

Before Sir Lal Gopal Mukerji, Acting Chief Justice,  
Mr. Justice King and Mr. Justice Niamat-ullah

1933  
January, 10

MOHI-UDDIN (JUDGMENT-DEBTOR) v. KASHMIRO BIBI  
(DECREE-HOLDER)\*

*Civil Procedure Code, order XXIII, rule 3—Compromise decree—“Lawful” compromise—Stipulation by way of penalty contained in compromise—Contract Act (IX of 1872), section 74—Applicability to compromise decree—Civil Procedure Code, section 47—Execution court can modify penal clause contained in compromise decree.*

A decree was passed, in accordance with the terms of a compromise, which provided that the defendant was to pay Rs.11,500 by yearly instalments of Rs.1,100, but that in case of default in payment of any one instalment the entire amount remaining unpaid would become immediately payable, with interest at the rate of 2 per cent. per mensem from the date of the decree. Seven instalments were duly paid and then there was default. The decree-holder applied in execution to recover the balance, Rs.3,800, with interest at the stipulated rate from the date of the decree. The judgment-debtor objected that the stipulation as to the interest was of a penal nature, and the question was whether the court executing the decree could give any relief against it.

*Held*, by the Full Bench, that section 74 of the Contract Act applies to the case of a compromise decree and it is open to a court executing such decree to interfere with a stipulation by way of a penalty contained in the compromise. *Raghunandan Prasad v. Ghulam Ala-ud-din Beg*, I. L. R., 46 All., 571, overruled.

*Per* MUKERJI, A. C. J.—Section 74 of the Contract Act applies in terms to a contract, but, in the case of a compromise decree, what there is before the court is a contract pure and simple. In passing a compromise decree the court does not exercise its judgment at all but merely embodies the terms of the agreement; and the decree does not cease to be a contract, for essentially it is a matter of contract and nothing else. Section 74 does not say that the relief to be granted under it is confined to a suit. Therefore, in executing the compromise decree, there is nothing in section 74 which prevents the court from applying that section to the case before it.

\* First Appeal No. 412 of 1931, from a decree of C. I. David, Subordinate Judge of Allahabad, dated the 21st of July, 1931.

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In entertaining a plea that one of the terms of the compromise contains a penal clause the court executing the decree does not really go behind the decree, but it finds out, as it is entitled to find out, on payment of what amount the decree should be discharged. If, instead of the amount of penal interest stipulated for, the court came to the conclusion that only a reasonable amount was to be paid, the court would be deciding a question as to the satisfaction or discharge of the decree under section 47 of the Civil Procedure Code, and would not be going against the terms of the decree.

An agreement which contains a penal clause is not necessarily an unlawful compromise, and in the stipulation contained in the compromise in the present case there was nothing which made the compromise not "lawful" for the purpose of order XXIII, rule 3 of the Civil Procedure Code.

*Per NIAMAT-ULLAH, J.*—Section 74 of the Contract Act, viewed in its proper perspective, does not involve any interference with the decree when applied to a compromise on which a decree is passed. 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 only to reasonable compensation not exceeding the penalty. Where such a contract is embodied in a compromise decree, the decree should be deemed to be giving effect to the compromise, with the legal incidents arising from section 74 regarding enforcement of the penal clause. The question of reasonable compensation will, therefore, arise when the compromise decree is sought to be enforced, and in determining such question the court executing the decree will not be going behind the decree, though seemingly it might appear to be doing so, but in reality will be giving effect to the decree in accordance with its real legal import.

This case was first heard by a Division Bench, which referred certain questions of law for decision by a Full Bench, with the following referring order :

NIAMAT-ULLAH and KISCH, JJ. :—An important question of law has been raised in this appeal, which arises out of execution proceedings. The appellant executed a deed of mortgage for Rs.7,000, carrying interest at the rate of 1 per cent. per mensem, compoundable every six months, in favour of the

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respondent. The latter instituted a suit on foot of her mortgage for recovery of Rs.22,170. The suit was resisted on grounds which it is not necessary to mention for the purpose of this appeal. The parties entered into a compromise, which provided that a decree be passed for Rs.11,500, payable by yearly instalments of Rs.1,100 which would fall due on the 30th of June of each succeeding year, the first instalment being payable on the 30th of June, 1920. It also provided that in case of default in payment of any one instalment the entire decretal amount remaining unpaid would become immediately payable, and the decree-holder would be entitled to interest at the rate of 2 per cent. per mensem from the date of the decree. The mortgaged property was liable to be sold for satisfaction of the amount remaining unpaid. A decree was passed on foot of the aforesaid compromise on the 30th of July, 1919. The appellant paid seven instalments at due dates. Default was made in paying the eighth instalment. Thereupon the decree-holder applied for execution of decree for recovery of the remaining sum, Rs.3,800, with interest at the rate of 2 per cent. per mensem from the date of the decree. The appellant objected to the stipulation relating to the interest contained in the compromise, on the ground that it was in the nature of penalty and should not be enforced.

