A DEEPA BHARGAVA & ANR.

v.

MAHESH BHARGAVA & ORS.

(Civil Appeal Nos. 7310-11 of 2008)

DECEMBER 16, 2008

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[S.B. SINHA AND CYRIAC JOSEPH, JJ.]

Code of Civil Procedure, 1908:

s.47 – Execution of decree – Executing court – C *Jurisdiction of – Scope – Held: Executing court has no jurisdiction to modify a decree – It cannot go behind the decree and must execute the decree as it is.*

Default clause contained in a compromise decree – Nature of – Held: It is not penal in nature – s.74 of the Contract D *Act is not attracted – Stipulation to pay interest @ 18% p.a. for default in payment within agreed period not unreasonable.*

In a suit for declaration and permanent injunction between brothers and sisters in respect of ancestral property, compromise petition was filed by the parties E **which was accepted by the Court. A decree was passed thereupon. Some of the terms of compromise decree were that the respondents-defendants would pay Rs.10 lakhs to the appellants-plaintiffs and in case of failure of payment within stipulated time, appellant would be** F **entitled to claim interest thereon @ 18% p.a. and that respondents would be at liberty to alienate/sell the suit property. As payment was not made in terms of the consent decree, the appellants filed an application for execution. Respondents filed objection under s.47 CPC before the executing Court, which was rejected. A** G **revision petition was filed thereagainst contending that the respondents were not liable to pay interest @ 18% p.a. The High Court rejected the objection holding that the consent decree was beyond the subject matter of the suit. Moreover, it opined that the question as to whether**

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the stipulation of payment of interest @ 18% p.a. on the judgment debtors is in the nature of penalty and is unreasonable within the purview of s.74 of the Contract Act, 1872 or not, should be considered afresh by the Executing Court.

The Executing Court directed payment of interest @ 14% p.a. Respondents filed writ petition. High Court reduced the rate of interest to 9% p.a. holding that the litigating parties were real brothers and sisters, the consent decree was not in respect of any commercial transaction and in the circumstances, the stipulation of interest in default of payment within the agreed *period* was by way of penalty, and thus the rate of interest of 18% p.a., looking at the nature of decree, was unreasonable and excessive. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. A decree remains valid unless set aside. Respondents never challenged the validity or otherwise of the said consent decree. It was acted upon. They disposed of the suit property pursuant thereto and, thus, took advantage of a part thereof. It was, therefore, impermissible for them to resile therefrom. There is no doubt or dispute as regards interpretation or application of the said consent terms. [Paras 10 and 11] [643-D-E]

2. An executing court cannot go behind the decree. It has no jurisdiction to modify a decree. It must execute the decree as it is. A default clause contained in a compromise decree even otherwise would not be considered to be penal in nature so as to attract the provisions of Section 74 of the Indian Contract Act. [Para 11] [643-F]

Sova Ray & Anr. v. Gostha Gopal Dey & Ors. AIR (1988) SC 981, referred to.

3. Interest becomes leviable either under a statute or under a contract. The stipulation to pay interest at the rate of 18% per annum cannot, by itself, be said to be unreasonable. [Para 14] [645-D]

A *P. D'Souza v. Shondrilo Naidu* **(2004) 6 SCC 649, distinguished**

Yogesh Mehta v. Custodian appointed under the Special Court & Ors. **(2007) 2 SCC 624, held inapplicable.**

4. The question as to whether the executing court B **had any jurisdiction to travel beyond the decree was not raised. The executing court had no such jurisdiction. The High Court while exercising the revisional jurisdiction also had no jurisdiction to invoke the provisions of Section 74 of the Contract Act which for all intent and** C **purport amounts to modification of a valid decree passed by a competent court of law. The decision of the High Court, therefore, was wholly without jurisdiction. Furthermore, the High Court did not hold that Section 74 of the Contract Act will have application. It only remitted the matter to the executing court. [Para 17] [646-D-E]**

D **5. No legal principle was adverted to by the executing court in reducing the rate of interest to 14 per cent and the High Court in reducing the same further to 9 per cent. In a large number of decisions, interest has been directed to be paid even at the rate of 18 per cent** E **or 21 per cent per annum. The executing court is directed to proceed to execute the decree as it is. [Paras 18 and 19] [646-F]**

Case Law Reference:

AIR (1988) SC 981	**referred to**	**Para 12**
F **(2004) 6 SCC 649**	**distinguished**	**Para 15**
(2007) 2 SCC 624	**held inapplicable**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7310-11 of 2008.

