

(1972) 11 MP CK 0007

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 25 of 1971

Gyasiram Kanairam Vaish

APPELLANT

Vs

Brij Bhushandas and Another

RESPONDENT

Date of Decision : 30-11-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 2

Citation : AIR 1973 MP 148 : (1975) ILR (MP) 133 : (1973) JLJ 150 : (1973) JLJ 125 : (1973) 18 MPLJ 201

Hon'ble Judges : Shiv Dayal Shrivastava, J

Bench : Single Bench

Advocate : C.B. Agarwal, Veena Mehta, H.G. Mishra and R.A. Roman, for the Appellant; A.R. Naokar, J.R. Sharma, N.K. Jain and V.G. Vishwaroop, for the Respondent

Final Decision : Allowed

Judgement

Shivdayal, J.

This appeal arises from proceedings under Order 21, Rule 2, Civil Procedure Code, in the following circumstances.

(a) In 1908, Rajabai executed a mortgage with possession in favour of Narayandas for Rs. 9,660/- in respect of the houses situate in Lohia Bazar and Dana Oli, Lashkar, Gwalior.

(b) On February 18, 1946, Rajabai brought a suit against Brijbhushandas (son and legal representative of Narayandas, who died in the meantime). During the pendency of the suit, Rajabai died, leaving a will behind by virtue of which the suit property devolved on Gyasiram appellant and Sitaram, brother of Smt Vithabai (respondent No. 2). Sitaram also died. Smt. Vithabai is his heir and legal representative.

(c) On February 30, 1954, a preliminary decree for redemption was passed in the above suit (No. 24 of Samvat 2006) in favour of Gyasiram and Smt Vithabai.

Under this decree, a sum of Rs. 21,354/3/- as principal and Rs. 13,798/11/- as interest and further interest thereon till the date of payment were payable by the mortgagor to the mortgagee within six months from that date.

(d) On March 20, 1959, Gyasiram alone applied for a final decree to be passed in his favour. In that application, he stated that it was on October 16, 1958 that the High Court decided the appeal which had been preferred by the plaintiffs, "and now, therefore, the plaintiffs have to make the deposit as per decree. Since Mst Vithabai plaintiff has no right to deposit the money, so appellant is making the whole deposit, i.e., Rupees 21,354/3/- as principal and Rs. 13,798/11/- as interest and further interest from 25th May, 1946 to 20th March, 1959, being Rupees 7051/7/-, aggregating Rs. 42,204/5/-. The deposit may be accepted and the defendants be notified and required to deliver possession of the mortgaged property as also all connected deeds."

(e) On March 27, 1959, the trial Court permitted Gyasiram to deposit the amount. It was made clear that the permission did not tantamount to extending the time and the Court reserved its judgment on the question whether the deposit would be within time. Notice was issued to Brijbhushandas. On March 28, 1959, Gyasiram deposited Rupees 42,204/5/-.

(f) On April 8, 1959, Brijbhushandas appeared and stated in paragraph 9 of his objections that the amount due under the preliminary decree came to Rs. 46,882/6/6, while the plaintiff had deposited only Rupees 42,204/5/-. Therefore, Gyasiram could not be permitted to make any deposit. An objection was also taken that the amount deposited by Gyasiram on March 28, 1959, was beyond the time fixed in the decree, so that the Court had no power to permit the plaintiff to make the deposit.

(g) On April 9, 1959, Gyasiram further deposited a sum of Rs. 4,590/- and prayed that a final decree be passed in his favour.

(h) On April 18, 1959, the trial Court held that the deposit had been made beyond the time allowed and directed a final decree for foreclosure to be drawn up. Aggrieved by that order, the appellant preferred an appeal to the District Court. The appeal was rejected as being on an insufficient stamp. But the High Court allowed Gyasiram's revision and remanded the appeal to the District Court for decision on the merits.

(i) On March 23, 1963, the Additional District Judge allowed Gyasiram's appeal, holding that since the amount had been paid before the final decree was passed, it was within time. Reliance was placed on Order 34, Rule 8. Civil Procedure Code. In the result, he directed a final decree of redemption to be drawn up in favour of Gyasiram.

(j) Before the Additional District Judge, it was contended that the amount which Gyasiram had deposited was still short by Rs. 88/1/-. Brijbhushandas preferred a second appeal to this Court. This court took the view that although the amount

deposited by Gyasiram was within time, yet, as there was shortage of Rs. 88/1/-, no final decree could be passed in his favour. The appeal was, therefore, allowed and the order of the trial Court was restored.

(k) Gyasiram appealed to the Supreme Court. Their Lordships held that since the shortage was on account of the undertaking given by Gyasiram in the matter of stay, it could not be taken to be a part of the amount due under the preliminary decree. Their Lordships, therefore, held that Gyasiram was entitled to a final decree in his favour. Accordingly, their Lordships set aside the order of this court and restored the order of the Additional District Judge (Civil Appeal No. 959 of 1964, decided on March 30, 1966). Their Lordships said in the judgment:--

"We may add that the shortage in question was made good by the appellant soon after the order of the Additional District Judge and long before the judgment of the High Court."

