
(1977) 07 GUJ CK 0001
In the Gujarat High Court

Dhami Navnitbhai Amratlal and Others	APPELLANT
Vs	
Bhagvanlal Chhaganlal and Another	RESPONDENT

Date of Decision : 04-07-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 35
Transfer of Property Act, 1882 — Section 76(a), 92, 93

Citation : (1978) 19 GLR 420

Hon'ble Judges : D.A. Desai, J;A.M. Ahmadi, J

Bench : Division Bench

Judgement

D.A. Desai, J.—Though the question raised in this appeal is a narrow one, it was argued on a wider canvass and that has added to our anxiety in reaching the correct conclusion in this matter.

2. Facts lie in a narrow compass. Respondent No. I (mortgagee) had filed Special Suit No. 8 of 1962 against the appellants (mortgagors) praying for a decree for recovery of amounts under two mortgages one in the amount of Rs. 21,000 dated 19th July 1947 and another Rs. 16,000 under mortgage dated 21st March 1950, first being mortgage with possession. Prayer specifically was for sale of the mortgage security and payment of the amount payable under the aforementioned two mortgages. This suit ended in a consent decree on 19th November 1962. There is some dispute between the parties whether the decree dated 19th November 1962 was a preliminary decree or a final decree or partly preliminary and partly final decree. By the decree, the mortgagors were required to pay Rs. 18,000 within six months that is by 20th May 1963 with running interest at 6% per annum and if they failed to pay within the period of grace, the mortgagee was entitled to recover the amount by sale of the mortgage security and balance if any by person and other property of the mortgagors. The decree further provided that as the mortgage security was in possession of the mortgagee, he must retain the rent recovered and give credit for the same towards the decretal amount. As the mortgagors failed to pay the decretal amount within the period of grace, the mortgagee filed Execution Application No.

7 of 1972 for sale of property and also for a further relief that in the event the amount realised by sale of the mortgage security does not satisfy the decretal debt, balance to be recovered from the person and other property of the mortgagors. During the pendency of this execution proceedings, the parties filed compromise statement, variously described as adjustment or compromise on 7th October, 1972. The mortgagors deposited Rs. 18,000 in the Court and mortgagee was entitled to withdraw that amount, the mortgagee was required to return all the documents of title of the mortgage security. The mortgagee vacated and handed over peaceful possession of the mortgage property except ground floor portion thereof. It was further stated that one Jadavji Parshottam was in possession as tenant inducted by the mortgagee of the ground floor of the mortgage property and, therefore, the mortgagee has not been able to hand over vacant possession of the ground floor portion of the mortgage property and the mortgagors are entitled to obtain possession by proceeding according to law. It was stated that the mortgagee has no more claim under the aforementioned two mortgages or under the decree dated 19th November 1962. It appears that was treated as adjustment of the decree and was endorsed on the decree dated 19th November 1962. Thereafter the mortgagee judgment-debtor filed Execution Application No. 3 of 1973. In this execution application, applicant mortgagee prayed for a warrant for possession against respondent No. 2, Jadavji who was in possession of the ground floor portion of the mortgage property. The Executing Court issued warrant for possession under Order 21 Rule 35 of the CPC (hereinafter referred to as "Code"), and in execution of the warrant possession was handed over to one Navnitlal one of the mortgagors. There were goods of respondent No. 2. and they were directed to be kept with the present appellant No. 1. In the mean time, it appears that respondent No. 2 filed an appeal against the order of the Executing Court awarding possession in the High Court being Appeal No. 190 of 1973. A Civil Application No. 1078 of 1973 was moved in the appeal and order staying further proceedings in execution application was obtained. The High Court while, allowing the appeal of respondent No. 2 directed to inquire whether decree in question was binding on respondent No. 2, and whether respondent No. 2 a tenant inducted by the mortgagee in possession can be directed in the execution application filed by the mortgagors to handover actual possession of the property in his possession or an order for symbolic possession can only be made. Pursuant to these directions given by the High Court, the matter was again set down for hearing by the Executing Court. The Executing Court ultimately made an order that direction for symbolic possession can only be given against the tenant inducted by the mortgagee in possession, but he cannot be directed to vacate the premises, nor can he be directed to hand over vacant possession in the execution proceedings. The mortgagors having been dissatisfied with this order have preferred this appeal.

3. Mr. S.B. Vakil, learned Advocate, who appeared for the appellants-mortgagors contended that a tenant inducted by the mortgagee in possession in the mortgage property, on redemption of the mortgage is not entitled to any

protection under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Rent Act for short), because on redemption the mortgagee's title comes to an end and anyone inducted by the mortgagee cannot have a title better than the mortgagee himself. It was said that if such a tenant of mortgagee in possession is not entitled to any protection of the Rent Act, possession can be recovered from him in execution proceedings commenced by the mortgagors to execute consent decree or a consent order in execution proceedings on his paying the mortgage dues and claiming return of possession which would complete the process of redemption. It was said that such a consent decree can be made even in a suit brought by mortgagee in possession to recover mortgage dues by sale of mortgage property and such a decree can provide for return of possession to the mortgagors on payment of the decree amount and such a decree can be executed through Court. Even if the decree was for sale of mortgage security, Mr. Vakil contended that in execution of such a decree mortgagors can pay decretal amount at any time before sale is confirmed" and either by consent of mortgagee or by an order of the Court under Order 34 Rule 5 ask for being put in actual possession and the Executing Court has jurisdiction to grant this relief. Incidentally it was urged that the Executing Court has jurisdiction to record adjustment of the decree and such an adjusted decree can be executed. Lastly it was urged that even if the Court comes to the conclusion that a separate suit is necessary, it is well settled that an execution application can be converted into a suit and execution application should be treated as a suit.

4. Mr. N.R. Oza, learned Advocate who appeared for respondent No. 2 (tenant for short) contended that the mortgage in question being an usufructuary mortgage, mortgagee cannot file a suit for sale of mortgage security or for foreclosure, and as the suit was for sale of mortgage security, it was incompetent and the decree passed therein is a nullity and the same cannot be executed. It was further said that if mortgage is considered an anomalous mortgage, rights of the parties will be governed by the terms of contract and in this view Section 76(a) of the Transfer of Property Act (Act for short) would not be attracted, with the result that the case would not be covered by the ratio of the decision in Lalji Purshottam v. Madhavji Meghaji 17 Guj. L.R. 497, but the ratio of the decision reported in Madhavji Meghaji v. Lalji 12 Guj. L.R. 980 would be attracted and the mortgagor will not be entitled to recover possession from the tenant inducted by the mortgagee in possession. Alternatively it was said that if the rights of the parties are governed by contract, on a correct construction of the terms thereof, the mortgagee had a right to lease the mortgage security and such a tenancy would enure beyond the redemption of mortgage and would be binding on the mortgagors. It was further contended that consent decree made on 19th November 1962 did not direct possession to be handed over to the mortgagors on adjustment or amendment of the decree or amendment of execution application which the Executing Court was incompetent to order, is a nullity. At any rate it was said that if it was an adjustment of the decree, it can only be recorded by the Court which granted it and the decree could be amended, but

the Executing Court has no jurisdiction to do it. Mr. Oza contended that as soon as decretal amount was paid in the Court, decree was fully satisfied and there was no adjustment of any existing liability and nothing remained to be done and future covenant in compromise decree cannot be executed, and, therefore, the execution application could not have been entertained. An alternative submission was that if the Court comes to the conclusion that decree could be amended, part of the decree relating to possession does not relate to the suit within the meaning of Order 23 Rule 3 of the Code and the Court could not decree that part and it cannot form subject matter of execution, discharge or satisfaction of the decree, and, therefore, the Executing Court cannot act upon it but it can only be enforced as an agreement between the parties in a separate suit. Assuming that what was done was adjustment of the decree, adjustment being beyond the purview of Order 21 Rule 2, the Court had no jurisdiction to record the same. It was further urged that the clause in the decree that "the mortgagors are entitled to recover possession according to law," only declared the right to recover possession and cannot be enforced by execution, that part of the decree being declaratory in character. Lastly it was urged that on a proper interpretation of the 4th clause of adjusted decree, the tenant is attorney to the mortgagor and hence he cannot be evicted.