From the Judgment and final Order dated 29.9.2006 of the G High Court of Madhya Pradesh at Jabalpur in Writ Petition Nos. 4112 of 2006 & 4173 of 2006.

Arvind Kumar Shukla, Alok Shukla, G.P. Mishra, Purcham Mubarak and Irshad Ahmad for the Appellants.

Shiv Sagar Tiwari, Varun Thakur and Rajesh Singh for the H Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

2. Whether the terms of a consent decree can be varied by the executing court is the question involved in this appeal which arises out of a judgment and order dated 29.9.2006 passed by a learned Single Judge of the Madhya Pradesh High Court at Jabalpur in Writ Petition No.4141 of 2006.

3. Appellants herein filed a suit in the Court of Additional District Judge, Jabalpur for declaration and permanent injunction in respect of their share in the suit property which they are said to have inherited from their mother.

In the said suit the parties settled their disputes and differences. A compromise petition in terms of Order XXIII Rule 3 of the Code of Civil Procedure, 1908 was filed which was accepted by the Court by an order dated 12.5.1995, some of the terms whereof are as under :

"(i) & (ii) ...

(iii) That the Plaintiffs have claimed a declaration to the suit properties which were given to them by dint of Will executed by the late Smt. Parmeshwari Devi in favour of the Plaintiffs. It is now agreed between the Plaintiffs and Defendants 3 to 5 that in respect to the above the Plaintiffs shall remain entitled to a sum of Rs.10 (Rs. Ten) Lakhs each only and rest of sale money shall be exclusive property of the Defendant 3 to 5.

(iv) That the defendant No.3 to 5 shall be at liberty to alienate the properties in any manner they like.

(v) (a) That the Defendant No.3 to 5 have paid Rs.1 Lakh (Rs. One Lakh) each to the plaintiffs and the remaining balance shall be paid within six months from the date the decree is passed by the Court. In case of failure of payment within the stipulated time, the Plaintiffs shall be entitled to claim interest on the above mentioned amount at the rate of 18% per annum and the total balance amount along with

A interest will be first charge on the suit property.

(b) That if after the expiry of the period of six months from the date of decree, the full payment of Rs. Ten Lakhs each could not be made to the Plaintiffs then the same made within the extended period of three
B months together with interest,. Till then the charge on the property will continue.

(vi) That out of the sale proceeds or earnest money received by the Defendant No.3 to 5 by the sale of the suit/will properties amount due to the Plaintiffs
C shall be paid first."

4. A decree was directed to be prepared on the said basis, stating :

"1. The suit is for declaration and possession.

2. The parties have moved compromise petition on
D the ground that the Plaintiffs and the Defendant happened to be real brother and sisters and to maintain the harmony in the families they come forward with this compromise petition regarding the property in disputes.

E 3. Shri O.P. Sahni (PW1) counsel for the Plaintiff had deposed thereof the parties have come to a compromise in accordance with EXC1 wherein his signature from 1 to 1 and accordingly the decree be granted also Shri V.R. Rao (DW1) counsel for the Defendant had deposed that they agrees to
F EXC1 where in his signatures are from B to B and therefore, decree be granted accordingly.

4. On perusal of EXC 1 the compromise petition the pleading and deposition I am of the view that all the necessary conditions of the complaint are adjusted
G in the compromise petition hence accordingly the decree be awarded.

I accordingly, order that the decree be drawn in accordance with EXC 1 compromise petition."

