



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH

WRIT PETITION NO. 485 OF 2006
AND
WRIT PETITION NO. 486 OF 2006

WRIT PETITION NO. 485 OF 2006

1. Smt. Jamotibai Satyanarayan Bajaj,
aged about 71 years,
occupation – Household.
2. Smt. Kirandevi Omprakash Bajaj,
aged about 46 years,
occupation – Household.
3. Shriram Omprakash Bajaj,
aged about 25 years,
occupation – Business.
4. Yogesh Omprakash Bajaj,
aged about 23 years,
occupation – Student.
5. Kum. Seema Omprakash Bajaj,
aged about 19 years,
occupation – Student.

All residents of Main Road,
Yavatmal, Tq. & District – Yavatmal.

... PETITIONERS

Versus

1. Abdul Razzak s/o Usman,

aged about 59 years,
occupation – Business.

2. Ahmad Usman,
aged about 55 years,
occupation – Business.
3. Harun Usman,
aged about 52 years,
occupation – Business.

All residents of Arni, Tq. Arni,
District – Yavatmal.

... RESPONDENTS

WRIT PETITION NO. 486 OF 2006

1. Smt. Jamotibai Satyanarayan Bajaj,
aged about 71 years,
occupation – Household.
2. Smt. Kirandevi Omprakash Bajaj,
aged about 46 years,
occupation – Household.
3. Shriram Omprakash Bajaj,
aged about 25 years,
occupation – Business.
4. Yogesh Omprakash Bajaj,
aged about 23 years,
occupation – Student.
5. Kum. Seema Omprakash Bajaj,
aged about 19 years,
occupation – Student.

All residents of Main Road,
Yavatmal, Tq. & District – Yavatmal.

... PETITIONERS

Versus

1. Abdul Razzak s/o Usman,
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occupation – Business.
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3. Harun Usman,
aged about 52 years,
occupation – Business.

All residents of Arni, Tq. Arni,
District – Yavatmal.

... RESPONDENTS

Shri J.T. Gilda, Advocate for the petitioners.
Shri S.U. Nemade, Advocate for the respondents.

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CORAM : B.P. DHARMADHIKARI, J.
DATE OF RESERVING THE JUDGMENT : SEPTEMBER 28, 2006.
DATE OF PRONOUNCING THE JUDGMENT: OCTOBER 13, 2006.

JUDGMENT :

Heard Shri Gilda, learned counsel for the petitioners and
Shri Nemade, learned counsel for the respondents finally by

consent.

2. The petitions are filed by the decree holders challenging the common order dated 28.4.2005 passed below Exh. 23 in Special Execution Case No. 175 of 2004 and Exh. 16 in Special Execution Case No. 176 of 2004. The Executing Court has by said order accepted the contention of respondents/ judgment debtors that after effecting balance payment of Rs.1,800/- each towards above mentioned execution cases, the decrees obtained against them would be satisfied if balance amount of Rs.900/- and Rs. 1,800/- were paid to decree holders.

3. It appears that the respondents moved these applications at Exh. 23 and 16 before the lower Court for recording satisfaction of decrees passed against them in Special Civil Suit Nos. 125 of 1995 and 124 of 1995. The Suits were amicably settled before Lok Adalat. In one suit giving rise to Special Execution No. 175 of 2004, claim of present petitioners was Rs.1,17,398.95 ps. and it has been settled by accepting amount of Rs.37,800/-. In other suit

which forms subject matter of Special Execution Case No. 174 of 2004, total claim of petitioners was Rs.1,30,692.76 ps. and it was compromised by accepting amount of Rs.37,800/-. The respondents accordingly wanted to complete payment of Rs. 37,800/- only in both the matters. They paid substantial amount and wanted balance amount to be certified. The payment made has been acknowledged and accepted by the petitioners. However, there was one default clause in Compromise Decree which envisaged that if judgment debtor made default in payment of any three installments within time, decree holder would be entitled to recover entire amount of Rs.1,17,398.95 ps. or Rs. 1,30,692.76 ps. The judgment debtors contended that this was penal clause and according to them they had completed the payment as per clause (1) of Compromise Decree and hence decrees stood satisfied. The decree holders, on the other hand, contended that amount of Rs.37,800/- each was to be paid by monthly installments of Rs.900/- within due time and judgment debtors made default in payment of three installments within time and therefore, the entire amount as mentioned above became due

and payable. The trial Court heard respective parties on the grievance made and found that the condition incorporated by default clause was a penal condition and therefore not enforceable. It found that in Special Execution Case No. 176 of 2004, only amount of Rs.900/- was to be recovered by decree holders while in other execution amount of Rs.1,800/- was due to the decree holders. Thus, in effect the lower court held that decree holders were entitled to recover total amount of Rs. 37,800/- each in both the executions.