5. First question which we must examine is: What is the nature of the mortgage in this case? Section 58 of the Act defines different kinds of mortgages. Section 58(b) defines "simple mortgage". Section 58(d) defines "usufructuary mortgage." Section 58(g) defines "anomalous mortgage." The essential feature of the "simple mortgage" is that where, without delivering possession of mortgage property, the mortgagor binds himself personally to pay the mortgage money, and agrees expressly or impliedly, that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money. Distinguishing feature of the "usufructuary mortgage" is that mortgagor delivers possession of the mortgaged property to the mortgagee and authorise him to retain such possession until payment of the mortgage money and to receive rent and profits accruing from the property in lieu of interest or in payment of the mortgage money. "Anomalous mortgage" is defined to be a mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title deeds.

6. First mortgage dated 19th July 1947 Exh. 40 shows that the mortgagors to secure a loan of Rs. 21,000/- mortgaged property therein described and put mortgagee in possession thereof. It provided that in one portion of the mortgaged property there was one tenant named Nandlal Hodaji and the tenant Nandlal accepted the mortgagee as landlord. Contract of mortgage further provides that mortgagee must recover rent and give credit for the same towards the mortgage dues. The mortgagee was authorised to let a portion of the property to the mortgagors also. Mortgagee was authorised to retain possession

till anything under the mortgage remained due and payable. Clause 8 of the mortgage provides that mortgagee is entitled to demand repayment of the mortgage dues at any time, by serving a notice of three months' duration and mortgagee would be entitled to recover mortgage dues by filing a suit bringing the mortgaged property to auction aid in the event of full mortgage dues being not satisfied from the price realised by sale of the mortgage property, balance can be recovered from the person and other property of the mortgagors. There are other terms of the mortgage which are hardly relevant for the present purpose.

7. Now, where the mortgagors bind themselves that in the event of their failing to pay according to contract, mortgagee shall have a right to cause mortgaged property to be sold and proceeds of the sale to be applied so far as may be necessary in payment of mortgage money and also undertake a personal liability, the mortgage is a simple mortgage. But in simple mortgage possession remains with the mortgagor. In this case mortgagors handed over possession of the mortgage property to the mortgagee and mortgagee was entitled to receive rent and profits accruing from the property. Therefore, it had the characteristics of usufructuary mortgage. The mortgage transaction, read as a whole was neither an usufructuary mortgage, because in usufructuary mortgage there is no personal liability to pay mortgage dues which is one of the essential conditions of simple mortgage that there would be a personal liability. Therefore, indisputably the mortgage in this case is an anomalous mortgage.

8. Section 60 provides for rights and liabilities of mortgagor and amongst other rights of mortgagor statutorily recognised one is where the mortgagee is in possession of mortgaged property he is required to delivery possession thereof to the mortgagor on the mortgagor paying or tendering mortgage money. The right of the mortgagor statutorily recognised in Section 60 of the Act is called a right to redeem and suit to enforce is called a suit for redemption. What is of importance to note is that this right to redeem carries within its sweep right to recove possession from the mortgagee on payment of the mortgage dues and if in a suit for redemption, a decree for redemption is made and if the mortgagee is in possession of the mortgaged property, the redemption decree must provide for return of possession to the mortgagor. Right to recover possession from the mortgagee and liability of the mortgagee to return possession on the mortgage debt being satisfied is an integral part of the right of redemption.

9. Section 68 provides that the mortgagee has a right to sue for the mortgage money in the cases set out in the Section. Clause (d) envisages a situation where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same "to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor, the mortgagee would be entitled to sue for mortgage money. It would transpire from the provisions contained in Section 68 that a mortgagee of an usufructuary mortgage would not be entitled

to file a suit for mortgage money if he is already put in possession of the mortgaged property. A mortgagee of an usufructuary mortgage, till he is in possession of mortgaged property would not be entitled to file a suit either for mortgage money or sale of the mortgaged property, or a decree for foreclosure. Section 98 provides that in the case of an anomalous mortgage, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage deed, and, so far as such contract does not extend, by local usage.

10. Provisions contained in Section 67(a) read with Section 68 makes it clear that a mortgagee of usufructuary mortgage who has a personal remedy given to him, whether or not, it is accompanied by right of sale, stricts sensu cannot bring an action for sale of the mortgaged property or for foreclosure *Sheikh Akbar Ali and Others Vs. Sheikh Mafijuddin of Islampur, , Mt. Mohair Den v. Nawab Talib Mehdi Khan AIR 1938 Lahore 145 and Mohammed Saeed v. Abdul Alim AIR 1947 Lahore 40*). It was, therefore, said that the mortgage in question being an usufructuary mortgage, suit filed by the mortgagee to recover mortgage money by sale of mortgaged property and also enforcing personal liability was not entertainable. A bare perusal of the mortgage deed and the relevant condition extracted herein-above unmistakably show that the mortgage was not an usufructuary mortgage simpliciter, but it was an anomalous mortgage because there was a condition in the mortgage deed making the mortgagor personally liable for the mortgage dues and which can be enforced against the mortgagor. Therefore, it was a combination of usufructuary mortgage and simple mortgage, and, therefore, it would be an anomalous mortgage. Once it is an anomalous mortgage, rights of the parties to the "mortgage would be governed by the terms and conditions of the contract of mortgage in view of the provisions contained in Section 98 (vide *Amarchand Lakamaji v. Kila Morar ILR 27 Bom 600 and Venkitasubramania v. V.T. Kamavan A.I.R 1956 Mad 434*). It thus clearly transpires that the suit mortgage was an anomalous mortgage, and therefore the submission that the mortgage was an usufructuary mortgage and, therefore, the suit filed by the mortgagee for recovery of mortgage money was not maintainable cannot be entertained and that contention must be negated.