5. The compromise petition was to form part of the decree.

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Payment having not been made in terms of the said consent decree the appellants filed an application for execution. Respondents deposited a sum of Rs.18 lacs in the year 1998. An objection was also filed by them under Section 47 of the Code before the Executing Court in 2002. The said objection petition was rejected.

6. A Civil Revision Application was filed thereagainst, *inter alia,* contending that the respondents were not liable to pay interest at the rate of 18% per annum.

The High Court, by reason of a judgment and order dated 5.8.2005, rejected the objection that the consent decree was beyond the subject matter of the suit. It furthermore rejected the contention that the suit should not have been decreed as adequate court fee had not been paid. The contention relying upon Sections 59 to 61 of the Indian Contract Act that the amount deposited in the court must be first adjusted towards the principal amount was also dismissed. The contention raised that the interest at the rate of 18 per cent per annum being excessive is hit by the provisions Usurious Loans Act was also rejected. However, the High Court opined that the question as to whether the stipulation of payment of interest at the rate of 18 per cent per annum on the judgment debtors come within the purview of Section 74 of the Indian Contract Act or not, should be considered afresh by the Executing Court, directing:

> "On a perusal of the impugned order, it is found that the learned executing Court has not adverted itself to the applicability of Section 74 of the Indian Contract Act. Though, the provisions of Usurious Loans Act, may not be applied so as to relieve the judgment debtors from the rate of interest when the same is excessive, Section 74 of the Contract Act does empower even an executing Court to consider whether the same is in the nature of penalty and is unreasonable. In such a situation, the executing Court has got ample power to pass suitable order on the parameters of reasonableness. The executing Court having failed to take this into consideration has committed an error and the executing Court is, therefore, liable to be

A directed to decide only the last objection taking into consideration the scope of Section 74 of the Indian Contract Act.

In the result, the civil revision is partly allowed and the case is remitted back to the executing court to decide whether the stipulation about the interest @ 18% per annum is in B the nature of penalty and further whether it is unreasonable within the meaning of Section 74 of the Indian Contract Act. The executing Court shall pass an order in accordance with the law within a period of three months."

7. The Executing Court, pursuant thereto and in furtherance C thereof, by an order dated 23.12.2005 directed that the amount of interest payable should be calculated at the rate of 14 per cent per annum, opining :

"Now the question arises is, if the interest at the rate of 18% is unreasonable and not in accordance with law, then D what rate of interest would be reasonable and in accordance with law? In this context, after perusing all the contentions as long pendency of the matter, the grant of amount of Rs.1 lakh to the plaintiffs, the benefits of the property to the parties, and stage of the objection, the E interest at the rate of 14% may be said to be reasonable and in accordance with law. Therefore, it is appropriate and hereby decided to charge interest at the rate of 14% per annum instead of interest at the rate of 18% per annum on the remaining principal amount."

F 8. A writ petition was filed thereagainst by the respondents. By reason of the impugned judgment, the High Court reduced the rate of interest payable to the decree holder to 9% per annum, stating :

"... In the circumstances, it has to be seen as to whether G the stipulating about the interest @ 18% per annum in default of payment within the time fixed, is in the nature of penalty and whether it is unreasonable within the meaning of section 74 of the Act. The litigating parties are real brothers and sisters. Having regard to the nature of the suit and the terms of the compromise enumerated in clause

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(v)(a) and (b) it is clear that the decree is not in respect of any commercial transaction. In the circumstances, in my view, the stipulation of interest @ 18% per annum in defaults of payment within the agreed period is by way of penalty, the rate of interest of 18% per annum looking to the nature of the decree is unreasonable and excessive. Considering the entire facts and circumstances of the case, the compromise decree passed, I am of the view that the reasonable rate of interest would be 9% per annum and not 18% as per the decree or even 14% per annum as held by the Executing Court."

9. Appellant is, thus, before us.

10. The parties had claimed their interest in the lands in suit from a common ancestor.

They entered into a compromise. A decree was passed thereupon. A decree, as is well known, remains valid unless set aside. Respondents never challenged the validity or otherwise of the said consent decree. It was acted upon. They had disposed of a property pursuant thereto and, thus, took advantage of a part thereof. It was, therefore, impermissible for them to resile therefrom.

