

CALCUTTA HIGH COURT

Kandarpa Nag

Vs

Banwari Lal Nag

(Ashutosh Mookerjee, C.J. E Fletcher, J.)

10.08.1920

JUDGMENT

Asutosh Mookerjee, Acting C.J.

1. This is an appeal by the plaintiff in a suit for recovery of possession of land upon declaration of title. The disputed property belonged to one Dina Nath Nag who left four sons, Kandarpa Nag (the plaintiff), Banwari Lal Nag (the first defendant), pasupati Nag (the second defendant) and Sasi Bhusan Nag, since decayed. The third and fourth defendants hold a decree for money against the Nag brothers and in execution thereof purchased the property at an auction-sale hold in 1911. The case for the plaintiff is that, as the ancestral homestead of the Nags was situated on the property sold, the execution-purchasers agreed, on their request, to reconvey the pro-party to them upon payment of Rs. 250 and costs incidental to the sale, but that the first two defendants, his brothers, fraudulently took a conveyance on the 9th September 1913, in their names alone. The plaintiff accordingly prayed that his brothers might be directed to transfer to him his one-fourth share upon receipt of a proportionate amount of the purchase-money. The Nag defendants repudiated the claim as unfounded. During the pendency of the trial in the court of first instance, the plaintiff and his brothers arrived at a settlement on the 22nd March 1916. The terms of the compromise were, that the plaintiff would get a decree declaring his title to the one-fourth share; that the plaintiff would pay to his brothers in two instalments Rs. 195 as the value of the share as also the amount of the costs of the suit that the first instalment of Rs. 100 would be paid on the 21st April 1916; that the second instalment of Rs. 95 would be paid on the 21st May 1916, and that if payment was right made on the due dates, the defendants would become owners of the entire property. The petition of compromise was filed in court on the same date and a preliminary decree was made thereon by consent of parties. No money, however, was paid by the plaintiff on either of the dates mentioned, but on the 22nd May 1916, he applied to the court for extension of time, explaining that what had prevented performance of his part of the bargain, was, not his but the conduct of the defendants. The court extended the time for payment till the 21st June 1916. On that date Rs. 145 was paid and an application made for a further extension of time. On the 5th July 1916, the balance due was deposited and accepted. The defendants contended that that

plaintiff had forfeited his rights under the compromise and the consent decree, and that the Court had no authority to extend the time under Section 148, Civil Procedure Code. The objection was over, ruled on the 4th August 1916, and the preliminary decree are made absolute on the 5th September 1916. Upon appeal, the District Judge has reversed that decision and has dismissed the suit on the ground that Section 148, Civil Procedure Code, had no application, and that, where the time for performance has been fixed by a (Consent order, the time cannot be enlarged except by consent. The plaintiff has now appealed to this Court and has argued that, although Section 143, Civil Procedure Code might not in apply, the Trial Court was competent, on principles of carefully, to afford relief against forfeiture, even though the time for performance had been fixed originally by content of parties and a consent-decree made on the basis thereof. The question raised is by no means free from difficulty, and requires careful examination,