(1) On July 25, 1966 Gyasiram (decree-holder) made an application for issuance of an injunction to restrain Brijbhushandas (judgment-debtor) from collecting rents from the tenants.

(m) On the same day, that is, July 25, 1966, Brijbhushandas made an application under Order 21, Rule 2, CPC and filed a copy of an alleged agreement "for recording compromise". The plaintiff opposed the defendant's application and denied having entered into any such agreement or to have received any advance payment or earnest, or to have transferred ownership of the suit property to the defendant. He further objected to the non-production of the alleged agreement in original in the Court, and also submitted that if any such document is produced, it must be fictitious and a forged document. He further alleged that there were no domestic disputes of which he was fed up. He had diligently prosecuted the litigation for several years and he was entitled to get the property, the value of which was Rs. 4,00,000/-.

(n) On August 4, 1966, Brijbhushandas filed in the Court the alleged original agreement, which, on Gyasiram's application, was kept in safe custody of the Court.

(o) While the enquiry under Order 21, Rule 2, Civil Procedure Code, was in progress, an application was made by Gyasiram on February 18, 1967, in which he reiterated that the defendant's application could not be allowed; that the alleged agreement was false and fictitious: and further submitted that according to the alleged agreement, six months time was fixed for execution of the sale deed but the defendant did not take any steps so that it had already become infructuous and nothing could be done in proceedings under Order 21, Rule 2, Civil Procedure Code; it was open to the defendant to sue him for specific performance.

The trial Court recorded evidence of the parties on the defendant's application under Order 21, Rule 2, Civil Procedure Code, and allowed it by order dated

February 24, 1970. It may be mentioned here that the plaintiff's application dated July 27, 1966. for issuance of injunction was dismissed by the trial Court by order dated September 28 1966. However, on a revision filed in this Court, Mr. Justice Krishnan ordered that the tenants on the property be directed to deposit rent in Court on due dates and the amount so deposited should not be paid to either party till the conclusion of the enquiry. (Civil Revision No. 297 of 1966, decided on November 30, 1966).

Aggrieved by the order of the Executing Court, Gyasiram preferred an appeal. The learned Additional District Judge, Gwalior, dismissed it. This second appeal has been filed from that order.

The alleged agreement for sale dated July 13, 1966, may be reproduced here:--

"Jo ki ham mujiram ke been jayadad ek kita bada Mu. No. hal 20/514 sabik Mu. No. 2/1761 wake Lohiya Bazar Lashkar Joki Rajabai ke bade ke nam se mash-hoor hai tatha ck kita makan Mu. No. hal 7/105 sabik Mu. 3/1895 wake didwana oli Lashkar ki jismen Nasim Ahmad Khan furniture wala kirayadar aabad hai in donon jayadadon ka rahan se wagujust karane ke muqadama No. 631/49 1. Di. Nyayalaya civil judge Pratham shreni Gwalior men ham muqiran ke beench chalkar decree infikar rahan muqir No. 2 Brijbhushandas ke khilap lio chuki hai aur jiska appeal dar appeal hokar decree infikar jayadad sadar mananiya Supreme Court se bhi tarikh 30-3-66 ko sthir rakhi gai hai pa-rantu main muqir No. 1 Gyasiram decreedar apane gharcloo jhagadon ss tang aakar jayadad sadr ko wagujust m karate buye use bechana chahata hun aur muqir No. 2 Brijbhushandas murtchan use kharidane ko razi hai. Ataewa main muqir No. 1 Gyasiram decree-dar uprokta jayadad marhuna men nihit apane samast hit swatwa tatha adhikaron ko ewam jayadad majkur ke mutallik sadir hua yah decree infi-kak men nihit jo bhi mujhe muqir ke haq haqoor ho unko sabko yani jayadad maj-koor ko kullam ratik par will ewaz 105000/-ek lakh panch hazar rupaye men qatai bay karne ka muhayata karta hun tatha aaj se 6 mahine ke bhitar jab bhi muqir No. 2 kreta chahe mujh sc baynama takmil kara lewe wa kreta muqir No. 2 ko is miyad men baynama takmil karna lazim hoga wa is iqrar bay pete aaj din muqir No. 1 ne muqir No. 2 se panch hazar rupaye batour peshgi hasil kiye hai tatha decree infikak jayadad majkur ke tehat aaj din tak ka Rood wagairah jodkar jo bhi matalawa jare decree baithata hai uska hisab tay hokar 50000/- pachas hazar rupaye matalawa jare decree sahi hona ham muqiran ne qabul and manjoor kiya hai. Yah mata lawa jare decree 50000/- pachas hazar rupaye tatha peshgi raqam 5000/- ru. jae bay ki raqam men waqta registry baynama mujra di jakar shesh matalawa jare bay 50000/-pachas hazar rupaye men muqir No. 1 muqir No. 2 se hasil karunga. Kharcha registry jm-me khariddar ke hota. Jaydad sadar par abhi tak jo qabja muqir No. 2 ka bataur mutahin ke chala aa raha hai wah aaj se bataur malik ko hoga wa rahega. Is prakar decree ka razinama ho gaya hai. Agar andar miyad men muqir No. 1 baynama takmil na karun to muqir No. 2 ko jabaran bajariye adalat bay-nama takmil karwa pane ka adhikar hoga. Usi tarah yadi muqir no, "kreta baynama

takmil na karawe to raqam byana zapt ho jawegi.