11. There is no doubt or dispute as regards interpretation or application of the said consent terms. It is also not in dispute that respondents-judgment debtors did not act in terms thereof.

An executing court, it is well known, cannot go behind the decree. It has no jurisdiction to modify a decree. It must execute the decree as it is. A default clause contained in a compromise decree even otherwise would not be considered to be penal in nature so as to attract the provisions of Section 74 of the Indian Contract Act.

12. In *Sova Ray & Anr. v. Gostha Gopal Dey & Ors.* [AIR 1988 SC 981], this Court held :

"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

A and there was presumption in favour of correctness of the 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
B 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 as the price. In Clause 2 of the agreement, as mentioned below, it was expressly stated thus:

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> 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:....
>
> (Emphasis added)

D 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
E on 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
F 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 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
G 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 the condition that if he had to take the advantage of the bargain he was under a duty to

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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 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."

13. Even assuming that the term stipulating payment of interest in the event the entire amount was not paid within a period of six months is penal in nature, the Executing Court was bound by the terms of the decree.

14. Interest becomes leviable either under a statute or under a contract. The stipulation to pay interest at the rate of 18% per annum cannot, by itself, be said to be unreasonable.

15. Mr. Tiwari, learned counsel appearing on behalf of respondents, has relied upon a decision of this Court in *P. D'Souza v. Shondrilo Naidu* [(2004) 6 SCC 649] to contend that even in a case of this nature, Section 74 of the contract Act would be applicable. In *P. D'Souza*, this Court was concerned with a suit for specific performance of contract. It was in the facts and circumstances of that case held that the time was not the essence of contract in that case. There existed a mortgage which was required to be redeemed. The question as to whether Section 74 of the Indian Contract Act was attracted in that case was considered from the point of view of grant of equitable remedy.

16. Reliance has also been placed on *Yogesh Mehta v. Custodian appointed under the Special Court & Ors.* [(2007) 2 SCC 624]. In that case, this Court was concerned with the forfeiture of earnest money where the special court held a bidding, as therein one of the conditions, namely, grant of sanction of Special Court was not complied with, it was opined that the penal clause as regards forfeiture of the earnest money was not attracted. It was, therefore, held that the forfeiture of earnest money in the aforementioned situation could not have

A been directed, stating :

"While directing forfeiture of the 'earnest money' the provisions of the Contract Act, 1872 are to be kept in mind. Forfeiture is permissible only when a concluded contract has come into being and not prior thereto. {See *Maula Bux* B *v. Union of India* [(1969(2 SCC 554] and *Saurabh Prakash v. DLF Universal Ltd.* [(2007) 1 SCC 228]."

The said decision has also no application.

17. Mr. Tiwari submitted that the appellant having not challenged the correctness of the order dated 12.5.1997 and, C thus, the same having attained finality, the question of applicability of Section 74 of the Contract cannot be revisited. We are not able to persuade ourselves to accept the said view. The question as to whether the executing court had any jurisdiction to travel beyond the decree was not raised. The executing court had no such jurisdiction. The High Court while D exercising the revisional jurisdiction also had no jurisdiction to invoke the provisions of Section 74 of the Contract Act which for all intent and purport amounts to modification of a valid decree passed by a competent court of law. The decision of the High Court, therefore, was wholly without jurisdiction. E Furthermore, the High Court did not hold that Section 74 of the Contract Act will have application. It only remitted the matter to the executing court.

18. We do not find that any legal principle has been adverted to by the executing court in reducing the rate of interest F to 14 per cent and the High Court in reducing the same further to 9 per cent. There are a large number of decisions where interest has been directed to be paid even at the rate of 18 per cent or 21 per cent per annum.

19. For the reasons aforementioned, the impugned G judgment cannot be sustained. It is set aside accordingly. The executing court is directed to proceed to execute the decree as it is. The appeals are allowed with costs. Counsel's fee assessed at Rs.25,000/-.

D.G. Appeal allowed.