4. Shri Gilda, learned counsel appearing for the petitioners has contended that the lower Court has erroneously placed reliance upon the judgment of the Hon'ble Apex Court in the case of Prithvichand Ramchand Sablok v. S.Y. Shinde, reported at AIR 1993 SC 1929. He contends that the law as laid down by the Hon'ble Apex Court has not been properly understood and appreciated by the trial Court and hence there is failure on its part to exercise jurisdiction available to it. He contends that the compromise clearly mentioned that concession was given to

judgment debtors to pay amount of Rs.37,800/- within specified time and if the amount was not paid accordingly, the entire amount as claimed was liable to be recovered. He has placed reliance upon the judgments of Hon'ble Apex Court in the case of Sova Ray v. Gostha Gopal Dey, reported at AIR 1988 SC 981, K.P. Subbarama Sastri v. K.S. Raghavan, reported at AIR 1987 SC 1257, in State of Goa vs. Placido Braganza, reported at 2002 (1) Mh.L.J. 370, in Rabindra Narain v. Nirmala, reported at AIR 1978 Pat. 162, N. Kullayyappa v. N. Dastagiri, reported at AIR 1982 A.P. 154, Sri Ram v. State Bank of Bikaner, reported at AIR 1972 All. 456, B. Kishanprasad v. Kunj Bihari Lal, reported at AIR 1926 All. 278.

5. Shri Nemade, learned counsel, who appears for the respondents in both the matters has placed reliance upon the judgment of the Hon'ble Apex Court in Prithvichand Ramchand Sablok v. S.Y. Shinde, reported at AIR 1993 SC 1929, to assert that the said judgment clinches the issue. In addition, he has placed reliance upon the judgment of Rajasthan High Court in the case of Naresh Kumar v. Jan Mohd., reported at 1999 (2) Civil L.J. 446,

judgment of Madhya Pradesh High Court in the case of Nonjibhai v. Ramkishan, reported at AIR 1977 M.P. 112, judgments of the Hon'ble Apex Court in the case of K.P. Subbarama Sastri v. K.S. Raghavan, reported at AIR 1987 SC 1257, Fateh Chand v. Balkishan Dass, reported at AIR 1963 SC 1405. He contends that the respondents never agreed to the suit amount as due and payable by them and hence it cannot be recovered under the guise of invoking default clause. He argues that the said clause has rightly been held to be penal clause by the lower Court.

6. It is to be noticed that the Court below has relied upon the judgment of the Hon'ble Apex Court in Prithvichand Ramchand Sablok v. S.Y. Shinde (supra) and there it was cited by Decree holders. The perusal of said judgment reveals that while considering the controversy before it, in order to explain the circumstances in which a clause in contract can be described as penal in character, the Hon'ble Apex Court has taken two illustrations. The said portion is reproduced below for ready reference :

“It is necessary to understand when a clause in the contract can be described as penal in character. Let us illustrate by taking two concrete situations. A plaintiff files a suit to recover Rs.20,000/- with interest and costs from the defendant. They enter into a compromise, the terms whereof are as under :

Situation 1 :

The defendant shall pay to the plaintiff a sum of Rs.15,000/- and costs on or before 31st December, 1993. If, however, he fails to pay the said amount of Rs.15,000/- with costs within the time stipulated, the plaintiff will be at liberty to recover the entire sum of Rs.20,000/- with interest and costs from the defendant by executing the decree.

The latter clause of such a decree will clearly be in terrorem and, therefore, penal in character. No Court will execute the same.

Situation 2 :

The decree provides that the defendant shall pay Rs.20,000/- with interest and costs to the plaintiff. However, if the defendant pays Rs.15,000/- and costs on or before 31st December, 1993 to the plaintiff, the plaintiff will treat the decree as fully satisfied and will not claim the balance amount from the defendant.

In such a case the latter clause operates as a

concession and the plaintiff waives his right to the balance amount. Such a decree will be executable to the full extent if the defendant fails to avail of the concession by paying Rs.15,000/- and costs on or before 31st December, 1993.

From the above two illustrations it should become clear that if the defendant is required to suffer the consequence for his failure to abide by the terms by a stipulated date such a consequence would be penal in nature but on the other hand if the defendant gets some benefit by complying with the requirement by the stipulated date such a clause granting benefit can never be treated as penal in character.”

7. The Hon'ble Apex Court has applied said test to the facts before it and found that the defendant – tenant was given grace period to comply with the decree failing which the landlord was given right to put the decree to execution and obtain possession of the premises and recover the arrears of rent. It held that by clause 3 of the consent terms before it, the tenant was given concession that if he paid entire rent etc. before 10th October 1970, the landlord would not recover the possession. The said stipulation was clearly made to secure arrears of rent and landlord

agreed not to insist for possession if all arrears were cleared. It found that, therefore, the defendant tenant was getting the benefit by complying with said requirement and clause could not have been assailed as penal clause. The judgment in the case K.P. Subbarama Sastri v. K.S. Raghavan (supra) is relied upon by both the learned counsel. The Hon'ble Apex Court there has applied the test of finding out whether the amount sought to be recovered after default were due on the date on which the compromise was entered into or were becoming payable only on account of such default. The Hon'ble Apex Court has found that if on proper construction of a contract real agreement between parties was found to be that the entire amount was on the date of agreement a debt due but the creditor for the convenience of the debtor allowed it to be paid by installments intimating that if default would be made in payment of any installment, he would withdraw the concession, then the stipulation as to the whole amount of the balance becoming payable would not be penal. If, on the other hand, the Court finds that the debts itself arises or becomes due and payable only on respective dates fixed for the installments,

the stipulation that default being made in payment of any installment, the whole of balance should become due and payable would be in the nature of penalty.