11. If the parties' rights are governed by the contract of mortgage, the next question that must be examined is Whether the mortgages could have filed suit for recovery of mortgage money. Under the terms of the mortgage, the parties have clearly agreed that mortgagee would be entitled to demand repayment of the mortgage money at any time and that after service of a notice within three months from the date of the receipt of the notice, mortgagor failed to pay mortgage money, the mortgagee would be entitled to file a suit for return of mortgage money. This is specific and indisputable term of the contract. For enforcement of this term of the contract if a suit for return of mortgage money by sale of mortgaged property was filed, it could never be said that the suit was not competent. The suit was indisputably competent and Court had jurisdiction to entertain the same. Now, if the suit was a suit by the mortgagee for mortgage money and also to enforce the personal liability of the mortgagor, the question

is: What decree could be made in such a suit? Order 34 of the Code contains provisions for suits relating to mortgages of immovable property. Rule 1 provides as to who should be parties to suit for foreclosure, sale and redemption. Rule 2 provides for the nature of preliminary decree that must be made in a suit for foreclosure. A passing reference is necessary to some of its provision because those requirements are also incorporated in Rule 4 which provides what preliminary decree could be made in a suit for sale. A suit praying either for foreclosure or for sale, would be by mortgagee and in such a suit, it is obligatory upon the Court to pass a preliminary decree which must provide for accounts to be taken of what was due to the plaintiff at the date of such decree for (i) principal and interest on the mortgage, (ii) the costs of the suit, if any, awarded to him, and (iii) other costs, charges expenses properly incurred by him upto that date in respect of the mortgage-security, together with interest thereon; or declaring the amount so due at that date; and further directing that if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under Clause (a) or from the date on which such amount is declared in Court under Clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided to Rule 10, together with subsequent interest on such sums respectively as provided in Rule 11, the plaintiff that is mortgagee shall deliver upto the defendant that is mortgagor, or to such person as the mortgagor appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the mortgagor at his cost free from the mortgage and from all encumbrances created by the mortgagee or any person claiming under him, or where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the mortgagor in possession of the property. Rule 3 provides for final decree in foreclosure suit envisaging both the situations where the amount is paid or whether the amount is not paid. If the amount found due is paid, the defendant mortgagor has to be put in possession of the property, and that is the duty cast on the Court. Rule 4 provides for preliminary decree in a suit for sale Requirements of Rule 2 are incorporated in Rule 4, and a further provision is made that if the mortgagor fails to pay the amount found due, mortgagee can apply for final decree directing that the mortgaged property or a sufficient part thereof be sold and the proceeds of the sale applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff together with costs etc. Sub rule (2) of Rule 3 confers power on the Court to extend time for payment on a good cause being shown. Sub-rule (3) of Rule 3 provides that in a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds the Court may, at the instance of any party to the suit or of any other person interested in the mortgage security, which would include mortgagor, pass decree for sale in lieu of a decree for foreclosure Then comes Rule 5. Sub-Rule (1) of Rule 5 being important may be reproduced in extenso:

5.(1) Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under Sub-rule (3) of this rule, the defendant makes payment into Court of all amounts due from him under Sub-rule

(1) of Rule 4, the Court shall, on application made by the defendant in this behalf, pass a final decree, or, if such decree has been passed, an order--

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and, if necessary,--

(b) ordering him to transfer the mortgaged property as directed in the said decree, and, also, if necessary.--

(c) ordering him to put the defendant in possession of the property.

Rule 6 provides for passing a decree for balance of the amount which remains outstanding to the mortgagee if the proceeds are insufficient to satisfy the mortgage money. Rule 7 provides for preliminary decree in redemption suit and Rule 8 provides for final decree in redemption suit. There are forms prescribed in Appendix D and the relevant forms for our purpose are 5A and 6, the former provides for preliminary decree for sale and the latter provides for final decree for sale. It is not necessary to reproduce the form save and except saying that preliminary decree for sale must provide for delivery of possession of the mortgaged property if the amount due under the preliminary decree is paid to the mortgagee. Such a provision is absent in final decree and for good reason.

12. The suit indisputably in this case was one for sale of mortgaged property for recovering the amount payable under the mortgagee and also for passing personal decree if the sale proceeds are insufficient to satisfy the amount due to the mortgagee. The suit ended in a consent decree. Controversy is whether it is a preliminary decree or final decree or partly preliminary and partly final decree. Section 2 of the Code defines "decree" to mean the formal expression of no adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters is controversy in the suit and may be either preliminary or final. Explanation annexed to the definition provides that a decree is preliminary when farther proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It further provides that decree may be partly preliminary and partly final. The suit ended in a consent decree on 19th November 1962. This is a decree in a suit brought by a mortgagee for sale of mortgaged property. By the decree the mortgagors were required to pay Rs. 18,000 within six months with running interest at 6% per annum, further providing that if the mortgagors fail to pay amount within the time prescribed by the Court, the mortgagee would be entitled first to bring the mortgaged property to Court auction and recover the amount from the sale proceeds and if the sale proceeds are found to be insufficient to satisfy the decretal debt, the balance may be recovered from the person and other property

of the mortgagors. To the extent that mortgagors were given time to pay Rs. 18,000 within six months this decree is indisputably a preliminary decree, because if the mortgagors failed to pay the amount within the time fixed by the Court by consent of parties or within such extended time; as the Court may grant, the plaintiff mortgagee will have to take further steps, namely to seek the final decree for bringing the property to Court sale. To this extent the decree is a preliminary decree. But the decree further recites that in the event of the failure of the mortgagors to pay the amount in time prescribed by consent of the parties, the property could be brought to Court auction and sold and balance if any can be recovered from the person and other property of the mortgagors, the decree indisputably is a final decree. And it is well recognised that a decree can be partly preliminary and partly final. Now, where the relations between the parties are governed by the contract of mortgage, either party to the contract may have to enforce the contract. Three types of suits can be envisaged between the mortgagor and mortgagee. Mortgagee may bring an action either for foreclosure or for return of mortgage money. Mortgagor may bring an action for redemption of the mortgage. In either event rights of the parties irrespective of who is plaintiff and who is defendant, but with reference to what are the rights of the mortgagee and mortgagor will have to be provided for in the decree. If a suit is brought by the mortgagee for sale of the mortgaged property, decree must also provide as to what would be the right of the mortgagor in the event he pays the amount within the time fixed by the Court. If the parties by consent provide for it, the decree may have to be executed on either side. Normal concept that decree can be executed by the plaintiff decree-holder is not exhaustive and especially where the relations are governed by contract of mortgage it may have to be enforced by one or other party to the contract and decree in such a suit must provide for rights and liabilities or obligations of both the sides. To enumerate in a decree for sale of mortgaged property a provision has to be made that in the event mortgagor pays up the decretal amount, how should the property, which was mortgage security, be dealt with. If the mortgagee was in possession and if he is paid, decree must provide for return of possession. In such a suit to contend that decree can only provide for what the plaintiff prayed for, is to narrow down or unnecessarily restrict or fetter Court's jurisdiction to pass appropriate decree. And what Court can do ordinarily parties can do it by consent. In this case, contention is that the decree dated 19th November 1962 did not provide for return of possession and therefore, that provision in the decree could not be subsequently made either by adjustment or amendment of the decree or by an order of the Court in view of the provisions contained in Order 23 Rule 3, is to narrow down or unnecessarily restrict the jurisdiction of the Court to pass a proper decree in the suit brought by the mortgagee in possession for sale of the mortgaged property and return of the mortgage money. Ultimately, it must be visualised that in every such suit even if it is brought by mortgagee, if the right to redeem vests in the mortgagor, that has to be given effect to by giving mortgagor a time to pay up. It is for this very reason that either in a suit for sale of the mortgaged property or for foreclosure it is

