(1950) 09 BOM CK 0010

Bombay High Court

Case No: Second Appeal No. 223 of 1950

Gajanan Govind Pathak		APPELLANT
	Vs	
Pandurang Keshav Puntambekar		RESPONDENT

Date of Decision: Sept. 13, 1950

Acts Referred:

- Transfer of Property Act, 1882 - Section 114

Citation: AIR 1951 Bom 290 : (1951) 53 BOMLR 100 : (1951) ILR (Bom) 240

Hon'ble Judges: Gajendragadkar, J; Dixit, J

Bench: Division Bench

Advocate: B. Moropant, for the Appellant; N.D. Dange, R.G. Samant and B.K. Sonar, for the Respondent

Final Decision: Dismissed

Judgement

Gajendragadkar, J.

This appeal arises in execution proceedings & the only question which it raises is, whether the judgment-debtor is entitled to be relieved against forfeiture. The decree in question is a compromise decree & it was passed by the Civil Judge, Junior Division Poona, in civil Suit No. 551 of 1946 on 22-8-1947. This suit had been filed by the landlord against his tenant claiming to recover possession of the premises let to the tenant on the ground that he had committed default in the payment of rent. According to the plaint the tenant was liable to pay Rs. 84 as past rent before the date of the suit. By the compromise decree the deft. was ordered to pay the said amount of Rs. 84, costs of the suit & the rent which had accrued due since the institution of the suit up to the end of Aug. 1947. It was admitted by the pltf. that this amounted in all to Rs. 188, out of which Rs. 100 had already been paid by the deft. In effect, therefore, the deft. was ordered to pay the balance of Rs. 88 & Rs. 4-8-0 as the rent for September. The whole of this amount of Rs. 92-8-0 had to be paid by the deft. before the end of Sept. 1947. On these terms the consent decree allowed the deft. to remain in possession of the premises as a tenant of the pltf. The

consent decree further provided that in case the deft. made a default in paying the amount as aforesaid, the pltf. should recover possession of the property through Ct. The judgment-debtor did not pay the amount on or before 30-9-1947, but paid Rs. 92 on 1-10-1947. Thereupon, the decree-holder filed the present execution appln. and claimed to recover possession of the premises in question. Pending the hearing of this appln. the judgment-debtor paid annas eight which he had failed to pay even on 1-10-1947, & he also tendered in Ct. the amount of rent which had become due subsequent to the filing of the execution appln. It was on these facts that the question which the Cts. below had to consider was, whether the judgment-debtor should be relieved against forfeiture. Both the Cts. have accepted the judgment-debtor''s plea for relief against forfeiture & have dismissed the darkhast for possession. It is this order which the decree-holder seeks to challenge in the present second appeal before us.

2. This appeal had come on for hearing before Chainani J. on 10-8-1950, & has been referred to a Division Bench by him. Before Chainani J. it was urged that there was a conflict between the view taken by a F. B. of this Ct. in Waman Vishwanath v. Yeshwant Tukaram 50 Bom. L. R. 688 : A. i. R. 1949 Bom. 97 & that accepted by an earlier F. B. in Krishna Bai v. Hari 8 Bom. L. R. 813 : 31 Bom. 15 , as also by a D. B. in Balambhat v. Vinayak 13 Bom. L. R. 154 : 85 Bom. 239, Chainani J. felt prima facie impressed with this argument & so he referred this case to a Division Bench. That is how this matter has come before us today for final disposal.