2. Two principles are well settled with regard to the nature and operation of consent-decree. In the first place, there is high authority for the proposition that a consent-decree is just as binding on the parties thereto as a decree after a contentious dial, South American and Mexican Co, In, re (1895) 1 Ch.37 : 12 R. 1 : 71 L.T. 594 : 43 W.R. 131 : 64 L.J. Ch. 189, The Bellcaim (1885) 10 P.C. 161 : 55 L.J.P. 3 : 5 Asp. M.C. 503 : 53 L.T. 685 : 34 W.R. 55, Jenlins v. Robertson (1867) 1 Sc. And Div. 117, Thomson v. Moore (1889) 23 L.R. Ir. 599, Irish Lord Commission v. Ryan (1900) 2 Ir. Rep. 565 : at.P. 584 : 5 Ir. L.R. 518. This rule has been repeatedly recognised and applied in Indian Court, Nicholas v. Asphar 24 C. 216 : 12 Ind. Dec. (N.S.) 810 , Bajlakshmi Dasee v. Katyayani Dasee 12 Ind. Cas. 464 : 38 C. 639 at. p. 674, Fate Chand v. Narsingh Das 16 Ind. Cas. 988 : 22 C.L.J. 383, Amriia Hundari v. Sherajud-din Ahamed 29 Ind. Casa. 156 : 19 C.W.N. 565, Kumara Venkata Perumal v. Thatha Ramaswamy Chetty 9 Ind. Cas. 875 : 35 M. 75 : (1911) M.W.N. 290 : 9 L.T. 487 : 21 M.L.T. 709, Thiruvambala Detikar v. Chinna Pandaram 34 Ind. Cas. 57 : 40 M. 177 : 30 M.L.T. 274 : (1916) 2 M.W.N. 43 : 4 L.W. 303. In the second place, it is equally well-settled that a consent-decree cannot have greater validity than the compromise itself. As was observed by the Court of Appeal in Hudders-field Banking Go, v. Lister 16 Ind. Cas. 988 : 22 C.L.J. 383, the real truth of the matter is that a consent order is a mere creature of the agreement, and if greater sanctity were attributed to it than to the original agreement itself, it would be to give the branch an existence which is independent of the tree. To use the language of Kay, J., the consent order is only the order of the Court carrying out the agreement between the parties. The same idea was expressed in different terms when Parte, J., said in Went-worth v. Bullen (1829) 9 B. and. C. 840 : 33 R.R. 353 : 9 L.J. (C.S.) K.B. 33 : E.R. 313, that "the Contract of the parties is cot the less a contract and subject to the incidents of a contract, absence there is superadded the command of the Judge." This statement was quoted with approval by Erie, C.J., in Lievesley v. Gilmore (1866) 1 C.P. 570 : 1 H. and R. 849 : 35 L.J.C.P. 351 : 12 Jur. (N.S.) 874 : 15 L.T. 386 and by Chitty, J., in Conolan v. Leyland (1884) 27 Ch. D. 632 : 54 L.J. Ch. 123 : 51 L.J. 895. The doctrine has been recognised and applied in a long series of cases in

this Court; Bajlakshmi Dasee v. Katyayani Dasee 12 Ind. Cas. 464 : 38 C. 639 : at .p. 674, Kshetra Moni Dasi v. Amodini Dasi 16 Ind. Cas. 611, Keshab Panda v. Bhubarti Panda 21 Ind. Cas. 538 : 18 C.L.J. 187, Umeshananda Dut Jha v. Mohendra Prosad Jha 11 Ind. Cas. 280 : 14 C.L.J. 337 : at P. 345, Lal fiehary Mitra v. Nagendra Nath Chitterjee 16 Ind. Cas. 690 : 22 C.L.J. 266, Amrita Sundari v. Kherajuddin Ahamed 29 Ind. Cas. 156 : 19 C.W.N. 565, Calstaun v. Woomesh Chandra Bannerjee 35 Ind. Cas. 850 : 44 C. 789 : 25 C.L.J. 303.