obligatory upon the Court to give time to the mortgagor to pay the amount and consequence would only follow on the failure of the mortgagor to take advantage of the time given to him to pay up the amount. Right to redeem the mortgage is a statutory right. It cannot be whittled down or done away with because the mortgagee has chosen to enforce his right under the contract of mortgage namely return of money by sale of mortgaged property or for foreclosure. In a suit either for foreclosure or for sale, the mortgagor has to be given time to pay up the amount and right to redesign does not come to an end till the property is sold and title vests in some one else, free from all encumbrances or right to redeem is extinguished by the decree. Right to redeem carries within its sweep right to be put back in possession on payment of mortgage money. If the mortgagor, who is called upon by a preliminary decree to pay up the amount within the stipulated time, complies with that part of the decree, could it ever be said that the suit stands disposed of? Mortgagee would take away money and is it the requirement of law that the mortgagor should be forced to a separate suit for return of possession. Therefore, there are mutual rights and obligations and each has to be provided for when there is a suit either by "mortgagee or by mortgagor in relation to a mortgage. Where mortgagee has come into possession under a contract of mortgage and if that mortgage is paid up and subject to that consideration only, the mortgagor would be entitled as a matter of right under law as well as under the contract to be put back in possession. Decree must provide for it and if the decree provides for it, it becomes executable at the hands of mortgagor who would in such a case be a defendant. Therefore, mere failure or omission to provide for possession in the decree dated 19th November, 1962 would have no impact on the right of the mortgagor. In fact, a preliminary decree if it is to be drawn according to the prescribed form under the orders of the Court, should have provided for return of possession. But assuming for a moment that no such provision was made and decree directed that mortgagor should pay up the amount within the time fixed by the Court and mortgagor in compliance with the preliminary decree pays up the amount, obligation of the Court would not come to an end Provisions contained in Order 34 Rule 5 would immediately come into play. Mortgagor can make an application to the Court to draw up a final decree which must provide for return of possession. Order 34 Rule 5 goes to this extent that after a preliminary decree was made and mortgagor failed to pay up the amount and the mortgage moved the Court for final decree and when made it was brought to execution, by bringing the property to Court auction and property was sold. Rule 5 of Order 34 comprehends that before sale is confirmed by Court if the mortgagor pays up the amount, not only sale is not to be confirmed but the mortgage should be declared as having been redeemed and title deeds of the property would have to be returned to the mortgagor and if required by the mortgagor Court will have to put him in possession of the mortgaged property. Redemption would not be complete in such a case unless mortgagor is put back in possession because he parted with possession under contract of mortgage and which cannot be enforced in part only. This becomes clear from a decision in *Bhaiya Raghunath Singh v.*

Musammat Hansraj Kunwar 36 Bom. L.R. 1189, wherein the Privy Council held that right to redeem was a right conferred upon the mortgagor by enactment of which he could only be deprived by means of and in the manner enacted for that purpose viz. by act of the parties or by an order of a Court under the provisions of old Sections 92 and 93 of the Transfer of Property Act, now reenacted as Rules 7 and 8 of Order 34 of the Code of Civil Procedure. In the case before the Privy Council, there was an earlier suit in which a decree was made and it was provided therein that mortgagor would be entitled to recover possession of the property on his paying to the mortgagee certain sum being the amount of the mortgage debt by November, 15, 1896 and in default his case would stand dismissed. Mortgagor defaulted. Subsequently he brought a suit to redeem the mortgage and it was contended that the mortgage could not be redeemed as earlier decree was not complied with and subsequent suit would be barred by res judicata. While dealing with this contention, scope and ambit of the right to redeem was examined and it was observed that proper decree in a suit to redeem mortgage ought to have provided that if the amount is paid, possession should be returned and in default of repayment, property should be sold. There was a provision that in the event of failure of the mortgagor to pay the amount, the suit shall stand dismissed would in no way impinge upon the right of redemption. Therefore, it would appear that both upon the provisions contained in Order 34 especially Rules 4 and 5 right to be put back in possession is a right of any mortgagee as statutorily recognised and failure to provide in the consent decree that possession should be returned on payment would not mean that decree was either defective or parties agreed that even if the mortgagor pays up the amount, possession was not to be returned or that in the matter of possession, mortgagor was to be left to an independent suit.

13. Looking at the matter from slightly different angle, at the state at which decree on 19th November 1962 was made, it was not necessary to provide for return of possession. If it had been provided for, there was nothing wrong in doing it. But assuming, it was not provided for yet the mortgagor could have asked for possession on his complying with the first part of the decree by paying the amount. It is not conceivable that mortgagor, who is by decree called upon to pay mortgage money, should be left to a separate suit for return of possession of the mortgage security, possession of which he parted for securing mortgage loan. In order to completely discharge rights and obligations of the mortgage transaction, possession has to be returned and that can be provided for, in the course of execution at a later stage.

14. It was incidentally urged that Order 23 Rule 3 enables parties to a suit to move the Court to pass a decree in accordance with the lawful agreement or compromise arrived at between the parties to a suit but the jurisdictional fact that must be satisfied is that compromise or agreement must relate to the subject matter of the suit. It is not necessary to go into a detailed analysis of Rule 3. We would proceed on the footing that before a decree could be made by a Court on compromise or agreement between the parties, decree must relate only

to that part of the agreement or compromise which must relate to the subject matter of the suit. What then is the subject matter of the suit when a mortgagee brings an action for return of mortgage money by sale of mortgaged property? As hereinbefore discussed, in such a suit all the rights and obligations under the transaction of mortgage have to be adjudicated in the decree. Subject matter of a suit either for redemption or for foreclosure or sale of the mortgaged property would be entire mortgage transaction and all rights and obligations arising out of the transaction and they have to be adjudicated by a decree of the Court so as to leave parties to the transaction who would be parties to the suit to a situation in which they were anterior to the transaction before mutual rights and obligations were incurred and acquired. It is, therefore, not correct to say that as the suit was by a mortgagee for a sale of mortgaged property, the question of return of possession of mortgaged property on payment of the mortgage money would not relate to the subject matter of the suit. When compromise or agreement is presented before Court by the parties to a suit. Court can embody in to the decree that part of the compromise or agreement which release to the subject matter of the suit but the other parts will be binding to the parties as an agreement. Dispute may arise when that agreement embodied in the decree is sought to be enforced by execution application and a contention is raised that a part of it did not relate to the subject matter of the suit and therefore could not have been a subject matter of the decree which could be enforced in execution. Now, the language of Rule 3 enables the Court to record any lawful agreement or compromise by parties to suit. However, when an agreement is embodied in a decree only that part can be brought within the purview of the decree which should relate to the subject matter of the suit. However, the Court was not incompetent to record agreement or accept the same as compromise between the parties. Merely because some part of the agreement does not relate to the subject matter of the suit, the decree does not become part of the compromise and the Court nevertheless decided that it does relate to the suit and incorporate it into the operative portion and passes a decree in terms of it, the decree is not a nullity and not one passed without jurisdiction but would be binding on the parties to the decree and its validity cannot be questioned in execution proceedings of that decree nor can any title, derived under it be attacked (vide *Ambalal Chunthabhai v. Samabhai Bakotbhai* 45 Bom L.R. 1045). This view was endorsed by a Division Bench of our High Court in *Ahmedabad Municipal Corporation v. Joitaram* 10 Guj. L.R. 431 at 441 wherein it has been observed that the expression "so far as it relates to the suit" in its wider context would include matters which form a consideration and are thereby intimately connected with the suit and the Court need not confine the operative portion of the decree only to what is strictly the subject matter of the suit, as seen from the frame of the suit and reliefs claimed. It was further observed that every Court must approach the problem keeping in view those objections which are of a technical nature and ,which could be waived and the real or substantial objection on the score of competence of the Court over the subject matter or the parties, which could not be waived and which strikes at the very authority of the Court to pass

