

**(1919) 12 CAL CK 0002**

**Calcutta High Court**

**Case No:** None

Surendra Nath Banerjee

APPELLANT

Vs

The Secretary of State for India  
in Council

RESPONDENT

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**Date of Decision:** Dec. 19, 1919

**Citation:** 57 Ind. Cas. 643

**Hon'ble Judges:** Panton, J; N.R. Chatterjea, J

**Bench:** Division Bench

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### **Judgement**

1. This appeal arises out of proceedings in execution of a compromise decree under the following circumstances.

2. The plaintiff (decree-holder) sued the defendants (judgment-debtors) for recovery of possession of 10 bighas and odd cottas of land situate in the Barraokpore Cantonments. The suit was compromised by a petition dated the 25th May 1915. The defendant recognised the right of the plaintiff to the land in suit, and admitted that the same formed part of the Cantonment waste land as claimed by the plaintiff, and fell outside their holding. The plaintiff, and the defendant agreed that the land in suit might be treated as a separate holding, that no additional tax would be imposed for the same, and that the defendant would execute a lease (agreement) within two months from that date in Form B, Schedule VI of the Cantonment Code, in accordance with Section 264, Explanation 1(d), but subject to the terms of the petition of compromise, and that on default, the terms would come to an end, and the plaintiff would take khas possession of the land in suit by executing the decree that would be passed on the petition of compromise. It is unnecessary for the purposes of the present appeal to refer to the other terms.

3. A decree was passed on the above petition of compromise on the 6th July 1915.

4. On the 19th July 1915, an application for review was filed on behalf of the plaintiff for setting aside the compromise decree. This application, however, was rejected by

the Court. The plaintiff then moved the High Court, and the case was ultimately disposed of by this Court on the 22nd August 1916, refusing to interfere.

5. About a year afterward, on the 19th July 1917, the plaintiff applied for execution of the decree and prayed for possession of the land. Notice having been served upon the defendant, he wrote a letter to the Secretary to the Cantonment Committee on the 1st September 1917 stating his willingness to execute the agreement, and asked for a draft copy of the agreement for his execution. The latter on the 3rd September replied, simply pointing out paragraph 4 of the petition of compromise which required the agreement to be executed within two months.

6. The defendant then raised objections to the execution of the decree and the Courts below have concurred in disallowing the objections. The defendant has appealed to this Court.

7. It appears that three contentions were raised on behalf of the defendant, the judgment-debtor in the Court of Appeal below. We need refer only to the third, which was that time was not of the essence of the contract, and that, therefore, further time should be granted. The learned District Judge, however, was of opinion that "the compromise has crystallised into a decree and the Court in execution cannot go behind the terms of the decree."

8. It is true that the Court in execution cannot go behind the decree, but it is open to the execution Court to consider what the rights of the parties, equitable or otherwise, are which follow from the contract embodied in a compromise decree. The question whether the Court is precluded from exercising its equitable jurisdiction by granting relief against forfeiture contained in a consent decree, whereby the status of landlord and tenant is established between the plaintiff and the defendant, was considered by a Full Bench of the Bombay High Court in the case of *Krishnabai v. Hari Govind* 31 B 15 : 8 Bom. L.R. 813 : 1. M.L.T. 370. In dealing with the question the learned Chief Justice Sir Lawrence Jenkins pointed out that there can be no doubt that if the matter had rested in agreement, the Court could have relieved, the right to relief would have been an incident of the agreement, and that it did not make any difference that the agreement was recorded and a decree passed in accordance therewith. The learned Chief Justice observed: "It was laid down in *Wentworth v. Bullen* (1829) 9 B. & C. 840 : 9 L.J.K.B. (O.S.) 33 : 109 E.R. 313 : 33 R.R. 353, and has since been repeatedly affirmed, that the contract of the parties is not the less a contract and subject to the incidents of a contract because there is superadded the command of a Judge," and held that as u/s 375 of the Civil Procedure Code, the decree was to be in accordance with the agreement, it cannot 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.

9. In that case, the forfeiture was sought to be enforced by a regular suit based on the compromise decree. But the principle there laid down was followed in a later case, *Balambhat v. Vinayak* 10 Ind. Cas. 746 : 35 B. 289 : 13 Bom. L.R. 154, where the question arose in execution proceedings. Sir Basil Scott, C.J., referring to the former case observed: "The ratio decidendi in that case is that Courts of Equity will not forego their power to grant relief against forfeiture in the case of non payment of rent, where the relations of the parties are those of landlord and tenants, merely on the ground that the agreement between them is embodied in a decree of the Court."