On the one hand, it is argued by the learned counsel for the appellant that a decree passed on compromise has no greater sanctity than the compromise itself so far as the application of section 74 of the Indian Contract Act is concerned. On the other hand, the learned counsel for the respondent contends that it is a well settled rule of law that a court executing a decree cannot go behind the terms of the decree. There is authority in support of both these views. A Division Bench of this Court has held in *Raghunandan Prasad v. Ghulam Ala-ud-din Beg* (1), that section 74 of the Indian Contract Act does not apply to a decree passed on compromise so as to relieve the judgment-debtor against a penal stipulation as regards interest contained in the compromise. Another Division Bench of this Court has doubted the correctness of this view in *Kishen Prasad v. Kunj Behari Lal* (2). It must, however, be said that the actual decision of the learned Judges proceeds on a different ground, and it was not necessary for them to express any opinion on the question which had been decided in *Raghunandan Prasad's* case. The learned Judges themselves observe that the point was not necessary for the purposes of the case

(1) (1924) I.L.R. 46 All., 571.

(2) (1925) 24 A.L.J., 210.

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before them, and that they did not express a definite opinion on that question. They have, however, marshalled all the authorities bearing on the subject and seem to be strongly of opinion that the view taken in *Raghunandan Prasad's* case is not correct. They have referred to a number of decisions of other High Courts. One of the learned Judges referred to a Privy Council decision in *Ram Gopal Mookerjee v. Samuel Masseyk* (1) and considered that the principle underlying the decision in *Balkishen Das v. Run Bahadur Singh* (2) supports the view which he was inclined to take. He was also inclined to the view that wholly apart from section 74 and on equitable grounds a penal clause occurring in a compromise which has become merged in a decree can be relieved against. The learned counsel for the appellant has referred us to a case decided by a learned single Judge of the Lahore High Court, *Chhunna Mal v. Hanuman Baksh* (3). Were it not for the case of *Raghunandan Prasad v. Ghulam Ala-ul-din Beg* (4), we would have held on the authorities that section 74 of the Indian Contract Act applies to a compromise which has become merged in a decree. We, however, feel that one Division Bench of this Court should not depart from the view taken by another Division Bench where the question is one of importance, on which different views can be entertained. We think that this should be referred to a larger Bench. We are clearly of opinion that this is eminently a question which ought to be settled once and for all so far as this Court is concerned. Accordingly, we direct that the case be laid before the Hon'ble the Chief Justice with the request that he may be pleased to constitute a larger Bench for decision of the following questions of law :

(1) Does section 74 of the Indian Contract Act apply to a compromise decree, and whether it is open to a court executing such decree to go behind it so as to interfere with a stipulation by way of penalty contained in the compromise?

(2) If section 74 of the Indian Contract Act does not apply, can the principle underlying that section be extended to a decree passed on a compromise containing a stipulation by way of penalty?

The case shall be laid before us on the reference being answered by the Full Bench.

(1) (1880) 8 Moo. I.A., 239.  
 (3) A.I.R., 1927 Lah., 659.

(2) (1883) I.L.R., 10 Cal., 305.  
 (4) (1924) I.L.R., 46 All., 571.

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Before the Full Bench,—

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Messrs. *Hyder Mekdi* and *Zafar Mehdi*, for the appellant.

Dr. *K. N. Katju*, Messrs. *B. Malik* and *L. Zutshi*, and Miss *S. K. Nehru*, for the respondent.

MUKERJI, A. C. J. :—Two questions have been referred to the Full Bench and they have been formulated as follows :

(1) Does section 74 of the Indian Contract Act apply to a compromise decree, and whether it is open to a court executing such decree to go behind it so as to interfere with a stipulation by way of penalty contained in the compromise?