any such consent decree or any decree on merits as well. It is only when the Court lacks such inherent competence over the subject matter or the parties that the decree would be a nullity and this objection can be urged even before the Executing Court. But apart from this what can be the subject matter of a suit in a suit by the mortgagee for sale of mortgage properly has been examined in depth in Haji T.J. Abdul Shakoor and Others Vs. Bijay Kumar Kapur and Others, . As the ratio of this case conclusively answers the question raised, few facts may be noted. The mortgagee in that case brought a suit for recovery of mortgage money, interest and costs due on a simple mortgage. The suit ended in a consent decree and terms of compromise were supplied to the Court and Court was invited to pass a decree in terms thereof. Court accepted the application and passed a decree as prayed for. By the terms of the decree mortgagors were to execute a regular sale deed of the mortgaged property within 10 days from the date of the decree and the mortgagees were to be put in possession by the mortgagor agreeing to pay rent at Rs. 75/- each for certain shops which were retained in their possession. It was further provided that if the mortgagor tenders the amount due under the mortgage through Court or otherwise within a period of one year, the decree-holders that is the mortgagees bind themselves to reconvey the property which was sold to them under the terms of the compromise and the time was to be treated as essence of the contract. The mortgagors failed to execute the sale deed as provided by the consent decree and the mortgagee filed execution application requesting the Court to direct the mortgagors to execute the sale deed in their favour in accordance with the terms of the consent decree. This application was opposed on technical ground that the relief sought could not be had on execution but only by separate suit inasmuch as the agreement did not relate to the subject matter or the suit. Negating this contention, the Supreme Court observed that the terms of compromise relate to the suit property which was to be conveyed consisted entirely of property included in the mortgage and which was therefore liable to be sold in execution of the mortgage decree which was the relief sought in the plaint. The sale price for the conveyance under the consent terms was same for the recovery of which the suit was laid. On these findings of fact it was observed that there was, therefore, nothing which was outside the scope of the suit and it was further observed that the conveyance was the consideration for the compromise. Approaching the matter from this very angle, a provision in the consent terms even at the late stage that possession should be returned as mortgage money is paid could never be said to be beyond the subject-matter of the suit.

15. It was next contended that after the mortgagee filed execution application for sale of the mortgaged property, the compromise arrived at between the parties on 7th October 1972 and filed in the execution application initiated by the mortgagee by which right was given to the mortgagor on payment of the amount which he paid under the consent terms, to obtain possession, was an adjustment of the decree or amendment of the decree or adjustment of the execution proceedings, or compromise arrived at between the parties and filed in the

execution proceedings which the Executing Court had no jurisdiction to record. There are couple of limbs of this submission and we would examine each one separately.

16. We have already set out above the terms of the consent terms filed in the execution application. Mr. Vakil urged that this compromise between the parties was adjustment of the decree. It was countered on behalf of the respondent by Mr. Oza urging that it would not fall within the purview of Order 21 Rule 2, and, therefore, could not be recorded as adjustment of the decree Mr. Oza urged that Order 21 Rule 2 of the Code, upon a proper construction would apply to money decree only, or at best a decree in which money is payable as part of decree but not to any other. On the other hand, it was contended that Order 21 Rule 2 would apply to all kinds of decrees. Order 21 Rule 2 provides that where any money, payable under a decree of any kind, is paid out of Court in whole or in part to the satisfaction of the decree holder, the decree holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly. A very interesting controversy centred round the expression "any money payable under a decree of any kind". It is not necessary for us to examine this controversy, because there is a binding judgment on this point and for the purpose of (his appeal, it is not necessary to examine the question whether that decision requires reconsideration such an attempt was made but after referring to other decisions of the other Courts, we are not persuaded for the purpose of the present appeal to reopen the controversy.

17. In *Ellis Enas Payloo v. Kitfer Philip* AIR 1922 Bom 380 Division Bench presided over by Macleod C.J. has in terms held that the words "where any money payable under a decree of any kind is paid out of Court or the decree is otherwise adjusted," do not confine the provisions of the Rule to money decrees and the provisions of Order 21, Rule 2 would be entirely defeated, if the Court permitted an uncertified adjustment of decree to be discussed in execution proceedings. It would mean that provisions of Order 21 Rule 2 would apply to all kinds of decrees. In fact in the case under discussion the decree was a decree for partition, and in no case it could be said to be a money decree and yet, Order 21 Rule 2 was held to apply to the same. This view is also adopted by the Allahabad High Court in *Chitra Talkies Vs. Durga Dass Mehta*, .

18. We must state that a contrary view has been taken in *Vythilinga v. Arumuga* AIR 1926 Mad 748 , and this view has been adopted by the Calcutta High Court in *Tarabai Mohata and Others Vs. Union of India (UOI)*, . Incidentally, it may be mentioned that Orissa High Court has taken a middle course when in *Dhani Bahera Vs. Sushil Chandra Palit*, , it observed that where one of the reliefs in the decree is for payment of money and such payment is made outside Court, it is necessary to be certified under Order 21 Rule 2 before it can be relied upon in execution. In other words, Orissa High Court's view is to the effect that Order 21 Rule 2 would apply to that part of a decree in which money is payable under a

decree. There are thus three different views and there is cleavage of opinion amongst various High Courts. However, the Bombay decision prior to 1960 is binding on us and we would follow the ratio of the Bombay High Court which held that Order 21 Rule 2 would apply to all kinds of decrees.

19. It was then contended that if Order 21 Rule 2 were to apply to the decree under examination, the Court must examine the other limbs of the submission as to whether the compromise offered amounted to adjustment of the decree and if it did, which Court had jurisdiction to certify the same. The approach in our opinion appears to be bit hypertechnical. The decree was made by the Civil Judge Senior Division, Bhavnagar and decree was being executed by the Civil Judge Senior Division, Bhavnagar. Order 21 Rule 2 confers jurisdiction on the Court to record or certify adjustment whose duty it is to execute the decree. It can never be questioned that Court of Civil Judge, Senior Division, Bhavnagar had duty to execute the decree. Thus it had a duty to record adjustment. It is immaterial that it was recorded in the execution proceedings or in a suit, the Court being the same.

20. Incidentally it was urged that if the compromise dated 7th October 1972 offered in the execution proceedings, initiated by the mortgagee, resulted in satisfaction of the decree, further provision made therein for handing over possession would not be part of the adjustment of late decree but it would amount to amendment of the decree. Alternatively it was said that nothing more was required to be done because by the compromise decree was satisfied and covenant for future action could not form part of the adjustment. It was said that it would amount to amendment of the decree. As a corollary to this submission, it was stated that a decree can be amended only in a specified manner and the Executing Court had no jurisdiction to amend the decree.

