CEYLON CARRIERS LTD.

v.

PEIRIS

COURT OF APPEAL.
SOZA, J. AND DE SILVA, J.
C. A. APPLICATION 117/80 · D.C. COLOMBO 1394/RE.
MAY 20, 21, 1981.

Civil Procedure—Application for execution of decree appealed against—Settlement entered at inquiry into such application—Judgment-debtor required to pay sum of money before last day of each month without two consecutive defaults—Writ to issue on such defaults - Standing order given to bankers of judgment debtor to make said payments in time—Failure to make payments due to inadvertence on part of bankers - Whether writ will issue—Laches - Scope of equitable doctrine relating to penalties and forfeitures—When strict compliance with terms dispensed with - Whether analogy of default in compliance with compromise entered under section 408 of Civil Procedure Code applicable.

Where an application was made for stay of writ pending appeal by the defendant-petitioner (judgment-debtor), a settlement was arrived at according to which the defendant-petitioner company had to pay the current monthly damages on or before the last day of each month without making two consecutive defaults. If there was such default both writs were to issue without notice to the defendant petitioner. The defendant-petitioner thereafter gave a standing order to its bankers to remit the said sum to the plaintiff respondents on or before the 20th of each month so as to comply with the settlement but the bankers by some inadvertence omitted to make two consecutive payments due for June and July 1979. The plaintiff-respondent applied for writ in terms of the said settlement and, on the defendant-petitioner objecting the matter was inquired into by the learned District Judge who made order directing the issue of writ. The defendant-petitioner moved the Court of Appeal by way of revision and/or for leave to appeal.

Held

(1) The analogy of the circumstances under which the Court would interpose to amend or set aside a compromise decree under section 408 of the Civil Procedure Code is misleading and not applicable when it comes to enforcement of arrangements entered into by the parties themselves of consent in regard to execution of decrees and reduced into an order of Court.

(2) The equitable doctrine relating to penalties and forfeitures does not apply to "pre-payment orders" and to orders made for the stay of execution on agreed terms and strict compliance with such terms will be insisted on except where there is absolute impossibility of performance.

(3) There had been laches on the part of the defendant-petitioner and a party guilty of laches will not in any event be granted equitable relief. The defendant petitioner could have caused the bank statement for June 1979 to be perused and would then have realised that the payment for June had not been remitted but this had not been done.

Cases referred to

(1) *Newton v. Sinnadurai, (1951) 54 N.L.R. 4.*
(2) *Ram Gopal Mookerjea v. Samuel Masseyk and Thomas, (1860) 8 Moore's Indian Appeals 239.*
(3) *Venkataramana v. Gurappa, (1916) A.I.R. Madras 1006.*
(4) *Mahalakshmamma v. Venkatachalamayya, (1954) A.I.R., Madras 870.*
(5) *Sanoon v. Theyvenderarajah, (1963) 65 N.L.R. 574.*
(6) *Ramanaden Chetty v. Fernando, (1923) 24 N.L.R. 411.*
(7) *Balprasad v. Dharnidhar Sakharam, (1874-1875) unreported.*
(8) *Mayer v. Harding, (1867) L.R. 2 Q.B. 410.*
(9) *Shirekuli Timapa Hegda v. Mahablya and others (1886) 10 Bom. 435.*
(10) *Punchi Nona v. Peiris, (1924) 26 N.L.R. 411.*
(11) *Simon Singho v. William Appuhamy, (1925) 26 N.L.R. 408.*
(12) *Perera v. Gonaduwa, (1971) 74 N.L.R. 207.*
(13) *Rajapakse v. Appuhamy, (1975) 79 (1) N.L.R. 457.*

APPLICATION in revision and/or for leave to appeal from an order of the District Court, Colombo.

C. Ranganathan Q.C., with *D. R. P. Goonetilleke, K. S. Tillekeratne* and *T. Yogesunderam*, for the petitioner.

Eric Amerasinghe, with *Vernon Martyn*, for the respondent.

Cur. adv. vult.

June 12, 1981.

SOZA, J.