3. From the second of the two principles enunciated above, Jenkins, C.J., in Krishna Dat v. Hari Govind Kulkarni 31 B. 15 : 8 Bom. L.R. 813 : 1 M.L.T. 370 drew the conclusion that, where the consent-decree gives effect to an agreement which embodies a right to forfeiture, the Court, in the exercise of its equitable jurisdiction, is competent to grant such relief against forfeiture as it might have granted if there had been no consent decree and a suit had been instituted to enforce the compromise. It was pointed out that are, under the Code of Civil Procedure, Order XXIII, rules, the decree is to be in accordance with the agreement, it cannot be deemed to have altered the relations of the parties as they existed under the agreement, and as it was an incident of those relations that the right of forfeiture was subject to relief that incident must still apply when those relations are established by a decree passed in accordance with the agreement. This coincides with the view previously expressed by the Madras High Court in Nagappa v. Venkat Row 24 M. 265 and Lakshmanaswami Naidu v. Rangavima 24 M. 265 followed in Kumara Vemkata Perumal v. Thatha Ramaswamy Chetty 9 Ind. Cas. 875 : 35 M. 75 : (1911) M.W.N. 290 : 9 L.T. 487 : 21 M.L.T. 709; Beaman, J., amplified the same point of view when ha stated, referring to the decision in Great North West Central Railway v. Charlebois (1899) A.C. 114 : 68 L.J.P.C. 25 : 79 L.T. that by private agreement converted into a decree, parties Court not empower themselves to do what they could not have done by private agreement alone. This logically leads to the conclusion that the Court could not be compelled to enforce the agreement unquestioningly and literally; the decree is to be deemed, So long as it stands, as only the indisputably correct presentment of the contract, subject necessarily to the incidents of such a contract which include equitable relief against a forfeiture as not the least important and well-established, A party to a contrast embodied in a constant decree cannot be held to have renounced any incidental advantages for equitable relief a of which, upon the face of the contrast itself as presented in the decree, he might ordinarily have claimed the benefit: Kumara Venkata Perumal v. Thatha Ramaswamy Chetty 9 Ind. Cas. 875 : 35 M. 75 : (1911) M.W.N. 290 : 9 L.T. 487 : 21 M.L.T. 709.

4. In Krishna Bai v. hari Govind Kulkarni 31 B. 15 : 8 Bom. L.R. 813 : 1 M.L.T. 370 the right to forfeiture was contained in a consent-decree whereby the status of landlord and tenant was established between the plaintiff and defendant, and the principle enunciated therein has been

applied in sub-sequent cases between landlords and tenants, as in *Balambhat Ravjibhat v. Vinayah Ganpatrao* 10 Ind. Cas. 746 : 35 B. 239 : 13 Bom. L.R. 164, *Surendra Nath Baneree v. Secretary of State for India in Council* 57 Ind. Cas. 643 : 24 C.W.N. 545, *Thayyammalachi v. Raiali* 12 Ind. Cas. 334 : (1911) 2 M.W.N. 327 : 10 M.L.T. 320. It is plain, however, from the judgments of Jenkins, C.J., and Beaman, J., in *Krishna Bai v. Hari Govind Kulkarni* 31 B. 15 : 8 Bom. L.R. 813 : 1 M.L.T. 370, that the principle enunciated therein was not intended to be restricted to cases where the relationship of landlord and tenant is created or recognised by the decree. An examination of the cases in the reports shows that the doctrine of the applicability of the principle of relief against forfeiture to consent-decrees is of very extensive application and has been at least twice recognised by the Judicial Committee. The principle was invoked as early as 1657 by the Sadar Dewau Adalat in the case of *Ramgopal Mookerjea v. Massey* (1857) 13 S.D.A. 101 : 15 Ind. Dec. (O.S.) 548, where an agreement had been made for the settlement of a litigation between A. and C. This agreement recited that C. was indebted to A in a certain sum which C. agreed to pay, upon remission by A. of part of his claim, by two instalments at specified dates. The agreement then provided that if default was made by C. in payment of the instalments the remitted money was to be held due to A. by C. and secured upon certain property in addition to the personal liability of C. The agreement was made the foundation of the decree in the suit. Default was made in the payment of the instalments, whereupon A. brought an action against C. to recover the sum remitted. C resisted the claim on the ground, that the default, if any, was not attributable to laches on his part but was due to accident and that, in the circumstances, he was entitled to relief against forfeiture. A Full Bench of the Sadar Dewani Adalat upheld this contention. The case was then taken on appeal to the Judicial Committee. *Ram Gopal Mookerjea v. Samuel Massey* 8 M.I.A. 239 : 2 W.R.P.C. 43 : 1 Suth. P.C.J. 409 : 1 Sar. P.C.J. 760 : 19 E.R. 521. Lord Kings down, in an elaborate judgment reviewed the circumstances of the case and held that the conduct of the parties justified the grant of relief against forfeiture to the defendant. A similar view was adopted by the Judicial Committee in the case of *Balkishen Das v. Run Bahadur Singh* 10 I.A 162 : 10 C. 305 (P.C.) (sic) C.L.R. 392 : 7 Ind. Jur. 554 : 4 Sar. P.C.J. 465 : 5 Ind. Dec. (N.S.) 264; remarks made therein show that consent decrees were assumed to be subject to the application of the principle of relief against forfeiture although it was ultimately held that, in the events which had happened, relief should not be granted against the forfeiture incurred under the clause contained in the consent decree for the payment of sums of money in instalments. The same view was adopted by this Court in the case of *Jamir Fakir v. Bum Lal Ghose Chowdhwy* 32 Ind. Cas. 697 where money was payable on a specified date under a consent-decree and forfeiture was to ensue in default of punctual payment. Illustrations of the application of this principle will be found in some recent decisions of the Madras High Court. Thus, in *Ana Sheikh Mohidin Thragan v. Vadivalasianambia Pillai* 22 Ind. Cas. 37 : (1914) M.W.N. 92 relief was granted against forfeiture under a consent-decree which provided that the