(2) If section 74 of the Indian Contract Act does not apply, can the principle underlying that section be extended to a decree passed on a compromise containing a stipulation by way of penalty?

The facts of the case as stated in the order of reference are as follows. There was a suit on a mortgage bond for Rs.7,000 carrying interest at 1 per cent. per mensem, compoundable every six months. In a suit instituted on the bond a sum of Rs.22,170 was claimed. The defendant contested the suit but ultimately the parties entered into a compromise by which a decree was made for Rs.11,500 payable by yearly instalments of Rs.1,100. These instalments were to be paid on the 30th of June of each succeeding year commencing with the 30th of June, 1920. It was provided that in case of default in payment of any one instalment the entire decretal amount remaining unpaid would become immediately payable, and the decree-holder would be entitled to interest at the rate of 2 per cent. per mensem from the date of the decree. A decree followed in terms of the compromise. The judgment-debtor paid certain instalments and a sum

of Rs.3,800 remained unpaid. This the decree-holder sought to recover with interest at 2 per cent. per mensem from the date of the decree, as stipulated in the compromise. The judgment-debtor objected to the execution on the ground that the stipulation as to the interest was in the nature of a penalty and it could not be enforced against him.

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The first point that we have to decide is whether section 74 applies to the circumstances like the present. Section 74 in terms applies to the case of a contract and begins by saying, "When a contract has been broken". Two views have been urged before us. One view is that a decree based on a compromise, in spite of the fact that it is a decree, is in substance a contract and therefore section 74 should be applied to a consent decree. The other view that has been urged before us is that, whether it is based on a contract or not, a decree is a decree after all and no court executing a decree can go behind it. There seems to be an apparent conflict between these two views and we have to find out which view we have to accept.

If we consider the nature of a compromise decree we shall be able to arrive at a satisfactory conclusion. Order XXIII, rule 3 deals with a compromise decree. It says: "Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, . . . the court shall order such agreement, compromise . . . to be recorded, and *shall* pass a decree in accordance therewith so far as it relates to the suit." It will be noticed that the court has to do two things when a compromise is produced before it. It has to find out whether the compromise or agreement is a lawful one, and the second is to pass a decree in accordance with the agreement or compromise. Beyond finding out whether the agreement or compromise is lawful or not, the court is left with no choice in the matter. 'An

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agreement which contains a penal clause is not necessarily an unlawful compromise and in the case of the stipulation contained in the compromise already quoted there was nothing unlawful. A party may very well agree that in case of default of payment on a due date he would pay a certain rate of interest, not only from the date of default but from a date prior to that, namely from the date of the decree. As we have said, there is nothing unlawful in this agreement. Thus, an agreement like this must be recorded by the court and a decree must be passed in terms of the compromise or agreement.

By section 96 of the Civil Procedure Code an appeal is allowed against a decree, but none is allowed against a decree passed on compromise. Sub-section (3) says: "No appeal shall lie from a decree passed by the court with the consent of parties." Thus, not only a court of original jurisdiction but also the appellate court is debarred from looking into the terms of the compromise which is lawful but contains a penal clause.

The result of the compromise decree is that the court is precluded from coming to any conclusion of its own and it has to accept a lawful compromise arrived at by the parties. This is the function of the court before which a compromise is produced.

In executing such a decree the court gives effect to the terms arrived at by the parties, although these terms have not been formulated by the court itself. If a question should arise as to the satisfaction or discharge of such a decree, the matter can be considered only by the court executing the decree and not in a separate suit (*vide* section 47 of the Code of Civil Procedure).

The question now is, whether the court executing the decree, in deciding whether the decree has been satisfied or not, can say that the payment of a certain

amount of money which does not contain any penal interest or which contains only a part of the penal interest, is sufficiently good for the discharge of the decree. If, for example, in the case before us, the court may choose to say that instead of 2 per cent. interest, 1 per cent. interest would be a reasonable amount to be paid in the circumstances of the case, it may call upon the judgment-debtor to pay that amount of the interest and no more. If the court chooses to act like that, and on receipt of the amount thus found due it declares that the decree has been satisfied, it does so declare as a court executing the decree and does not, in making the declaration, in any way go against the terms of the decree.