This is an application for revision and/or leave to appeal from the order made on 9.12.1980 by the learned District Judge of Colombo directing that the writ in execution of the decree entered in this case be issued. It would be useful to have before us a resume of the incidents which lead to the making of the order sought to be reviewed.

The respondent who is the plaintiff in this case instituted this action on 17.12.1969 for the ejectment of the petitioner company which was the defendant in the case from premises No. 45/2, Alwis Place, Colombo 3, and for the recovery of arrears of rent and damages. After trial judgment and decree were entered in favour of the plaintiff-respondent on 28.7.1973. The defendant-petitioner appealed. The plaintiff-petitioner moved for execution of the writs and the defendant-petitioner moved for stay of execution. On 9th October, 1973, the matter was settled on the following terms:

> "After giving credit for all the payments made by the defendant up-to-date, it is agreed that a sum of Rs. 51,485 is due as arrears of damages up to 30th September, 1975. Of

consent, writs are stayed pending the decision of the appeal, in the event of:

(a) the defendant paying a sum of Rs. 2,135 per month to the plaintiff, as from 1st October, 1975, on or before the 1st day of each and every month, commencing from 31st October, 1973, without making two consecutive defaults;

(b) the defendant paying to the plaintiff's proctors a sum of Rs. 705 per month out of the accruing damages, as from 1st October, 1975, on or before the 1st day of each and every month, commencing from 31st October, 1973, without making two consecutive defaults; and

(c) the defendant paying to the plaintiff's proctors a sum of Rs. 2,000 per month out of the aforesaid accrued damages of Rs. 51,485 as from 1st October, 1973, on or before the last day of each and every month, commencing from 31st October, 1973, without making two consecutive defaults.

If the defendant makes default in any of the payments as aforesaid, both writs will issue without notice to the defendant. If writs issue after one year they are to issue without notice to the defendant.

The payment under (b) and (c) above will be retained by the plaintiff's proctors till the final decision of the appeal and be paid out in accordance with the results of the appeal.

In the calculation of the accrued damages of Rs. 51,485 legal interest provided for in the decree have not been taken into account".

Under the settlement the defendant-petitioner had to pay the current monthly damages of Rs. 2,135 on or before the last day of each month beginning 1st October, 1973. On 13th November, 1973, the defendant-petitioner gave a standing order to its bankers to remit to the plaintiff-respondent the said sum of Rs. 2,135 on or before the 20th day of each month beginning from 20th November, 1973, until further notice. The bankers of the

defendant-petitioner made the payments directed on the standing order but by some inadvertence omitted to make the payments due for June, 1979 and July, 1979. The defendant-petitioner tendered these payments later but the money was not accepted. Instead, the plaintiff-respondent moved for writ in terms of the settlement that had been entered into on 9th October, 1973. The defendant-petitioner objected to the application being allowed and the matter was inquired into by the District Judge of Colombo on 3rd September, 1980. On 9th December, 1980, the Court made order directing the issue of writ and it is the validity of this order that the defendant-petitioner seeks to canvass before us.

Before I deal with the main argument that was advanced in this case, I should make a passing reference to an argument that was advanced on behalf of the defendant-petitioner on a wrong assumption of facts. It was submitted that the plaintiff-respondent had consented to accept payment in the manner arranged by the defendant-petitioner through its bankers on the standing order referred to earlier. It was however pointed out that the plaintiff-respondent did not give such a consent. On the contrary he wrote to the defendant-petitioner refusing to inform him of any defaults of payment that were made by the bankers of the defendant-petitioner. The entire responsibility for payment was thus cast on the defendant-petitioner. When these facts were brought to the notice of learned counsel for the defendant-petitioner he did not press the argument founded on the assumption that having consented to the form of payment it is not open to him now to complain of an inadvertent omission made by the bankers.