8. In *Sova Ray v. Gostha Gopal Dey* (supra), the Hon'ble Apex Court has considered the situation in which plaintiff had in trial Court obtained the decree for partition for 1/3rd share in his favour. At appellate stage defendant wanted to acquire 1/2 of the share of plaintiff on payment of consideration. The plaintiff agreed to it and sum of Rs.40,000/- was fixed as price. The appeal accordingly was disposed of by compromise and in said compromise, the plaintiffs claim of 1/3rd share was accepted as correct. It was further agreed that 1/2 of plaintiffs share i.e. 1/6th share would go to one of the defendants provided he paid a sum of Rs.40,000/- to the plaintiffs by a particular date. It also provided that failing payment within time, the decree passed by the trial Court would stand confirmed. The defendant was to pay Rs. 40,000/- in two installments. He paid Rs.10,000/- within time but remaining amount was not paid. In view of the default in payment of second installment, the plaintiffs deposited back the amount of



Rs.10,000/- received by them and thereafter defendant made application before the High Court for extension of period of second installment. The defendant contended that default clause in the agreement was illegal being penal in nature. The Hon'ble Apex Court held that a particular benefit was bestowed upon the defendant and he was subjected to a condition that if he had to take advantage of the bargain he was under a duty to pay the stipulated amount by the time mentioned in the agreement. On failure to do so within time, he was deprived of that special benefit and such a clause therefore could not be considered to be a penalty clause.

9. In this background, when the compromise entered into between the parties before this Court is looked into, said compromise nowhere shows that respondents accepted that entire amount of Rs.1,17,398.95 ps. or Rs.1,30,692.76 ps. was either due or payable by them to the petitioners – plaintiffs. Clause (1) only states that on account of said demand, the defendants have agreed to pay Rs.37,800/- and the petitioners – plaintiffs have

given up remaining amount. The subsequent clause further states that amount of Rs.37,800/- is to be paid in monthly installments of Rs.900/- before 1st day of each month and entire amount is to be cleared in 42 installments. The first installment was to be paid on 1.12.1996 or before that. All next installments were to become due before 1st day of each subsequent English month. Default clause provided that if defendants committed default in paying within time any three installments, the plaintiffs would be entitled to recover entire suit amount.

10. Thus, when the tests laid down by the Hon'ble Apex Court above are applied to the facts of present case, it is apparent that the defendants (present respondents) nowhere accepted their liability to pay the suit amounts. Therefore, suit amount was not the amount due on the date of compromise. The amount is becoming due to present petitioners only on account of default committed by present respondents. Thus, the compromise was not a concession given to the respondents but it was a threat given to them. The illustrations in Situation 1 and Situation 2

mentioned by the Hon'ble Apex Court in Prithvichand Ramchand Sablok v. S.Y. Shinde (supra) clearly clinch the issue. The Situation 1 in which the decree drawn was only for Rs.15,000/- and time was given to pay that amount till 31.12.1993 and default clause provided that if said amount was not paid, the plaintiff would be entitled to recover entire sum of Rs.20,000/- with interest and cost, clearly applies to the facts of present case. The default clause has the effect of permitting the plaintiffs liberty to recover amount for which there was no decree. As against this, when Situation 2 considered by the Hon'ble Apex Court is looked into, there the decree was for Rs.20,000/- hence it was held that amount of Rs. 15,000/- and time till 31.12.1993 was in fact a concession provided to the defendant. It is therefore clear that here when there is no decree for Rs.1,17,398.95 ps. or for Rs.1,30,692.76 ps., the default clause has been rightly read as penal clause by the Executing Court.

11. As I find that the controversy is clearly covered by the judgment of the Hon'ble Apex Court in Prithvichand Ramchand

Sablok v. S.Y. Shinde (supra) and I also find that the ratio in other two Apex Court judgments mentioned above are against present petitioners, I do not find it necessary to consider various other judgments on which reliance has been placed by the learned counsel for the petitioners or respondents. However, in most of the cases, the plaintiffs had an existing right in their favour incorporated in compromise to recover the entire amount and thereafter the concession was provided.

12. I, therefore, find that there is no jurisdictional error or perversity in the approach of trial Court in the matter. No case is made out for interference in writ jurisdiction. Writ Petitions are accordingly dismissed. There shall be no order as to costs.

JUDGE

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