Section 74 applies in terms to a contract, but, in the case of a compromise decree, what is there before the court but a contract pure and simple? I have already stated that the court has not exercised its mind at all in selecting how the case should terminate. In making the decree the court has not exercised its judgment at all. If that is so, I fail to see how the decree ceases to be a contract when, essentially, it is a matter of contract and *nothing else*. Section 74 of the Contract Act does not say that the relief to be granted under it is confined to a suit. Therefore, in executing the compromise decree, there is nothing in section 74 which prevents a court from applying that section to the case before it. Thus, on general principles, and on the language of the law, I am clearly of opinion that the answer to the question No. 1 should be given in the affirmative.

Coming to authorities, I shall first consider the cases decided in this Court. There are two cases which are directly applicable and the earlier is *Raghunandan Prasad v. Ghulam Ala-ud-din Beg* (1). The judgment on the point is rather short. The fact was that on the compromise decree an agreement had been made to

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pay interest at 3 per cent. per mensem in case of default of payment on a particular date. Two learned Judges of this Court held that the interest, however hard the terms, must be paid, because the court could not go behind the terms of the decree. Their Lordships professed to follow a case of the Calcutta High Court, namely *Kalipada Sarkar v. Hari Mohan Dalal* (1). But the facts of that case were entirely different. In that case the plea had been taken that one of the parties was not properly represented in the suit and therefore the decree could not be executed against him. That was a matter which could not be taken cognizance of by the court under section 47 of the Code of Civil Procedure. The question could be raised only by a separate suit. The Calcutta case therefore was no authority for the view expressed by the two learned Judges of this Court in *Raghunandan's* case (2). The other case in this Court is *Kishen Prasad v. Kunj Behari Lal* (3). It must be admitted at the outset that the opinion expressed there was an *obiter dictum*, because the actual decision of the case was not based upon the opinion expressed. Nonetheless, two Judges of this Court (including myself) came to the conclusion that section 74 of the Indian Contract Act applied to a compromise decree. I pointed out in my judgment in that case that the court embodying the terms of a decree had no discretion to use and was bound to record the contract as it stood, if that contract happened to be lawful. The question of section 47 was not raised in that case and was not considered. But I have already expressed the opinion that the plea of penalty can be properly raised within the purview of section 47 of the Code of Civil Procedure.

Coming to other courts, the Lahore High Court in two cases has accepted the view that the terms of a

(1) (1916) I.L.R., 44 Cal., 627.

(2) (1924) I.L.R., 46 All., 571.

(3) (1925) 24 A.L.J., 210.

compromise decree can be interfered with in execution. The earlier case is *Chhunna Mal v. Hanuman Bakhsh* (1) and the later case is *Jwala Ram v. Mathra Das* (2). In Bombay the opinion was at one time entertained that a compromise decree, being a decree, no plea could be taken that it contained a penal clause which should be relieved against. This view was taken in *Shirekuli Timapa v. Mahablya* (3). But in *Krishna Bai v. Hari Govind* (4) a Full Bench of that court dissented from this view. It is true that the case before the Full Bench did not arise out of an execution proceeding but arose out of a regular suit, but the principle applied. If the terms of the compromise were sacrosanct, they could not be interfered with even in a subsequent suit. Their Lordships of the Bombay High Court in the Full Bench case doubted the correctness of the principle on which the case in *Shirekuli Timapa v. Mahablya* had been decided.

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In Madras the view has been uniformly taken that in execution of a decree the executing court could see whether the compromise contained any penal clause or not. The latest case on the point is *S. R. Jaya Rao v. Venkatanarayana Chetty* (5).

In Calcutta the same view has been taken, not only in suits but also in execution proceedings. *Surendra Nath Banerjee v. Secretary of State for India in Council* (6) was the case of an execution of a decree and *Ganesh Chandra Pal v. Chandra Mohan Datta* (7) was the case of a suit.

The Patna High Court, in *Jitendra Nath Chatterjee v. Mt. Jasoda Sahun* (8) has agreed with the Bombay case, *Shirekuli Timapa v. Mahablya*, already referred

(1) A.I.R., 1927 Lah., 659.

(3) (1836) I.L.R., 10 Bom., 435.

(5) (1921) 80 Indian Cases, 925.

(7) (1923) 28 C.W.N., 984.

(2) A.I.R., 1931 Lah., 696.

(4) (1906) I.L.R., 31 Bom., 15.

(6) (1915) 24 C.W.N., 545.

(8) A.I.R., 1926 Pat., 122.

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to and holds that in a court executing the decree the plea that there was a penal clause in the agreement could not be entertained.