I will come now to the main argument that was submitted in this case. Learned counsel for the defendant-petitioner referred to section 408 of our Civil Procedure Code which deals with the adjustment of actions out of Court before decree. Where such adjustments of the action are made out of Court, they can be notified to the Court by motion made in the presence of or on notice to all the parties concerned and the Court would then pass a decree in accordance therewith so far as it relates to the action and such decree would then become final so far as it relates to so much of the subject-matter of the action as is dealt with by such agreement or compromise. It has been held by the Supreme Court that such decrees commonly called compromise decrees can be rectified by the Court in its equitable jurisdiction so as to

give effect to the real intention of the parties but which owing to a common mistake has been inadequately expressed. Where it is necessary it would even substitute fresh terms which would be more in accordance with the results which the parties intended to achieve. The real scope of the equitable jurisdiction is not to rectify the contract itself but to rectify the instrument in which the terms of the contract have been inaccurately represented. The Court will interfere where the documents which the parties have prepared leave no doubt as to the general ambit of their obligations, but they have omitted through inadvertence or faulty draftsmanship to cover an incidental contingency, and this omission unless remedied, would frustrate their design—see the discussion of Gratiaen, J. in the case of *Newton v. Sinnadurai* (1). In fact a consent decree could be set aside on grounds of fraud, mistake or misrepresentation. Learned counsel referred to the Indian Civil Procedure Code Order 23 Rule 7 Note 24. *Chitaley & Rao* in their *Commentary on the Code of Civil Procedure 1908,* 7th ed. Vol. 3 (1963), explain the principles applicable to compromise decrees as follows at pages 3509, 3510:

"Where a suit is terminated by a compromise decree, a breach of its terms does not restore the parties to the rights which they had prior to the decree. But a compromise decree is a creature of the agreement on which it is based and is subject to all the incidents of such agreement. A compromise decree is but a contract with the command of a Judge superadded to it. Hence such a decree is of no greater validity than the contract on which it is based. It can, therefore, be set aside on any of the grounds, such as fraud, mistake, misrepresentation, etc., on which a contract may be set aside. For the same reason, where a compromise decree contains any term which is in the nature of a penalty under s. 74 of the Contract Act or of a forfeiture, it is open to the Court to grant relief against the forfeiture incurred under such penal clause. As a minor's contract is void, a decree on a compromise with a minor is a nullity. As between parties to a compromise the title of each party prior to the compromise cannot be set up so to defeat a title acquired under the compromise. Where, however, the nature of the title of a person in possession is being enquired into as between persons claiming under him, it cannot be said that title prior to the compromise must be ignored as non-existent".

Learned counsel for the petitioner referred us to some Indian cases also on this question. The oldest of these is the Privy Council decision in *Ram Gopal Mookerjea v. Samuel Masseyk* and *another* (2). The point which Their Lordships had to consider here was the manner in which a court would give effect to a compromise entered into between parties. The facts in this case as they appear in the headnote are as follows: Pending the execution of decrees in suits between A, lessee, and B, under-lessee, for balance rent C purchased B's interest in the under-lease. For the protection of the property suits were then brought by C against A. An agreement was then entered into by A and C to put an end to the litigation. This agreement recited that C was indebted to A in a certain sum which C agreed to pay upon a remission by A of part of his claim, by two instalments at specified dates; and the agreement then provided that if default was made by C in paying the instalments, then the remitted money was to be held due to A by C and secured upon certain property comprised in the under-lessee as well as by making C himself liable. No place was specified nor was there any custom established by the evidence where the money was to be paid. The instalments were to be paid but not until sometime after the date specified in the agreement. The money had been tendered to A's agent but refused by him because A was absent and also because interest was not tendered. A afterwards brought an action against B and C to recover the sum remitted under the agreement on the ground that by the conditions of that agreement the instalments should have been paid on the specified days, which had not been done nor had any legal tender been made. The Judicial Committee of the Privy Council held that although A had agreed to remit part of his demand on condition of receiving payment on specified days or in default that the remitted sum was to be paid, yet there was nothing in the agreement which made the payment of the instalments on the dates fixed the essence of the contract. The technicalities of English Law with respect to breach of contracts would not be applied to such an agreement but the Court would look at what the real intention of the parties was and inquire whether it appears from the evidence that there has been any failure by B and C in the substantial performance of the contract and if there was any default to whom such default is attributable. The penalty could not be enforced as there was a bona fide endeavour to pay the money on the specified dates. Further, the agreement had been substantially performed by the payments and a strict legal tender was not necessary. The next case that was