3. There can be no doubt the present case falls within the principle laid down by the F. B. of this Ct. in Krishna Bai''s case 8 Bom. L. R. 813 : 31 Bom. 15 . In the said case the pltf. was seeking to enforce by a suit her right to forfeiture which had been declared in a consent decree. The decree was merely declaratory & could not have been executed. That is why the decree-holder had to file a separate suit to enforce the terms of the said decree. The defence raised by the judgment-debtor in the said suit was that he should be relieved against forfeiture & the said plea of the deft. was accepted by the F. B. It was then thought necessary to refer the question to F. B. because an earlier decision of this Ct. in Shirekuli Timapa v. Mahablya 10 Bom. 435 was entirely against the deft''s plea & it was thought that the view expressed in Shirekuli''s case 10 Bom. 435 required reconsideration. This view was that the doctrine of penalties was not applicable to stipulations contained in decrees; and that such stipulations have to be strictly enforced without regard to any equitable consideration. In taking this view, Birdwood and Jardine JJ. had purported to follow the observations made by West J. in Balprasad v. Dharnidhar Sakharam (1875) P. J. 366 where West J. had emphasised the fact that the doctrine of penalties is not applicable to the class of cases covered by decrees & added that

"those who, with their eyes open, have made alternative engagements & invited alternative orders of the Ct., must, if they fail to perform the one, perform the other, however greatly severe its terms may be."

It may be pointed out that both in the case of Shirekuli Timapa v. Mahablya 10 Bom. 435 as well as the earlier judgments on which it relied, the plea for relief had been urged by the judgment-debtor in execution proceedings, whereas in Krishna Bai''s case 8 Bom. L. R. 813 : 31 Bom. 15 the F. B. were dealing with the same plea made by the deft. in the suit filed against him to enforce a decretal clause. Jenkins C. J. who delivered the principal judgment of the F. B. referred to this distinction, but he proceeded to deal with the question of the principle involved & he came to the conclusion that on principle the earlier view was unsound. On principle there can be no doubt that as between the landlord & the tenant, the tenant, would be entitled to relief against forfeiture resulting from the non-payment of rent. The principles underlying Section 114, T. P. Act, have been applied on equitable grounds even apart from the provisions of the said section. In England it has always been recognised that a forfeiture clause for non-payment of rent amounts merely to a security for the rent & so relief was always given to the defaulting tenant on the ground that if the tenant pays the lessor the rent in arrear together with interest thereon & his full costs of the suit, the lessor is deemed to have recovered full compensation and to have been put in the same position as if rent had been paid to him when it was originally due. The same view has been taken by all the Indian H. Cs. in dealing with the claims for possession made by landlords against their tenants on the ground that the tenants have committed default in the payment of rent. It is this equitable principle which has received statutory recognition in the provisions of Section 114, T. P. Act. In dealing with the question raised before the F.B., Jenkins C. J. observed that if the tenant was entitled to relief principle against forfeiture under this equitable principle, it is difficult to see why he should not get the same relief merely because the agreement between the parties has merged in a consent decree. It was an incident of the relationship of landlord & tenant, observed Jenkins C. J., that the right of forfeiture was subject to relief & so that incident must still apply when those relations are established by a decree passed in accordance with the agreement. He then referred to the decision in Wentworth v. Bullen (1829) 9 B. & C. 840 : 9 L. J. K. B. 33, & observed that the principle had been repeatedly affirmed that

"the contract of the parties is not the less a contract & subject to the incidents of a contract because there is superadded the command of a Judge."

The result of this F. B. decision was that the earlier view in Shirekuli''s case 10 Bom. 435, was overruled & it was treated as settled that in cases where the relationship of landlord & tenant is created between the parties by a compromise decree, the judgment-debtor who is a tenant would be entitled to relief against forfeiture resulting from, his failure to pay the rent at the stipulated time. In the present case there is no doubt that the compromise decree did create or continue the relationship of landlord & tenant between the decree-holder & the judgment-debtor, & the forefeiture which the decree-holder seeks to enforce has resulted from the judgment-debtor''s failure to pay the amount in question within

the stipulated period. The Cts. below have held, following the earlier F. B. decision, that the judgment-debtor is entitled to the relief as claimed by him, & so long as that decision stands, there can be no doubt that he is entitled to such relief.

