SMT. SOVA RAY & ANR.

v.

GOSTHA GOPAL DEY & ORS.

MARCH 18, 1988

[A.P. SEN AND LALIT MOHAN SHARMA, JJ.]

Agreement—Whether an order of Court based on consent of parties can be modified by Court at the instance of one party without further consent of other party—Whether it is open to Court to alter terms of compromise otherwise—Whether a default clause in agreement is penal in nature and illegal.

The appellants had filed a suit for partition of property claiming 1/3rd share. A preliminary decree was passed by the trial court. Respondent No. 1 (defendant No. 9 in the suit) challenged the decree before the High Court in first appeal. The appeal was disposed of on compromise whereby the appellants plaintiffs' claim to 1/3rd share was accepted, but it was agreed that half of the share of the plaintiffs would go to the defendant No. 9, provided he paid Rs.40,000 to the plaintiffs in two instalments, the first one of Rs.10,000 by 31.7.1979 and the second of the remaining amount, by 28.2.1980, failing which payment within time, the decree passed by the trial court would stand confirmed as per the terms of the compromise. The first instalment was paid within time, but the remaining amount was not paid. The defendant No. 9 made an application before the High Court on 28.8.1981 for extension of time for payment of the second instalment. The High Court by its order dated 31.8.1981 allowed the application. The appellants moved this Court by special leave, challenging the said order dated 31.8.1981 of the High Court.

The appellants *inter alia* contended that an order based on the consent of the parties could be modified only with the further consent of the parties and it was not open to the Court to alter the terms otherwise. If the High Court had issued notice on the application for extension of time made by the defendant No. 9 to the plaintiffs–appellants, they would have placed before the Court the circumstances showing that it was against the cause of justice to allow the prayer of the defendant No. 9 and specially so after such a long delay. There was no justification whatsoever for the High Court to condone the delay and extend the period for deposit of the money, they contended.

The contesting respondents argued that the 6th term of the compromise dealing with the consequence of the default in payment of the instalments was penal in nature and illegal, and that the clause being severable from the other terms of the compromise should be ignored. It was further argued that it was not correct to suggest that the Court had no power to permit the respondent No. 1 to make the deposit later.

Allowing the appeal, the Court,

HELD: There was no merit in the argument that the impugned clause 6 of the agreement was illegal being penal in nature. It had to be noted that the plaintiffs had in the trial court obtained a decree for partition for their 1/3rd share in the suit properties and there was presumption in favour of correctness of the decree. At the appellate stage, one of the three branches of the parties, represented by the heirs of Brajgopal, and uncle of the plaintiffs–appellants, was satisfied with the share allotted to them and the interest of defendant No. 9, second uncle of the plaintiffs, was identical to their interest. The situation was acceptable to the defendant No. 9 also but he wanted to acquire half the share of the plaintiffs on payment of consideration, fixed at Rs.40,000. The amount was to be paid by way of price. It had not been suggested by the defendant No. 9 or his heirs that the entire compromise should be ignored on account of the impugned clause 6 thereof. They had been relying upon the compromise except the default clause which alone was sought to be ignored. That part of the compromise was in substance an agreement for transfer by the plaintiffs of half of their share for a sum of Rs.40,000 to be paid within stipulated time. The market price of the property was higher, and a beneficial right was bestowed on the defendant No. 9 to acquire the property for a considerably low amount. In this background, the said defendant was subjected to the condition that if he had to take the advantage of the bargain, he was under a duty to pay the stipulated amount within the time mentioned in the agreement. On failure to pay within time, he was to be deprived of that special benefit. Such a clause could not be considered a penalty clause. The expression 'penalty' is an elastic term with many different shades of meanings, but it always involves an idea of punishment. The impugned clause in this case did not involve infliction of any punishment, it merely deprived the defendant No. 9 of a special advantage in case of default. [293A-H; 294A]

The High Court assuming it had the power to do so, was not justified in allowing the prayer of the defendant No. 9 to make a grossly belated payment. Even where such a power exists, it is not to be exercised liberally. [294B-C]

Justice was manifestly in favour of the plaintiffs and against the contesting respondents. The clause in question was not a forfeiture clause. [294E] A

The grievance of the plaintiffs that they were not afforded reasonable opportunity to contest the prayer of the defendant was also well-founded; notice of the application for extension of time should have been directly sent to the plaintiffs. The Court did not consider it necessary to remand the matter to the High Court for a fresh consideration, as it had come to a final conclusion on merits in favour of the plaintiffs. [294G; 295B] B