cited was the case of *Venkataramana v. Gurappa* (3). In this case the plaintiff sued the defendant to recover a certain property which was sold by the defendant to the plaintiff. The suit was compromised on condition that the defendant would pay into Court a certain sum of money within a certain date and get back the promissory notes exhibited in the suit and return them cancelled to the plaintiff within the said date. The defendant paid the money within the date but took out the notes and deposited them after the date. On his applying for entering of satisfaction of decree the Court held that the provision regarding possession to be given to the plaintiff, if the conditions were not complied with within the time limit was penal, the object being to secure the prompt payment of the money. The money itself was paid before the time fixed. The provision for the return of the promissory notes was intended to safeguard against their possible fraudulent negotiation. As they were in the custody of the Court there was no possibility of the plaintiff suffering from their non-return within the time limit. In this type of case time is not the essence of the contract and when the interests of third parties are not affected justice will be defeated by too strict an adherence to the wording of the compromise without regard to the object intended to be secure by it. In such a case where the rights of third parties are not being prejudiced, the Court will grant relief to the defendant from the penalty.

The next case to which reference was made is that of *Mahalakshmamma v. Venkatachalamayya* (4). Here under the terms of a compromise decree A had agreed to convey certain property to B for a certain amount and that proper documents would be executed within one month after the date of the compromise. The decree further provided that both the parties should be at liberty to have the right and interest enforced in execution of the decree without reference to a separate suit. B filed two execution applications to keep the decree alive. When he subsequently filed an execution petition which was within time praying that A should be directed to execute sale deeds in his favour in terms of the compromise decree, A contended that having regard to the long delay and the rise in prices of properties the execution petition should be dismissed. It was held that the mere fact that there had been delay in enforcing the decree for specific performance did not extinguish A's rights. The delay must be such that it may be properly inferable that the party has abandoned his rights or on account of delay there must have been such a

change of circumstances that a grant of specific performance would prejudice other parties. In the present case it was not possible to infer waiver or abandonment as B had filed two earlier execution petitions indicating thereby his intention to enforce the decree for specific performance. It was further held that the rising prices of properties were not a hardship within the meaning of the law. The question of hardship had to be judged as at the date of the transaction and not in the light of subsequent events. The hardship should be one collateral to the contract, and not in relation to a term of the contract. It was held further that the compromise decree cannot be regarded as a mere contract but it has a sanction far higher than the agreement between the parties and although Courts can interfere and refuse execution of compromise decrees, in order to relieve parties against penal clause or against forfeiture, and compromise decrees embodying terms which are opposed to public policy or any statutory provision would also not be enforced in execution by Courts, yet these principles do not warrant any further extension by importing further equitable considerations. Learned counsel for the petitioner submitted that the application of equitable principles was limited in England to cases of rent and ejectment and we have imported the equitable doctrine as applied in England.

The doctrine of equity is that where a penalty clause is inserted in an instrument merely to secure the performance of some act or the enjoyment of some benefit the performance of the act or the enjoyment of the benefit is the substantial intent of the instrument and the penalty is only accessory and in such a case the Court will view the penalty clause as having been put in simply *in terrorem*. The same principle applies even in regard to forfeiture clauses for non-payment of rent—see *Modern Equity* by Hanbury, 8th ed. (1962), pp. 51, 52, 88, 89. These principles he submitted were applied in the case of *Sanoon v. Theyvenderarajah* (5) where H. N. G. Fernando, J. (as he then was) considered the authorities and adopted the English principle that in equity the construction put on a clause of forfeiture of a lease on non-payment of rent is that it is a mere security for the payment of rent, and that as the breach of that covenant is capable of a just compensation a Court of equity may award the compensation and abstain from enforcing the forfeiture. H. N. G. Fernando, J. laid down that the Courts have accepted the English principle that jurisdiction to grant relief against forfeiture for non-payment of rent does exist.