4. We must, however, proceed to examine the contention urged before us by the applt. that this decision is inconsistent with the subsequent F. B. decision in Waman v. Yeshwant 50 Bom. L. R. 688 : A. I. R. 1949 Bom. 97 . Now, in Waman v. Yeshwant 50 Bom. L. R. 688 : A. I. R. 1949 Bom. 97, the F. B. was dealing with a mtge. decree which was passed on an award. The decree directed the judgment-debtor to pay the decretal amount by certain instalments & it provided that if the judgment-debtor failed to pay any two instalments regularly, the decree-holder would be entitled to realise the moneys due to him by getting the mortgaged property sold through Ct. The judgment-debtor failed to pay two instalments regularly & the decree-holder sought to exercise his right to recover the whole amount due by sale of the properties. Thereupon the judgment-debtor pleaded to be relieved against the said claim. The question as to whether in such a case the executing Ct. was entitled to grant relief to the judgment-debtor had given rise to conflicting decisions & so the matter was referred to the F. B. As was pointed out by Ghagla Ag. C. J., as he then was, who delivered the judgment of the F. B., the two protagonists of these conflicting views were Sir John Beaumont and Sir Norman Macleod. The F. B. in Waman''s case 50 Bom. L. R. 688 : A. I. R. 1949 Bom. 97 , preferred the view expressed by Beaumont C. J. & ruled that the contrary view adopted by Macleod C. J. on several occasions should be treated as no longer good law. Shortly stated the view accepted by the F. B was that if it appears that the decree in question directs a certain sum of money to be paid by a particular date & adds a condition that if the said money is not paid on the said date a larger sum shall be paid, that condition is in the nature of a penalty against which a Ct. of equity can grant relief & award to the party seeking payment only such damages as he may have suffered by the non-performance of the term as to the payment of the money. On the other hand, if the decree makes a particular sum payable on a certain date & it follows the said direction by a condition allowing to the debtor a concession, as for example, the liberty to pay a lessor sum or to pay the said sum by instalments, then the party who seeks to take advantage of that concession must carry out strictly the conditions on which the concession was granted. If the terms on which the concession was thus given are not carried out, there is no power in the Ct. to relieve the defaulting party from the obligation of so doing. The terms of the mtge. decree with which the F. B. was concerned in Waman''s case 50 Bom. L. R. 688: A. I. R. 1949 Bom. 97, Were construed as amounting to a concession, with the result that the F. B. held that the judgment-debtor was not entitled to any relief aa claimed by him.

5. It would thus be clear that the two F. B. decisions do not cover the same or similar ground & were in fact dealing with entirely different situations. The earlier F. B. was dealing with a compromise decree creating the relationship of landlord & tenant & it was held that the equitable jurisdiction to give relief to the tenant against the

landlord''s claim for forfeiture & re-entry can be exercised by Cts. even though the said relationship of landlord & tenant is the result of the terms of a compromise decree. In a sense, therefore, this decision recognises an exception to the rule that consent decrees can be varied only by consent. On the other hand, the subsequent F. B. decision in Waman''s case 50 Bom. L. R. 688 : A. I. R. 1949 Bom. 97 was not concerned with compromise decrees of this kind. In this latter F. B. case the question was as to the powers of the executing Ct. to grant relief to the judgment-debtors where consent decrees direct such judgment-debtors to pay certain amounts on specified dates or within a specified period, & in dealing with this question the P. B. held that there is jurisdiction to grant such relief if on a construction of the decree in question it appears that the clause sought to be enforced amounts to a penalty. This again can well be regarded as another exception to the rule that consent decrees can be varied only by consent. If it is borne in mind that the question of granting relief which the two F. B. decisions deal with arose under dissimilar circumstances & involved the consideration of different principles, it would be difficult to hold that there is any conflict between them. On the other hand, there is one feature which is common to both the decisions & that consists in the fact that both the decisions do not accept unreservedly or without exception the broad principle that consent decrees can be varied only by consent. We are, therefore, unable to accept the argument of the applt. that there is any conflict between the two F. B. decisions at all. We think that whenever Cts. are dealing with the question of granting relief to judgment-debtors, they must decide in which class of cases the decree in question falls. If the decree falls in the class of cases which was dealt with by the judgment in Krishna Bai''s case 8 Bom. L. R. 813 : 31 Bom. 15 the principle therein laid down must be applied. If, on the other hand, the decree falls in the other class of cases which was the subject-matter of the decision in Waman''s case 50 Bom. L. R. 688 : A. I. R. 1949 Bom. 97 it is the principle laid down in that case that must be applied.