defendant should give up possession of the land decreed to him on his failure to pay the plaintiff a sum certain on a date fixed This was followed in the case of *Bheema Venkataramana v. Bommini Gurappa* 28 Ind. Cas. 970 : 28 M.L.J. 488 : 2 L.W. 537, where also the compromise decree provided that the plaintiff should recover the property in suit unless the defendant paid into Court a certain sum of money within a certain date. To the same effect is the decision in *Ramajanam Jogamma v. Enarnandra Ramalakshmi* 30 Ind. Cas. 248 : 2 L.W. 635, where the consent-decree in a suit by a Hindu widow for recovery of land from the reversioners of her husband provided that she should obtain possession, unless the defendants punctually paid into Court a prescribed amount as maintenance within a specified period. It was ruled that time was not of the essence of the contract, and that relief should be granted against forfeiture on the ground that the power of the Court to grant relief against the enforcement of a penal clause is confined to contracts between landlords and tenants incorporated in a compromise decree but extends to compromise decrees generally. The substance of the matter then is that the circumstance that a consent-decree has been passed on the basis of a compromise, does not oust the jurisdiction of the Court to grant relief against forfeiture, the Court must determine whether, on the suitable grounds relief would have been granted against forfeiture if it had been called upon to enforce the agreement itself. An exhaustive enumeration of all the classes of cases where Courts of Equity have granted relief against forfeiture need not be attempted here. It is sufficient to point out that the general principle just enunciated explains and justifies the decisions in *Uttam Chandra Krithy v. Khetra Nath Chattopadhyaya* 29 C. 517, *Harakh Singh v. Sahib Singh* 6 C.L.J. 76, *Chandanlala Debi v. Gobodh Chandra Roy* 2 Ind. Cas. 338 : 36 C. 422 : 9 C.L.J. 251 and *Shashi Bhushan Banerjee v. Charushda Debi* 36 Ind. Cas. 809 which uniformly recognised the principle that time is of the essence of the agreement, when, in the course of proceedings by the judgment-debtor to set aside an execution sale, a compromise is made among the decree-holder, judgment-debtor and execution purchaser that on payment of the judgment debt within a prescribed period the sale shall stand cancelled, while upon failure to make such payment the sale shall stand confirmed. In such cases, as the parties intended in the first conception of the agreement to make time the essence of the contract, the Court would not be competent to extend the time, except by consent of all the parties concerned. On the other hand, as we have seen, time has not been deemed to be of the essence of the contract when the agreement is for the payment of money on a prescribed date whether upon default of "payment on that date money or land is forfeited. We are not unmindful that in *Bapu v. Vithal* 27 Ind. Cas. 134 : 16 Bom. L.R. 670 (note) and *Lachiram v. Jana Yesu Mang* 27 Ind. Cas. 830 : 16 Bom. L.R. 668, Scott, C.J., who had been a party to the decision in *Balambhat Ravjibhat v. Vinayak Ganpatrao* 10 Ind. Cas. 746 : 35 B. 239 : 13 Bom. L.R. 154 strictly applied the dictum of North, J., in *Australasian Automatic Weighing Machine Co. v. Walter* (1891) W.N. (Eng.) 170. that a consent-decree can only be varied by consent, expressed himself in favour of restriction of the rule to cases of landlords and