The order dated 31.8.1981 of the High Court was set aside and the application filed by respondent No. 1 defendant No. 9 for extension of time was rejected. [295C-D] C

Charles Hubert Kinch v. *Edward Keith Walcott & Ors.*, A.I.R. 1929 P.C. 289; *Banku Behari Dhur* v. *J.C. Galstaun & Anr.*, A.I.R. 1922 P.C. 339; *Jagat Singh & Ors.* v. *Sangat Singh & Ors.*, A.I.R. 1940 P.C. 70 and *Smt. Periyakkal & Ors.* v. *Smt. Dakshyani*, [1983] 2 SCR 467, referred to. D

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2463 of 1982.

From the Judgment and Order dated 31. 8. 1981 of the Orissa High Court in First Appeal No. 184 of 1977. E

Veenu Bhagat for the Appellants.

A.P. Mohanty and A.K. Mahapatra for the Respondents.

F

The Judgment of the Court was delivered by

SHARMA, J. The appellants filed a suit for partition of the properties detailed in the plaint claiming 1/3rd share. A preliminary decree was passed by the trial court which was challenged by the defendant No. 9 (original respondent No. 1 in the present appeal) before the Orissa High Court in First appeal No. 184 of 1972. The appeal was disposed of on compromise whereby the plaintiffs' claim to 1/3rd share was accepted as correct. The terms of the compromise are set out in paragraph 2 of the order dated 27.3.79. It was, however, further agreed that half of the share of the plaintiffs, i.e. 1/6th share, would go to the defendant No. 9 provided he paid a sum of Rs.40,000 G H

to the plaintiffs by a particular date, failing payment within time, the decree passed by the trial court would stand confirmed as per term of the compromise. The compromise was recorded on 27.3.1979. According to the compromise the sum of Rs.40,000 was to be paid in two instalments; the first instalment of Rs.10,000 by 31-7-1979 and the remaining amount of Rs.30,000 by 28.2.1980. The first instalment was paid within time but the remaining amount was not paid. In the meantime, the decree by the High Court was formally drawn up on 6.9.1979. In view of the default in payment of the second instalment the plaintiffs–appellants deposited the sum of Rs.10,000 received by them as the first instalment to the credit of the defendant No. 9 with the permission of the Court. The defendant No. 9, thereafter, made an application before the High Court on 28.8.1981 for extension of the period for payment of the second instalment of Rs.30,000. The application was allowed by the order dated 31.8.1981 which is under challenge in the present appeal.

2. Before proceeding to the points involved in the present appeal it will be useful to briefly state the facts. The parties are close relations, the defendant No. 9 (original respondent No. 1) being the uncle of the plaintiffs–appellants. He died during the pendency of the appeal here and his heirs and legal representatives have been substituted as respondents. The father of the plaintiffs Nityagopal, defendant No. 9 (original respondent No. 1) Ghosta Gopal and Brajgopal were brothers. Nityagopal died in 1953 leaving behind the plaintiffs and their mother who also died in 1962. According to their case, they thus became entitled to 1/3rd share in the properties belonging to the family. The appellants were very young girls and lived with Gostha Gopal for some time after the death of their parents. But, according to their case, they had to leave for their maternal grandmother's place in 1964 due to the ill–treatment by their uncle. In 1965, a collusive suit for partition was commenced by both the uncles Gostha Gopal and Brajgopal, in which although the plaintiffs were impleaded as parties, their address was wrongly mentioned in the plaint. Consequently no summons could be served on them nor did they have any information about the suit and the decree passed therein. No share was allotted to the appellants at all. After they learnt about the collusive suit and the decree, they filed the present suit being T.S. 32 of 1967, for setting aside the earlier decree and for partition. The trial court accepted the plaintiffs case that the earlier decree was obtained by fraud. The plaintiffs were awarded 1/3rd share as claimed by them. Brajgopal became reconciled to the situation but Gostha Gopal challenged the decision in the aforementioned First Appeal No. 184 of 1972.