6. In this connection it may not be inappropriate to refer to some observations made in the judgment in Waman''s case 50 Bom. L. R. 688 : A. I. R. 1949 Bom 97 . While dealing with the two conflicting views adopted by Beaumont C. J. and Macleod C. J,, Chagla Ag. C. J. has referred to a third view which has been characterised by him as the more extreme view & he has added that this extreme view has been adopted in Shirekuli Timapa v. Mahablya 10 Bom. 435 and Lachiram Dagduram Marwadi Vs. Jana Yesu Mang, . He then added that it was unnecessary to consider whether the extreme view adopted in these two decisions had not gone too far in restricting the jurisdiction of the Ct. to give relief against penalties. It has been suggested before us by the applt. that these observations show that this more extreme view has not been disapproved & may still have to be considered by us in the present case. Since I was a party to this decision of the F. B. I think I ought to add that it was not brought to our notice pointedly that the decision in Shrekuli''s case 10 Bom. 435, had been expressly overruled by the F. B. decision in Krishna Bai

v. Hari 8 Bom. L. R. 813 : 31 Bom. 15. As the observations in question show, we felt some hesitation in accepting the extreme view propounded in the two decisions in question, & if only our attention had been invited to the F. B. decision in Krishna Bai''s case 8 Bom. L. R. 813 : 31 Bom. 15 , we would certainly have made it clear that the view adopted in Shirekuli''s case 10 Bom. 435, was no longer good law. As regards the decision in Lachiram Dagduram Marwadi Vs. Jana Yesu Mang, it is no doubt true that Scott C. J. and Beaman J. adopted the extreme view that a consent decree can only be varied by consent ; but it must be pointed out that even while this extreme view was adopted, the learned Judges recognised the validity of the raito in Krisnna Bai''s case 8 Bom. L. R. 813 : 31 Bom. 15 but refused to apply the said ratio to the facts before them on the ground that the said ratio was applicable only where the relationship of landlord & tenant is created by the decree. In fact, Scott C. J. himself applied the principle laid down in Krishna Bai''s case 8 Bom. L. R. 813: 31 Bom. 15 in Balambhat v. Vina-yak 13 Bom. L. R. 154 : 35 Bom. 239. It is significant to notice that while applying the said principle Scott C. J. refused to make any distinction between cases where the relief is claimed in a separate suit & those where it is claimed in execution proceedings. In Balambhat v. Vinayak 13 Bom. L. R. 154 : 35 Bom. 239 the judgment-debtor had asked for the relief in execution proceedings & had relied upon the decision in Krishna Bai''s case 8 Bom. L. R. 813 : 31 Bom. 15 in support of his plea. The decree-holder, on the other hand, contended that the said decision was inapplicable because the principle laid down therein could be applied only where a separate suit is brought to enforce the terms of a declaratory decree & not where the decree is being executed. The decree-holder''s contention had been upheld by the lower appellate Ct., but Scott C. J. reversed the decision of the lower appellate Ct. on the ground that the distinction sought to be made was without any substance & that the principle applied equally in both classes of cases.

7. We therefore think that there is no substance in the applt''s. contention that the decision in Krishna Bai''s case 8 Bom. L. R. 813 : 31 Bom. 15 is inconsistent with the subsequent decision in Waman''s case 50 Bom. L. R. 688 : A. I. R. 1949 Bom. 97 & we are satisfied that the case before us is governed by the principles laid down in Krishna Bai''s case 8 Bom. L. R. 813 : 31 Bom. 15 & that the decision in the said case is still good law. We must, therefore, hold that the Cts. below were right in granting relief to the judgment-debtor. The default made by the judgment-debtor in the case in payment of rent is purely technical since the amount in question was paid by him only a day later than the stipulated period.

8. The result is that the appeal fails & must be dismissed with costs.