21. It was submitted that a decree can be amended u/s 152 of the Code or by review application under Order 47 Rule 1 or as envisaged by Order 20 Rule II and there is no other mode or method of amending the decree. Section 152 of the Code provides for amendment of judgment Or decrees so far as it is relates to clerical or arithmetical mistakes arising therefrom or error arising from any accidental slip or omission and may be corrected by the Court which pronounced the judgment or passed the decree either of its own motion or on the application of the parties thereto. That is unquestionably correct. Order 47 Rule I confers power of review. If the judgment is reviewed and as the decree is required to be in conformity with the judgment, on review application being granted decree would stand corrected according to the judgment as pronounced on grant of the review application. That would be tantamount to the amendment of the decree. Order 20 Rule 11 confers power on the Court to direct payment of an amount payable under a decree to be made by instalment. Sub-rule (2) confers power on the Court after decree is made to grant option to pay by instalment but that can only be done by consent of the parties. It was said that these very provisions are exhaustive of the power of the Court to amend the decree and decree cannot be

amended in any other manner. The whole submission proceeds on the assumption that by a compromise dated 7th October 1972 offered in the execution proceedings decree was amended. As a proposition of law it must be said that decree can be amended in the only manner as hereinbefore discussed. Amendment of the decree can be made as authorised by the Code *Srilasri Vythilinga Desika Pandarasannadhi Vs. Arumuga Thambiran and Another*, . This view was reaffirmed in *Bhikhi Lal and Others Vs. Tribeni and Others*, , though on the facts of the case it was said that there was no amendment of the decree. Same view was taken in *Kishorelal Vs. Surajmal*, .

22. Real question is whether the compromise dated 7th October 1972 invites the Court to amend the decree or by recording compromise original decree dated 19th November 1962 was sought to be amended. Decree dated 19th November 1962 was being executed. Execution was sought by the mortgagee requesting the Court to sell the mortgaged property and to satisfy the decretal debt. In the course of execution of this decree mortgagor appeared and paid the amount as was sought to be paid and amount was accepted in full satisfaction of the decretal debt. At that stage, it was open to the mortgagor to call upon the mortgagee to return the title deeds and as the original mortgage was mortgage with possession and "mortgagee was in possession, mortgagor was further entitled to call upon the mortgagee to return possession. That neither amounts to adjustment of the decree nor amendment of the decree. It is merely a further execution of the decree. At best it can be said to be a compromise arrived at between the parties in course of execution of the decree, with respect to the subject matter of the decree and such a compromise is not only valid but can be further executed. Where incourse of execution of a decree for sale of mortgaged property mortgagor appears and pays up the decretal amount and ask for return of title deeds of the mortgaged property and for being put in possession, it is a fair compromise which executing Court can accept and if necessary execute it. In AIR 1939 80 (Privy Council) in the course of execution of a decree parties arrived at a compromise by which, time to pay the amount was given on the judgment-debtors agreeing to pay interest at higher rate. Contention was raised that this compromise amounts to adjustment of decree and as it was not recorded it cannot be recognised by the executing Court and stipulation for higher rate of interest cannot be enforced in course of execution, because it did not relate to the subject matter of the suit. Negating this contention. Privy Council observed as under:

Code contains no general restriction of the parties' liberty of contract with reference to their rights and obligations under the decree and that if they do contract upon terms which have reference to and affect the execution, discharge or satisfaction of the decree, the provisions of Section 47 involve that question relating to such terms may fail to be determined by the executing Court. "Amendment", or alteration of the decree whether u/s 152 or by review is a different matter under the Code. No doubt all adjustment, if not recorded under Order 21 Rule 2 cannot be recognised by any Court executing the decree. The

compromise of 1927 however was recorded; it was an adjustment even if it was something more, and it contained the terms upon which the Judgment was agreed to. It was not an attempt to bring under the decree a liability extraneous to the mortgage or the mortgage suit: of 64 I A 302 at p. 308. Their Lordships see nothing in the Code requiring them to hold that had the judgment-debtor paid the agreed installments punctually the appellants, after 1927, could have executed the decree for whole sum outstanding contrary to the terms of the compromise. Nor do they think it reasonable that such a compromise, if enforced, by the executing Court, should not be enforced as a whole. They are not prepared to regard a fair and ordinary bargain for time in consideration of a reasonable rate of interest as an attempt to give jurisdiction to a Court to amend or vary the decree. Such a bargain has its effect upon the parties' rights under the decree and the executing Court u/s 47 has jurisdiction to ascertain its legal effect and to order accordingly. It may or may not be that any and every bargain which would interfere with the right of the decree-holder to have execution according to the tenor of the decree comes under the term "adjustment" on that. Their Lordships do not pronounce.

It thus appears quite well settled that executing Court can take into account the compromise and if it amounts to adjustment, it must be recorded as required by the code but every such compromise need not be treated as adjustment merely because it has some effect on the parties' right under the decree. It also says that such compromise which is a fair bargain can be recognised by executing Court and can be given effect to in execution, and it does not amount to amendment of the decree. Question of character of the application for execution has to be decided upon the circumstances of each case. Substance of the matter must prevail over the form of the application. In the case before us, the mortgagee was seeking to get the property sold on the failure of the mortgagors to pay the amount within the prescribed time. In the course of execution, mortgagors paid up the amount and by compromise called upon the mortgagee to do what it was obligatory to do in law. This is a fair bargain and either on account of compromise or on account of provisions of Order 21 Rule 35 the mortgagors were entitled to execute this compromise for possession. Once mortgage amount is paid up the mortgagee in possession cannot retain possession of the mortgage security except under the terms of the mortgage and under the terms of mortgage, if he is bound to return possession, then on payment of the amount even by compromise mortgagor can call upon the mortgagee to return possession. On the failure of the mortgagee to do so that part of the compromise can be enforced by execution.

23. Mr. Oza however urged that this view of the Privy Council has been explained away in a very elaborate decision of the Full Bench of the Allahabad High Court in *Maharaj Kumar Mahmud Hasan Khan Vs. Moti Lal Banker*, . In fact considerable time was spent in reading the judgment of the three Judges comprising the Bench and Mr. Oza is right that it explains away the ratio of the decision in *Oudh Commercial Bank's case* (supra). But we would not examine it because decision

in Maharojkumar Mahmud Hasan's case (supra) has been overruled in Motilal Banker v. Maharajkumar Mahmud this very Allahabad judgment which went to the Supreme Court has in terms been overruled and in so doing ratio in Oudh Commercial Bank's case (supra) has been affirmed. It is, therefore, not necessary to examine the decision in Anantalal Daga and Others Vs. Debi Prasad Pandey and Others, Messrs Sehgal Brothers and Others Vs. Bharat Bank Ltd., , and Kesava Kurup Kunjurama Kurup v. Narayana Kurup Parmeswar Kurup AIR 1967 Ker 193 .

