue thereof, or executed by a surety to secure the due performance of a contract or the due discharge of a liability. Obviously it refers to a transaction where the principal engagement is of the kind mentioned in this article. That apart, the mode of calculating the proper stamp duty is, under clause (a); when the amount secured does not exceed Rs. 1,000/- the duty is assessable as in the case of a bond under Article 15, for the amount secured. Clause (b) provides for "any other case" and for it, there is a fixed stamp duty. Thus a document of the nature of a security bond is assessable to a fixed duty, where the amount or the value secured is not ascertained. Article 15, however, does not provide for a bond where the amount or value secured is not ascertained.

13. The obligation to pay money in the present case is contained in the penalty clause which comes into operation on breach of the principal covenant to supply the Rab. To such a penalty clause Section 74 of the Contract Act is applicable. Section 74 provides:-

"When a contract has been broken if a sum is named in the contract as the amount to be paid in case of such 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 or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

Niamatullah, J., in *Mohiuddin v. Mt. Kashmiro*,¹ at p.255 held:-

"Parties to every contract containing a stipulation by way of penalty have

rights and are subject to obligations mentioned in Section 74, which are part and parcel of every such contract which should be deemed to include a proviso, imported by Section 74, to the effect that the party complaining of the breach is entitled to reasonable compensation not exceeding the penalty but is not entitled to enforce the penalty stipulated for in the contract."

14. In law the contract in the present case will be deemed to be that on Peer Bux not supplying the agreed quantity of Rab the applicant was entitled to reasonable compensation not exceeding the stated amount namely not exceeding 50 per cent of the profits. So construed the transaction between the parties provided to the applicant a remedy by way of suing for compensation for breach of contract. In the case of a bond, the remedy is to recover the sum named in the bond. If the bond is conditioned on the performance of some covenant, the person recovers the actual damage which he could prove that he has sustained. The point is that in either case, as Garth, C.J., put it in *Gisborne and Co. v. Subal Bowri*,²

"not only is the bond a contract of a different form and nature from a covenant with a penal clause, but the remedy upon it, and the amount recoverable for the breach of it, is also different."

This is corroborated by the provisions of the Limitation Act. Clause (d) of Section 2 of the Limitation Act, 1963, gives the definition of 'bond' in terms identical with clause (a), Section 2(5) of the Stamp Act. Article 27 provides for a suit for compensation for breach of a promise to do anything within a specified time. The prescribed period of three years begins to run when the time specified arrives. Articles 28 and 29 provide for a suit on a simple bond depending upon whether a day is specified for payment or not. The time of three years begins to run on the day so specified or the date of executing the bond. The position is the same under the Limitation Act 1908. It will be seen that the cause of action for a suit on a bond accrues on an occasion different than the cause of action for a suit for compensation for breach of a promise. This also tends to show that the obligation to pay money as penalty for breach of a covenant is not within the purview of the definition of 'bond' in clause (a) of Section 2(5). In my opinion the document before us was not a bond within

meaning of Section 2(5)(a). It was chargeable to duty as an agreement.

15. For the opposite party reliance was placed upon the Full Bench decision of this Court in (1878-80) ILR 2 All 654 (FB). In that case by the sixth clause of the instrument one party to the instrument bound itself in the event of any breach on the part of that party in the observation or performance of any of the conditions of the instrument, to pay the other party thereto a penalty of Rs. 5,000/-, Oldfield, J., (Pearson, Spankie and Straight, JJ., concurring observed:-

"No part of this instrument except clause six comes within the meaning of a bond as defined in the Stamp Act. I look on the main clauses as only evidence of a contract between contracting parties in respect of the lease or sale of a right of manufacture and vend of spirits, and so far the instrument is subject to stamp duty as an agreement under Schedule I, No.5(c)."

The learned Judge then held:-

"I agree with the Board that the words in the definition of bond in the Act 'on condition that the obligation shall be void if a specified act is performed, or not performed, as the case may be' refer to the obligor, and it is the obligor and not the obligee on whom the performance or non-performance of the specified act is incumbent. Clause six, however, meets the requirements of the definition of 'bond', the obligors therein binding themselves to pay a penalty of Rupees 5,000 on failure by them to comply with the conditions of the contract, and the instrument will be subject to duty accordingly under the provisions of Section 7 of the Act."

Oldfield, J., construed the definition of 'bond' as if its provisions could be read inversely. That course, in my opinion, is not legitimate. It is true that the performance or non-performance of the specified act is incumbent upon the obligor, but the accrual of the obligation to pay money should precede the performance or non-performance of the specified act. Upon the performance or non-performance of the specified act the obligation should become void. In the case of a penalty clause the position is just the reverse. In my opinion, the majority view does not, with respect, lay down the law correctly. Stuart, C.J., in

his minority opinion held that the sixth clause was not a bond but an agreement.

16. The ratio of the majority opinion in this case was doubted by another Full Bench of this Court in (1887) ILR 9 All 585 (FB) (In the matter of Gajraj Singh) and also in *Sunderlal v. Thakur Gandharp Singh*,³ The Calcutta High Court in the case of *Gisborne and Co.*, (1882) ILR 8 Cal 284 differed from the majority opinion and agreed with the minority view of Stuart, C.J. The Madras, Rangoon and Nagpur High Courts have also disagreed with the majority view expressed in (1878-80) ILR 2 All 654 (FB) (*Madras Railway Co. v. Rust*,⁴ *Yeo Eng. Pwa v. Chetty Firm*,⁵ (*Low Bur*); *Collector of Rangoon v. Maung Aung Ba*,⁶ *Collector of Nimar v. Lakhmichandsa*⁷ In my view, the consensus of opinion in the country lays down the correct law.

17. I would hold that the document in question before us was not chargeable to duty as a bond but as a simple agreement.

18. In the result, the revision succeeds and is allowed with costs. The order of the learned Insolvency Judge dated 12-2-1969 is set aside and it is directed that duty and penalty is assessable on the document in question on the basis that it was a simple agreement.

S.N. Dwivedi, J.

19. I agree.

R.L. Gulati, J.

20. I agree.

Hari Swarup, J.

21. I agree.

H.N. Seth, J.

22. I agree.

Gopi Nath, J.

23. I agree.

K.N. SETH, J.

24. I agree.

Cases Referred.

1. AIR 1933 All 252 (FB)
2. (1882) ILR 8 Cal 284 at p.286
3. (1937) ILR 12 Luck 131
4. (1891) ILR 14 Mad 18
5. (1909) 4 Ind Cas 298
6. 33 Ind Cas 920: (AIR 1916 Low Bur 100)
7. AIR 1927 Nag 72