Submitting all this material learned counsel for the petitioner invited this Court to apply similar principles to the matter we have before us. The authorities relate to compromises and agreements embodied in decrees under section 408 of our Civil Procedure Code and the parallel provisions of the Indian Civil Procedure Code. It is hardly necessary to emphasise that the principles contended for by learned counsel for the petitioner apply to agreements and compromises entered into before decree is entered. When it comes to execution it is elementary that the decree as it stands must be executed. At the execution stage even where the decree is one entered in a rent and ejectment case we have no longer a landlord and tenant but a decree-holder or judgment-creditor and a judgment-debtor—see section 217 of the Civil Procedure Code.

The analogy of the circumstances under which the Court would interpose its intervention to amend or set aside a compromise decree is misleading and not applicable when it comes to arrangements made of consent in regard to execution. The principles which govern the enforcement of contracts and modification of their terms when justice requires it do not apply when it comes to the enforcement of terms and conditions entered into by the parties themselves for their convenience in regard to execution of decrees and reduced into an order of court. The decree so long as it stands will be executed by the Court at the instance of the judgment-creditor. If the circumstances spelled out in the relevant provisions of the Civil Procedure Code exist the Court will grant a stay of execution. A stay of execution can also be granted by the Court on terms agreed upon by the parties.

The compromise decree entered under section 408 of the Civil Procedure Code may limitedly be regarded as being in substance a contract to which is superadded the command of the Judge—the limitations being such as our law as accepted imposes. A stay of execution on terms proposed by the parties of their consent however is outside the field of contract. This is an advantage given to the judgment-debtor with agreed safeguards to the judgment-creditor. Such stays of execution are more closely analogous to cases where postponements of trials or inquiries are granted on agreed terms than to compromise decrees under section 408 of the Civil Procedure Code.

When a party is not ready on a trial date and is granted a date on terms what happens is that an indulgence is extended to the

party who has moved for the postponement. When a case is fixed for trial the Court will ordinarily try it. If a party is not ready for the trial when he should have been ready for trial and the Court postpones the case on agreed terms what really happens is that the Court grants that party an indulgence. So when a prepayment order is made what happens is that the Court is granting the party concerned an indulgence upon terms consented to by both sides. In fact even where the adverse party is agreeable to a postponement on terms the Court can refuse to grant the postponement. Here too there is no question of a contract. Hence if the recipient of the indulgence does not make strict compliance with the terms imposed on him the provision made in respect of defaults will be enforced. There is no question here of penalty or forfeiture. This is clear from the decided cases. Thus in the case of *Ramanaden Chetty v. Fernando* (6) an application for a postponement by the defendants was granted on their consenting to pay Rs. 75 to the plaintiff as his costs of the day along with a sum of Rs. 6.50 before the next date of trial. In default of such payment the defendants agreed to judgment being entered as prayed for. On the trial date the defendants tendered the money but the plaintiff refused to accept it and claimed judgment. The Supreme Court upheld the plaintiff's contention and gave judgment for him as prayed for with costs.

The principles which the Courts apply in such cases are the same as those enunciated by West, J. in the unreported Indian case of *Balprasad v. Dharnidhar Sakharam* (7). Here the decree was based on an agreement made by the parties that the judgment-debtors would pay a fixed sum within two months but failing such payment within the stipulated time, a much higher sum. Owing to the Court vacation there were available to the judgment-debtors only two months less than two days to make the payment. The judgment-debtors were out of time by two days in making the payment. The judgment-creditor then claimed the higher sum. West, J. said as follows at page 438:

> "If the parties, instead of submitting to the judgment of the Court before which they have placed their dispute, make a decision for themselves by an agreement which they then ask the Court to reduce to a decree, there is no authority, that we know of, for treating the decree thus obtained as to be enforced in any way differently from one proceeding solely from the mind of the Judge. The principles which govern the enforcement

of contracts and their modification, when justice requires it, do not apply to decrees which, as they are framed, embody and express such justice as the Court is capable of conceiving and administering. The admission of a power to vary the requirements of a decree once passed, would introduce uncertainty and confusion. No one's rights would, at any stage, be so established that they could be depended on, and the Courts would be overwhelmed with applications for the modification, on equitable principles, of orders made on a full consideration of the cases which they were meant to terminate. It is obvious that such a state of things would not be far removed from a judicial chaos; and as ordinary decrees are thus unchangeable, so we think are those in which, through a special provision for the convenience of parties, their own disposals of their disputes are embodied. The doctrine of penalties is not applicable to such a class of cases; and those who, with their eyes open, have made alternative engagements and invited alternative orders of the Court must, if they fail to perform the one, perform the other, however greatly severe its terms may be".