24. It was next contended that by the compromise, decree was fully satisfied and enabling provision to hand over possession cannot be enforced in execution, it merely remains as an agreement between the parties, and if it is to be enforced by one or other party, separate suit will have to be filed. This is merely another limb of the argument. We have held that in a mortgage suit decree may provide such stipulations both in respect of a decree in invitum or by a consent decree where mutual rights and obligations have to be settled and as the situation demands each party has a right to execute the decree. In fact assuming there was no consent decree in a suit which was filed by the mortgagee for recovering mortgage money and it resulted in preliminary decree Preliminary decree granted time to the mortgagor to pay the amount within the time prescribed by the Court. The mortgagor failed to pay the amount. The mortgagee moved and obtained final decree and also thereafter executed the decree by asking the Court to sell the property at Court auction. Property was brought to Court auction and was being sold. Till then the mortgagor has not participated in the proceedings and has not questioned the correctness of the finding or the decree. After the bid was accepted but before sale could be confirmed, the mortgagor appeared and paid up the amount payable under the decree. At that stage it is open to him to seek direction of the Court for return of possession. If the amount is paid up under compromise between the parties which provided for return of possession that part can be executed at the instance of the mortgagor. Even if the consent decree omitted to provide for return of possession on payment of mortgage dues, it is implicit in such a decree that as soon as mortgagor performs his obligation by paying up the mortgage dues, he became entitled to return of possession and he can move the Court to act as required by Order 34 Rule 5 read with Section 60 of the Transfer of Property Act. Therefore, the compromise dated 7th October 1972 may as well be treated as compromise in execution proceedings relating to execution, discharge or satisfaction of the decree or it may be treated as part of compromise or the request made by the mortgagor for return of possession which became his right on paying did the amount found due. Viewed from either angle, it cannot be said that nothing further was required to be done under the decree when the amount was paid up by the mortgagor, and the decree as a whole was satisfied and an execution application for return of possession would not lie.

25. It was then contended that at best the decree is a declaratory decree with reference to the question of possession and, therefore, it can not be executed.

We have above translated Clause 4 of the consent terms dated 7th October 1972 filed in execution application. It does provide that as the mortgagee in possession had inducted the tenant, the mortgager is unable to return possession and the mortgagor is entitled to recover possession according to law. Mr. Oza urged that the expression "that the mortgagor is entitled to recover possession of the ground floor portion of the mortgaged property according to law merely declares right of the mortgagor on paying the mortgage money but it does not give him a decree which can be executed. And it was urged that mere declaratory decree declares right of party and a suit can be filed to enforce right but no execution application can be straightway filed. This submission raises question of construction-of the decree. While interpreting a decree, one must keep in view the intention of the parties. Could it be the intention of the parties that while mortgagor discharges alibi obligations, it was intended by the parties that the mortgagor should file a separate suit for recovering possession, which was a counter-part obligation of the mortgagee which becomes enforceable on paying up mortgage dues. If that be so, would not have called upon even the mortgagee to part with possession of that property which was in his actual possession, and no declaration of his right was necessary because on the mortgage being redeemed, the mortgagor would be entitled to be put back in possession of the property of which he parted with possession as a part of transaction of mortgage. There was no dispute about his right to be put back in possession. Mortgagee never questioned right of the mortgagor to be put back in possession. Declaration was not an exercise undertaken for any purpose. And when a decree is a consent decree, attempt of the Court should be to find out the real intention of the parties and Court should not be merely guided by the language in which the decree is couched because it is a trite saying that drafting in *mofussil* is neither articulate nor very satisfactory. It was, however, urged by Mr. Oza that the statement in the decree that the mortgagor would be entitled to recover possession according to law, merely creates right to recover possession, but not executable as a decree. The decree when read as a whole does not permit such a construction. Apart from other consideration, the mortgagor paid up the amount, mortgagee returned possession of that part of the property which was in his possession. Mortgagee stated that he had inducted tenant and mortgagor was entitled to recover possession according to law. How he would recover possession according to law would be a question of law and not merely a declaration of right. In this connection we would refer with advantage to *Parkash Chand Khurana, etc. Vs. Harnam Singh and Others*, . Contention was that award was merely declaratory of the right of the property and, therefore, inexecutable. This contention was based on the wording of Clause 7 of the award, which provided that on the happening of certain event, the respondent shall be entitled to take back the possession. Relying on the expression "shall be entitled to take back possession" it was urged that it merely declares right to be put back in possession and can not be executed as direction given in the decree. Negating this contention, it was observed that the Court was unable to appreciate how such a clause makes award merely declaratory. It is never a precondition of the

executability of a decree that it must provide expressly that the party entitled to a relief under it must file an execution application for obtaining that relief. One has to look to the tenor of the decree to come to the conclusion one way or the other whether it is executable or merely declaratory of the rights of the parties. On the expression in the award before the Supreme Court it was held that it was executable for obtaining possession of property. We look at the tenor of the decree made on 19th November 1962 and tenor of the compromise arrived at on 7th October 1972 and we feel satisfied that executable decree was made in favour of the mortgagor when it is said that he is entitled to recover possession according to law. What constitutes "entitled to recover possession according to law, we would presently examine. In view of the latest pronouncement of the Supreme Court, it is not possible to interpret decree in the manner as done in *Banu Mal v. Paras Ram* AIR 1930 Lah 110 wherein the expression defendant shall be liable to pay interest and principal by installments and default clause was merely held to constitute declaration of right but same could not be taken note of in execution proceedings. Similar is the construction placed on the decree in AIR 1929 34 (Nagpur) , wherein under the terms of the decree it was agreed that one party named S was entitled to 3 annas share in the property belonging to the firm. S sought to execute the decree proving that he should be put in joint possession. That decree was considered to be only a declaratory decree and not executable one. We are also unable, with respect, to agree with the construction placed by the learned single Judge of the Madhya Pradesh High Court in *Hubbailal Sadashiv Vs. Mohammad Makbool Ahmed Khan and Others*, , that expression "liable to be evicted" in a consent decree only suggested that merely a liability was created which could be enforced only by a separate suit.

26. We may however frankly state that the contention is beside the point because there was no question of declaring any right. Once mortgage money was paid, by that very act, mortgagor would be entitled to be put in possession and he can ask the Court even only by an application under Order 34 Rule 5 to grant him that relief. Therefore, the whole contention that the decree was merely declaratory is beside the point.

27. It was however urged that respondent No. 2 tenant being not a party to the suit, straightway decree cannot be executed against him and therefore, a merely declaratory decree was made. It is at this stage, we must succinctly point out that respondent No. 2 was tenant admittedly inducted by the mortgagee in possession. He obtained tenancy from the mortgagee in possession. He claims to remain in possession even after mortgage is redeemed. That is an important question. Under the law of property as administered in our country no one can transfer a title to anyone better than what he has. A mortgagee in possession is under a legal obligation to return possession to the mortgagor once mortgage money is paid. He is liable to return possession on the redemption of the mortgage. Redemption can be brought about by the act of the parties or by enforcing decree for redemption. Even if the suit is not by a mortgagor for redemption but suit is by mortgagee for sale of mortgaged property or for

foreclosure, the mortgagor is entitled under law to time within which he must pay up the money and if he pays up the decree for sale or foreclosure will have to be not only refused but mortgagor can call upon the mortgagee to return possession to him. If such be the statutory obligation, can a mortgagee create a tenancy which would enure beyond the redemption of the mortgage?