3. The parties reached an amicable settlement and the appeal was disposed of on 27.3.1979. Accordingly the heirs of Brajgopal (who was dead by then) got their 1/3rd share in accordance with the trial court's decision and the suit so far as the other two branches, that is, the plaintiffs and Gostha Gopal were concerned, was disposed of on the terms as mentioned in paragraph 1 above. According to the case of the plaintiffs–appellants they had no information of the application dated 28.8.1981, filed by the defendant No. 9 for extension of the period for payment of the second instalment of Rs.30,000 and when a copy of the application was offered to their advocate he did not accept the same making an endorsement thereon that notice should be served directly on the plaintiffs as he did not continue to hold any authority on their behalf. Despite this stand of their learned counsel in the High Court, no notice was sent to the plaintiffs and the case was listed only after two days on 31.8.1981. The plaintiffs' advocate—although he did not represent them on that date—was present in Court when the case was called out, and pointed out that there was no justification for excusing the long delay. Earlier the court by its order dated 17.8.1981, after taking into consideration the conduct of the defendant No. 9 in not complying with the terms of the compromise, had permitted the plaintiffs to refund the sum of Rs.10,000 paid to them as the first instalment. The plaintiffs' counsel pointed out that the aforesaid order had finally closed the matter. The court, however, allowed the prayer of the defendant and permitted him to pay the remaining money along with an additional sum of Rs.6,000 by way of compliance of the terms of the compromise. The counsel who was representing the plaintiffs earlier, refused to accept the money when offered, and the court permitted the defendant to deposit the amount with the Registrar of the court observing that the same would be available to be withdrawn by the plaintiffs. When the petitioners learnt about the order they took a copy of the same and approached this Court under Article 136 of the Constitution.

4. While hearing the Special Leave Petition this Court directed the Subordinate Judge, Baripada to ascertain the market value of the 1/6th share of the property in question. The Subordinate Judge in his report to this Court stated that the value of the entire properties would be Rs.13,90,000 and the value of 1/6th share would accordingly be Rs.2,31,716. After the parties filed a number of affidavits, special leave was granted on 30.7.1982.

5. Mr. Bhagat, appearing in support of the appeal, contended that an order based on the consent of the parties can be modified only

A with further consent and it is not open to the court to alter the terms otherwise. It was further argued that assuming the court to be so empowered, the jurisdiction has to be exercised in exceptional circumstances and only in the ends of justice. If the High Court had directed notice to be issued to the plaintiffs, they would have placed before the court the circumstances showing that it was against the B cause of justice to allow the prayer of defendant No. 9 and specially so after such a long delay. The plaintiffs were shabbily treated by their uncle after the death of their father when they were very young and had to take refuge at their deceased mother's parental home. Out of the two sisters only one could be married, and the younger one could not be married as the sum of Rs.30,000 promised by the respondent C No. 1 to be paid by 28.2.1980 was not actually paid. According to the affidavit filed before this Court by way of rejoinder to the respondents' supplementary affidavit she was not married till then. The learned counsel, therefore, argued that there was no justification whatsoever for the High Court to condone the delay and extend the period for deposit of the money by the respondent after more than 1½ years of D default.

6. Mr. Mohanty, the learned counsel representing the contesting respondents, who have been substituted in place of the original respondent No. 1 Gostha Gopal, contended that the 6th term of the compromise dealing with the consequence of default in payment of the E instalments is penal in nature and must, therefore, be held illegal. He urged that the clause being severable from the other terms of the compromise should be ignored and the other terms of the compromise ought to be given effect to. As a result the clause that on the non-payment of the agreed sum by the time indicated therein the decree of the trial court would become final, must be rejected as illegal. F Reliance was placed on Section 74 of the Indian Contract Act. It was further argued that the position with respect to an order of a court of law made on the basis of consent of parties is also the same and it is not correct to suggest that in the circumstances of the present case the court had no power to permit the respondent No. 1 to make the deposit later. The learned counsel relied on the observations made in G *Charles Hubert Kinch* v. *Edward Keith Walcott & Ors.*, AIR 1929 P.C. 289, *Banku Behari Dhur* v. *J.C. Galstaun & Anr.*, AIR 1922 P.C. 339 and *Jagat Singh & Ors.* v. *Sangat Singh & Ors.*, AIR 1940 P.C. 70 and the decision of this Court in *Smt. Periyakkal & Ors.* v. *Smt. Dakshyani*, [1983] 2 SCR 467. It was argued that it is not right to assume that the decree of the trial court was unassailable in appeal. The H respondent No.1 had a substantial defence which he could have suc-

cessfully pressed if the dispute had not been amicably settled. A

7. We do not find any merit in the argument that the impugned clause 6 of the agreement is illegal being penal in nature and has, therefore, to be ignored. It has to be noted that the plaintiffs had in the trial court obtained a decree for partition for 1/3rd share in the suit properties and there was presumption in favour of correctness of the B decree. At the appellate stage one of the three branches represented by the heirs of Brajgopal was satisfied with the share allotted to them and the interest of Gostha Gopal (defendant No. 9) was identical to their interest. The situation was acceptable to the defendant No. 9 also but he wanted to acquire half the share of the plaintiffs on payment of consideration. The plaintiffs agreed and the sum of Rs.40,000 was fixed C as the price. In clause 2 of the agreement, as mentioned below, it was expressly stated thus:

> "The sum of Rs.40,000 agreed to be paid by defendant No. 9 to the plaintiffs *as compensation for the 1/6th share* shall be paid in two instalments: ....." D
>
> (Emphasis added)

The amount was to be paid by way of price was reiterated by the use of the word "consideration" in clause 3. It is significant to note that the defendant No. 9 in the court below or his heirs (after his death) before us have not suggested that the entire compromise should be ignored on E account of the impugned clause 6. They have been relying upon the compromise except the default clause which alone is sought to be ignored. They insist that under the compromise the shares allotted to the different branches should be treated as final and further half of the share of the plaintiffs, i.e. 1/6th share in the suit properties should have gone to the defendant No. 9 (and after him, to them, i.e. his F heirs) for Rs.40,000. This part of the compromise is in substance an agreement for transfer by the plaintiffs of half their share for a sum of Rs.40,000 to be paid within the time indicated. It is true that the market price of the property was higher, and a beneficial right was bestowed on the defendant No. 9 to acquire the same for an amount considerably low. In this background the defendant was subjected to G the condition that if he had to take the 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 to be deprived of this special benefit. Such a clause cannot be considered to be a penalty clause. The expression 'penalty' is an elastic term with many different shades of meaning but it always involves an idea of H

punishment. The impugned clause in the present case does not involve infliction of any punishment; it merely deprives the defendant No. 9 of a special advantage in case of default.

8. Coming to the next question as to whether the High Court acted rightly in extending the period for payment of the second instalment, the learned counsel for the parties have placed all the facts and circumstances of the case in detail in support of their respective arguments, and we have considered them closely and do not have any hesitation in holding that the High Court, assuming that it had the power to do so, was not justified in allowing the prayer of the defendant No. 9 permitting him to make a grossly belated payment. Even where such a power exists it is not to be exercised liberally. In *Smt. Periyakkal and Ors.* v. *Smt. Dakshyani,* [1983] 2 SCR 467, relied upon by the respondents, this Court thus observed:

> "Of course, time would not be extended ordinarily, nor for the mere asking. It would be granted in rare cases to prevent manifest injustice. True the court would not rewrite a contract between the parties but the court would relieve against a forfeiture clause . . . ."

In the present case, justice is manifestly in favour of the plaintiffs and against the contesting respondents and further the clause in question was not a forfeiture clause. Even the High Court had to observe as follows:

> "The conduct of the appellant (i.e. the defendant No. 9) is indeed very reprehensible. Though extensions were obtained from us, he did not comply with the directions and suffered Order No. 72 dated 17.8.1981 to be passed. Only when his rights were taken away did he realise the real effect of what he had lost."

In view of our conclusion it is not necessary to decide the abstract question of the general power of the court in this regard.

9. The grievance of the plaintiffs that they were not afforded reasonable opportunity to contest the defendants' prayer is also well founded. The appeal in the High Court had been disposed of earlier. After the default in payment of the second instalment occurred the present appellants placed the circumstances before the court and prayed for permission to refund the first instalment of Rs.10,000,

received by them so that they could take full advantage of the compromise decree. The matter was fully considered and decided by the order dated 17.8.1981 as mentioned by the High Court in the above quoted passage. In the situation the counsel who represented the plaintiffs in the appeal could not have been held to have continued to represent them specially when they informed the court that he had no further authority and that notice should be directly sent to the plaintiffs. However, we do not consider it necessary to remand the matter to the High Court for fresh consideration as we have considered all the relevant materials and have come to a final conclusion on merits in favour of the plaintiffs.

10. For the reasons mentioned above, the order dated 31.8.1981 passed by the Orissa High Court in First Appeal No. 184 of 1972 is set aside and the application filed by Gostha Gopal Dey for extension of time is rejected. The appeal is accordingly allowed with costs payable to the appellants by the contesting respondents.

S.L. Appeal allowed.