10. On behalf of the respondent we have been referred to a later case in the Bombay High Court *Lachiram v. Jana Yesu* 27 Ind. Cas 880 : 16 Bom. L.R. 668, where Scott, C.J., held, following the decision of Mr. Justice North in *Australasian Automatic Weighing Machine Company v. Walter* (1891) W.N. 170, that a consent decree can only be varied by consent, and distinguished the two cases cited above on the ground that they are inapplicable where the relation of landlord and tenant is not created by the decree.

11. There is no doubt that a consent decree can be varied only by consent, but as pointed out by Sir Lawrence Jenkins, C.J., in *Krishnabai v. Hari Govind* 31 B 15 : 8 Bom. L.R. 813 : 1. M.L.T. 370, a compromise decree is under section 375, Civil Procedure Code, to be in accordance with the agreement, and it cannot have, therefore, altered the relations of the parties as they existed under the agreement; and as it is an incident of those relations that the right of forfeiture is subject to relief that incident must still apply when those relations are established by a decree passed in accordance with the agreement. Sir Basil Scott, C.J., himself, as stated above, followed the principle in *Balambhat v. Vinayak* 10 Ind. Cas. 746 : 35 B. 289 : 13 Bom. L.R. 154 and he merely distinguished the case in the later case of *Laohiram v. Jana Yesu* 27 Ind. Cas 880 : 16 Bom. L.R. 668 on the ground that the principle was inapplicable where the relation of landlord and tenant is not created by the decree.

12. In the present case that relation was created by the compromise decree. The suit was to recover possession against the defendant as trespasser. By the compromise the defendant admitted the right of the plaintiff and was to hold the land as a separate holding under the plaintiff though without the payment of any additional tax, and the defendant and his son were to execute an agreement in favour of the plaintiff. Even assuming that there was any relation of landlord and tenant before the suit, that was put an end to, and a new relation was created between them under the compromise decree. The principle of the cases *Krishnabai v. Hari Govind* 31 B 15 : 8 Bom. L.R. 813 : 1. M.L.T. 370 and *Balambhat v. Vinayak* 10 Ind. Cas. 746 : 35 B. 289 : 13 Bom. L.R. 154, therefore, is applicable to the present case.

13. That being so, the learned Judge is in error in refusing relief to the defendant on the ground that the contract had "crystalised into a decree." The time (two months)

agreed upon for executing the agreement in the present case does not, having regard to the principle slated by the Judicial Committee in the case of Jamshed v. Burjorji 32 Ind. Cas. 246 : 43 I.A. 26 : 30 M.L.J. 186 : 3 L.W. 239 : 10 M.L.T. 184 : 14 A.L.J. 225 : (1906) 1 M.W.N. 239 : 18 Bom. L.R. 163 : 23 C.L.J. 358 : 20 C.W.N. 744 : 40 B. 289 (P.C.) [see also Mahadeo Prosad v. Narain Chandra 57 Ind. Cas. 121 : 30 C.L.J. 224 : 24 C.W.N. 330], appear to be of the essence of the contract, nor was time mace essential by any notice given by the plaintiff to the defendant. The plaintiff, as stated above, took steps to set aside the compromise decree, and the proceedings for setting it aside lasted from the 19th July 1915 to the i2nd August 1916, a period of 13 months. It was not till the 29th July 1917 that the plaintiff applied for execution of the compromise decree, and as soon as notice was served upon the defendant, he at once expressed his willingness to execute the agreement.

14. In the circumstances of the case, we think that the defendant should not be ejected for failure to execute the agreement within two months from the date of the compromise decree, and that he should be given some time within which to execute it.

15. It has, however, been contended on his behalf that he and his son are unable to execute the agreement in the form agreed upon in the petition of compromise which is embodied in the decree, that is to say, in Form B, Schedule VI of the Cantonment Code, unless certain particulars are in the first place supplied to him by the agents of Government. This objection has reference to the third clause of the form that runs "and whereas the said application has received the sanction of the general officer of the command."

16. It is urged that the appellant before executing the deed must have intimation that the sanction therein referred to has been accorded and information needful to enable him to fill in the blank.

17. We think that there is no substance in this contention. By the compromise decree the sanction of the Secretary of State in Council, who was a party to it, has already been accorded to the grant of a lease to the appellant of the land that is the subject of this litigation, and it will be enough if the appellant and his son execute the document with the clause just quoted omitted there from.

18. We accordingly direct that the defendant and his son do execute, within one month of the arrival of this order in the Court below, the agreement as provided in the compromise decree in the manner indicated above, and execution will issue on their failing to do so within the time specified above.

19. As, however, the precise ground upon which the appellant has succeeded in this appeal was not raised in the Court of first instance we direct hat each party do bear its own costs in all the Courts. Let the records be sent down without delay.