tenants and declined to treat it as applicable to cases of venders and purchasers. In this connection, it must be remembered that the judgment of Scott, C.J., in *Burjorji Dhunjibhai v. Jamshed Khodaram Irani* 20 Ind. Cas. 469 : 33 B. 77 : 15 Bom. L.R. 405 where he had held that time was of the essence of the contract in agreements for the sale of land had not yet been reversed by the Judicial Committee; *Jamshed Khodaram Irani v. Burjorji Dhunjibhai* 32 Ind. Cas. 246 : 43 I.A. 26 : 40 B. 289 : 23 C.L.J. 358 : 30 M.L.J. 186 : 3 L.W. 239 : 19 M.L.T. 184 : 14 A.L.J. 225 : (1916) 1 M.W.N. 229 : 18 Bom. L.R. 163 : 20 C.W.N. 744 (P.C.) It is, however, well-settled now by the decision of the Judicial Committee that in cases of specific performance of contracts to sell real estate, equity which governs the rights of the parties looks, not at the letter but at the substance at the agreement, in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. This accords with the doctrine formulated by Lord Cairns in *Tilley v. Thomas* (1867) 3 Ch. App. 61 : 17 L.T. 422 : 16 W.R. and by Lord Atkinson and Lord Parker in *Stickney v. Keeble* (1915) A.C. 386 : 84 L.J. Ch. 259 : 112 L.T. See also *Dagenham (Thames) Dock Co. In re* (1873) 8 Ch. App. 102 : 43 L.J. Ch. 261 : 21, *Mahadeo Prosad v. Narain Chandra* (10). We may add that we are not concerned here with the question of the right of a Court to grant relief against forfeiture under a decree which is not by consent as in *Sajjadi Begam v. Dilzwar Husain* 47 Ind. Cas. 4 : 40 A. 579 : 16 A.L.J. 625 or under a decree made in accordance with statutory provisions which reserves power to the Court to grant an extension of time *Bodh Narain v. Mahomed Moosa* 26 C. 639 : 3 C.W.N. 628 : 13 Ind. Dec. (N.S.) *Akkach Mondal v. Aminuddi Mullik* 50 Ind. Cas. 937 : 23 C.W.N. 439. We hold accordingly, first, that in the case before us the jurisdiction of the Trial Court to grant relief against forfeiture was not ousted by the circumstance that the agreement had been followed by a consent-decree and, secondly, that the nature of the agreement was such as entitled the Court to grant relief against forfeiture on equitable grounds. The view taken by the District Judge that as the agreement had crystallized into a decree the Trial Court was deprived of its power to grant relief cannot be supported. It has not been argued here that if the authority of the Trial Court to grant relief against forfeiture were deemed established, its decision could be successfully challenged on the ground that the exercise of its discretion had been so manifestly erroneous as to justify interference of a Court of Appeal, and plainly the question cannot be usefully discussed from that point of view in a Court of second appeal which cannot investigate the facts.

5. The result is, that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored. There will be no order for costs either here or before the District Judge.

Ernest Fletcher, J.

6. I agree.