28. As one stage, it was felt that a mortgagee in possession has a statutory duty u/s 76(a) of the Act to manage the property as a person of ordinary prudence would manage it if it were his own, and that this prudent management would enable him to induct a tenant and tenancy would enure beyond redemption of the mortgage so as to be binding on the mortgagor. Some High Courts were of the view that such a tenant would have the protection of local rent restriction Act. In the case of agricultural lands, there was near unanimity, that such a tenant of the agricultural land would have protection of the local Acts and on the redemption of the mortgage, the mortgagor at best would be entitled to symbolic possession. But there was cleavage of opinion in respect of urban immovable property. Matter came up before the Full Bench of this High Court in *Lalji Purshottam v. Thakkar Madhmji Meghaji* 17 G.L.R. 497. The Full Bench after examining different points of view of the different High Courts, specifically held that Section 76(a) of the Act cannot apply to cases of urban immovable property and hence the lease created by the mortgagee in possession of an urban immovable property would not be binding on the mortgagor after redemption of the mortgage, even if it were to be assumed that the lease is such as a prudent owner of property would have granted in usual course of management. It was further held that if the words of the mortgage deed clearly and indubitably expressed an intention to allow expressly creation of a tenancy beyond the term of the mortgage, then only the lease created in exercise of the power expressly conferred by the mortgage deed would be binding on the mortgagor; if the words of the mortgage deed do not clearly and indubitably disclose the intention to allow expressly the creation of tenancy beyond the term of the mortgage, the mere fact that the mortgage deed authorises the mortgagee with possession to induct a tenant would not create a tenancy binding on the mortgagor after the redemption of the mortgage. It was further held that a tenant inducted on the property by a mortgagee with possession when the tenancy of that tenant is not binding on the mortgagor after the redemption of the mortgage, is not protected under the provisions of the Rent Act. In reaching this conclusion, the Full Bench observed that once mortgagee's interest terminates, the relationship of landlord and tenant comes to an end and there being no landlord and no tenant, unless there is something special in the provisions of the particular Rent Restriction Act so far as urban immovable property is concerned, those provisions could not apply and would not confer any protection on the tenant inducted by the mortgagee during the subsistence of the mortgage with possession. It was further observed that when the mortgagor has either in the deed of mortgage or elsewhere stated that the mortgagee with possession may lease the property such authorisation to the mortgagee to let out the property to any other tenant

does not amount to any intention to allow expressly tenancy beyond the term of the mortgage and a tenancy beyond the terms of the mortgage with possession under such authorisation cannot create a tenancy which would enure beyond the term of the mortgage. These legal formulations of the Full Bench are binding on us.

29. Two questions would therefore arise:

(i) Whether respondent No. 2 a tenant was inducted by the mortgagee in possession; and (ii) Whether there is anything in the mortgage deed which clearly and indubitably expresses an intention to allow creation of tenancy beyond the term of the mortgage? Relevant part of the mortgage deed has been set out at various places in the course of this judgment. It may at once "be stated that by the terms of the mortgage, mortgagee was" given power to lease property during the subsistence of the mortgage and this can be culled out by the terms of the mortgage that on redemption of mortgage, the mortgagee shall return possession to the mortgagor. If the mortgagee agreed and undertook by the terms of the mortgage to return possession on redemption of mortgage, it would clearly negative any contention that express power was given to let out the property in such a manner that tenancy would enure beyond redemption of the mortgage. There is no express power to that effect, and on a proper construction such power will have to be negated. General power in the deed of mortgage that during the subsistence of mortgage, the mortgagee in possession may let out the property, cannot be construed to confer express power for creating, a tenancy which would enure beyond the redemption of the mortgage so as to bind the mortgagor. In this case, the tenant was inducted by the mortgagee in possession of the mortgaged property. The mortgagee in possession was landlord and relationship of landlord and tenant must terminate on the redemption of mortgage. There was no power in the mortgagee to create tenancy which would enure beyond the subsistence of the mortgage. Such a tenant in view of the decision of the Full Bench is not entitled to the protection of the Rent Act.

30. Contention is that as the tenant was not a party to the suit, decree cannot be straightway executed against him. We see no substance in this contention. Mortgagee was a party to the suit. Mortgagee was in possession. Tenant claims title under the mortgagee. Order 21 Rule 35 provides that where a decree is for the delivery of any Immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property. If the tenant claims to come in possession under the mortgagee with possession, a decree for possession against the mortgagee would be binding on the tenant. Analogy would be where a lessee is in possession a decree against the head lessee would be binding on the under lessee. Ordinarily a decree for possession passed against the tenant in a suit for ejectment is binding on a person claiming title under or through that

tenant and is executable against such person whether or not he was or was not a party to the suit. (Vide Importers and Manufacture's Ltd. v. Phiroze Framroze Taraporewala 55 Born. L.R. (SC) 271 at 277). In Jagadguru Gurushiddaswami Vs. Dakshina Maharashtra Digambar Jain Sabha, , it was in terms held that sub-lessee would be bound by the decree for possession obtained by the lessor against the lessee, no matter whether the sublease was created before or after the suit provided the eviction is based on a ground which determines the sub-lease also. In reaching this conclusion, the Supreme Court affirmed the ratio in Sheikh Yusuf Vs. Jyotish Chandra Banerjee and Others, . In fact the proposition emerges that where some one claims under judgment-debtor he can be removed irrespective of the fact whether he is a party to the suit. For the purpose of executing a decree for possession mortgagee would be a judgment-debtor who is bound to return possession, once mortgage money is paid. Position will be reverse till mortgage money is not paid and the decree is executed for recovering mortgage money. Once mortgage money is paid and mortgagor judgment debtor becomes entitled to recover possession, he becomes a decree holder and at that stage, the tenant inducted by the mortgagee with possession holds title under the mortgagee in possession. Decree for possession is against the mortgagee in possession. In such a suit tenant is not a necessary party and decree would be binding on him and can be executed through Court and it would be all the more so because the tenant being a tenant of urban immovable property and was inducted by the mortgagee with possession, he is not entitled to protection of Rent Act. Therefore, the decree can be straightway executed against him and he can be removed.

31. Last submission was that by the terms of the compromise dated 7th October 1972, tenant was attorney to the mortgagor. This submission is merely to be mentioned to be rejected. In order to claim any right by attornment u/s 109 of the Act, it will have to be shown that when on redemption of the mortgage, mortgagee returned possession and mortgagee in possession being lessor, his return of possession would amount to transfer of property leased. Even then the tenant would not be attorney because unless the mortgagor accepts him, attornment does not take place. Lessee has to elect to be subject to all the liabilities as against the mortgagor. In this case, the lessee has not elected to do anything. The mortgagor has not accepted him as a tenant. Mortgagor on the contrary was entitled to possession as agreed in the compromise dated 7th October, 1972. Therefore, there is no substance in the contention that respondent was attorney to the mortgagor.

31.1. As none of the objections raised by Mr. Oza is substantiated and in order to complete the decree for redemption as the mortgagor has paid the mortgage money, he is entitled to be put back in possession under Order 21 Rule 35. He can be put in actual possession by evicting the tenant inducted by the mortgagee in possession. Therefore, the mortgagors would be entitled to a warrant for possession and not merely a symbolic possession as held by the executing Court.

32. Accordingly this appeal is allowed and the order made by the executing Court on 7th December 1973 only awarding symbolic possession is set aside and executing Court is directed to issue warrant for possession and place the appellant in possession, if necessary, by removing respondent No. 2. Respondent No. 2 is given six months" time upto 31st December 1977 to vacate and hand over possession. In the circumstances of the case, there shall be no order as to costs.