On principle considered and on the majority of decided cases I am clearly of opinion that section 74 does apply to the case of the compromise decree. In entertaining a plea that one of the terms of the compromise contains a penal clause the court executing the decree does not really go behind the decree, but it finds out, as it is entitled to find out, on payment of what amount the decree should be discharged. I would answer the question No. 1 accordingly.

In view of my opinion entertained on question No. 1, question No. 2 does not arise. I would answer the reference accordingly.

KING, J. :—I agree that the first question should be answered in the affirmative.

NIAMAT-ULLAH, J. :—I agree generally with the views expressed by the Hon'ble ACTING CHIEF JUSTICE, but I would like to add a few observations of my own on the principal question which calls for decision in this reference. It seems to have been assumed by the learned Judges who decided the case of *Raghunandan Prasad v. Ghulam Ala-ud-din Beg* (1) that if the court executing the decree applies section 74 of the Indian Contract Act to a compromise which has become merged in a decree, it must necessarily interfere with the decree itself. The argument of the learned counsel for the respondent proceeded on the same assumption. In my opinion section 74 of the Indian Contract Act, viewed in its proper perspective, does not involve any interference with the decree when applied to a compromise on which a decree is passed.

Section 74 enacts the rule that "if a contract contains any stipulation by way of penalty, the party complaining of the breach is entitled to receive from the party

(1) (1924) I.L.R., 46 All., 571.

who has broken the contract a reasonable compensation not exceeding the penalty stipulated for." 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. Where such a contract is embodied in a compromise which is recorded under order XXIII, rule 3 of the Code of Civil Procedure the decree should be deemed to be giving effect to the compromise with the legal incident arising from section 74, namely that the party complaining of the breach is not entitled to enforce the penal clause but is entitled only to reasonable compensation not exceeding the penalty stipulated for. What is reasonable compensation is to be determined whenever a dispute arises and the contract is sought to be enforced. The court executing the compromise decree can only enforce covenants either expressly mentioned in the compromise or therein implied from the legal incident attaching to the compromise on which the decree is based. In determining the compensation to which the party complaining of the breach of the contract is entitled the court executing the decree is not going behind the decree. Its action may seemingly appear to amount to interference with the apparent tenor of the decree. In reality, however, far from interfering with the decree the court is giving effect to it in accordance with its real legal import. In this view, I do not think it necessary to hold that the well established rule, that a court executing the decree cannot go behind it, admits of exceptions or that an exception would be grafted on that rule if section 74 of the Indian Contract Act be applied to a compromise

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which has become merged in the decree. Nor do I think, for the reasons already stated, that there is any conflict between the aforesaid rule and the view that, acting under section 74 of the Indian Contract Act, a court executing a decree can relieve against the penal provision contained in the compromise.

*Niamat-ullah, J.*

For these reasons I agree with the Hon'ble ACTING CHIEF JUSTICE in answering the first question referred to this Bench in the affirmative. I also agree that the second question does not arise.

*Before Sir Lal Gopal Mukerji, Acting Chief Justice,  
 Mr. Justice King and Mr. Justice Niamat-ullah*

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KHAIR-UN-NISSA BIBI (JUDGMENT-DEBTOR) v. OUDH  
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*Civil Procedure Code, order XXXIX, rule 1—Temporary injunction—Stay of execution of a decree by temporary injunction granted in another suit—Injunction granted on furnishing security hypothecating immovable property—Mode of enforcing security—Separate suit or execution—Civil Procedure Code, section 47.*

A final decree for sale on a mortgage was put in execution, and one K was impleaded as an heir to one of the judgment-debtors deceased. K, however, had a claim to certain items of the mortgaged property in her own right and she instituted a suit, against the decree-holder and others, for a declaration that the decree was not binding on her or on the items of property belonging to her. The suit was dismissed and K filed an appeal in the High Court. She applied in the High Court for an injunction, pending disposal of the appeal, restraining the decree-holder from executing his decree against her. The decree-holder objected that as part of the decretal amount did not carry any interest, he would suffer loss of interest if the sale were to be stayed. It was estimated that probably Rs.6,000 would be the amount of such interest up to the time when the appeal would come to be decided, and it was ordered that if K executed a security bond for Rs.6,000 to cover the loss of interest her application would be granted. K accordingly furnished the security bond, hypothecating im-

\* First Appeal No. 431 of 1931, from a decree of C. Deb Banerji, Subordinate Judge of Azamgarh, dated the 20th of June, 1931.