West, J. went on to refer with approval to the principle laid down in the case of *Mayer v. Harding* (8) that where the law requires something to be done within a given time, it must equally be done within that time, though performance during some part of the time is impossible.

The judgment of West, J. was relied on by Birdwood, J. in the case of *Shirekuli Timapa Hegda v. Mahablya* (9) where it is reproduced as a footnote. The case before Birdwood, J. was a tenancy suit and the consent decree entered in the case in effect created a perpetual tenancy but subject to the stipulation that the plaintiff would be entitled to re-enter the property if it was alienated or if the defendant failed to pay the rent. The Judge refused to apply the doctrine of penalties to the stipulation in the decree giving effect to the compromise.

The decision of West, J. was cited with approval by Jayewardena, A. J. in the case of *Punchi Nona v. Peiris* (10). Here a postponement of the trial of the case had been granted to the defendant on his consenting to pay the plaintiff a fixed sum of money by way of costs before the next date of trial. The defendant also agreed to judgment being entered for the plaintiffs if he made default in the

payment of costs. The defendant defaulted in the payment of the costs but pleaded that this was due to his being hindered by the floods. But it could not be said that he was prevented by floods from paying the sum he had agreed to pay during the whole of the period allowed to him. It was held that the Court had no power to grant relief to the defendants against the breach of their undertaking to pay costs in terms of the agreement. But this is not an inflexible rule. It will yield in cases where performance of the agreement is absolutely impossible.

The rule however is applicable even where the terminal date fixed for the prepayment of costs falls on a Sunday—see the case of *Simon Singho v. William Appuhamy* (11). This case was followed by Samerawickrema, J. in *Perera v. Gonaduwa* (12) where the defendant was held to his agreement to judgment being entered against him if he failed to pre-pay costs before a fixed date.

The judgment of Jayewardena, A. J. in *Punchi Nona v. Peiris* (supra) was followed in the case of *Hemamala Rajapakse v. Peiris Appuhamy* (13). Here the plaintiff had been granted a date on his undertaking to pay the defendant a stipulated amount as costs before 10 a.m. of a specified date. He agreed to his action being dismissed with costs in default. The plaintiff failed to make the payment of costs as agreed but attempted unsuccessfully to prove impossibility of performance. His action was dismissed with costs in accordance with his agreement.

One can conclude that the equitable doctrine of penalties and forefeitures does not apply to cases where the Court enforces what is commonly called a pre-payment order. Strict compliance with the terms will be insisted on except where there is absolute impossibility of performance. In regard to orders made for the stay of execution on agreed terms the legal position is no different. Strict compliance with the terms will be insisted on except where there is absolute impossibility of performance. The equitable doctrine relating to penalties and forfeitures does not apply. This is so even when the case in which the decree was entered is a tenancy suit.

In the instant case the terms on which stay of execution was granted were eminently reasonable. In fact none of the terms can be interpreted as a penalty or forfeiture. This is a case where the

judgment-creditor was asking for execution and the judgment-debtor for stay of execution of the decree. It is the substance of the total relief which the judgment-creditor is entitled to claim by virtue of the decree in the case. Hence the provision for execution of the decree on a breach of the terms on which stay is granted is not a penalty or forfeiture put in simply *in terrorem.* Indeed in the instant case in the terms on which stay of execution was granted there is provision even to cover defaults. It is only upon two consecutive defaults that writ will issue. There were in fact two consecutive defaults. If the defendant petitioner had only caused the bank statement for June 1979 which should have been available in the first half of July 1979 to be persued it would have realised that the payment for June 1979 had not been remitted. There has been laches on its part and a party guilty of laches will not in any event be granted equitable relief.

There is therefore no merit in the application of the petitioner to this Court and it is refused with costs.

DE SILVA, J.--I agree.

Application dismissed.

J. P. de Almeida,
Attorney-at-Law