Etewa yah iqrarnama likh diya ki pra-man rahe aur samay par kam awe."

It opens with a statement about the institution of the suit for redemption (original suit No. 631/1949, in the court of the Civil Judge, Class I, Gwalior) and that a decree for redemption had been passed against Brijbhushandas, which had been maintained by the Supreme Court on March 30, 1966. Then the recital is:--

""But, I party No. 1 Gyasiram decree-holder having been tired of my domestic quarrels, desire to sell the suit property in stead of redeeming it, and party No. 2 Brijbhushandas mortgagee is willing to purchase it. Therefore 1, party No. 1, Gyasiram, decree-holder agree to sell absolutely on a consideration of Rs. 1,05,000/- (One lac five thousand) all my rights, title and interests in the said mortgage property and also in the decree for redemption in respect of the suit property,

and

Within six months from today, whenever party No. 2 vendee desires, he may get a sale deed executed by me and party No. 1 will be bound to execute a sale deed within the said time. (Underlined by me) "

It is then recited that Gyasiram has received Rs. 5,000/- as advance from Brijbhushandas and then it is recited as follows:--

"This decretal amount Rs. 50,000/- (Fifty thousand) and the advance Rs. 5000/- will be adjusted at the time of the registration of the sale deed and party No. 1 will be paid by party No. 2 the balance Rs. 50,000/-. Expenses for registration will be borne by the purchaser. The possession of party No. 2, which has so far been as mortal see, shall from today be and continue as that of the owner. In this way, there has been a com promise of the decree. If within the stipulated time, I, party No. 1, do not execute a sale deed, party No. 2 will have the right to get specific performance through Court. Simi larly, if party No. 2 vendee does not get a sale deed executed, then the earnest shall be forfeited." (Underlined by me).

Learned counsel for the appellant had confined this appeal to two points. It is contended that the trial Court palpably erred when it held that Gyasiram executed the alleged agreement. Secondly, such an executory agreement cannot be certified under Order 21, Rule 2, Civil Procedure Code.

In the trial Court, each side produced a hand-writing expert. Each gave an opinion in favour of the party which called him. The trial Court did not discuss their evidence but relied on the handwriting expert produced by Brijbhushandas because his evidence was consistent with the evidence of two attesting witnesses. A third handwriting expert, Banmali Dwivedi, was called by the judgment-debtor, but he was required merely to take photographs of the

disputed documents and the specimen signatures. He was not examined by the judgment-debtor as his witness. In the disputed signature there is a line drawn below the alleged signature of Gyasiram. The statement of Brijbhushandas is that Gyasiram did not underline his signature, when he executed the alleged agreement. It was he who got it photographed before filing in the Court. But in the photograph the line is there. This means that the line must have been drawn while the document was in the judgment-debtor's possession. The judgment-debtor's witness, Sitaram, Photographer, states that when he took the photograph and prepared the negative, there was no line under the signature of Gyasiram. It is not possible to believe him because if there was no line in the negative, it could not appear in the print.

Some stress was laid by the learned counsel for the appellant on the overwriting in the letters ^.^;** and ^.^e** The over-writing does not appear in the photograph, which means that the over-writing must have been made after the photographs were taken. One possibility is that the overwriting was made before the original was filed in the Court. The other possibility is that the over-writing was made after it had been filed in the Court. Learned counsel for the appellant excludes the second possibility on the ground that as soon as the document was filed, it was kept in a served cover in safe custody of the Court. There could not be any tampering thereafter.

The Courts below have overlooked this feature of the case.

It seems clear to me that the probabilities of the case speak against the judgment-debtor's story that such a compromise was arrived at between the parties.

(i) The suit for redemption was instituted on February 18, 1946, and ultimately a final decree for redemption was passed by the Supreme Court on March 30, 1966. Thus, the battle was won by Gyasiram after it had been fought for about 20 years.

(ii) From March 23, 1962, Gyasiram was entitled to rent, the amount of which came to Rs. 29,376/- on July 25, 1966, (51 months at Rs. 576/- per month) He was thus to lose this amount of Rs. 29,376/- and was to get only Rs. 55,000/-, that is, he was to get Rs. 25,624/- only and was to lose his title for that paltry sum.

(iii) There was nothing which remained for Gyasiram to do. He had deposited the entire amount payable under the decree. A final decree had been passed by the Supreme Court. All that remained was that Gyasiram was to be delivered possession of the property and also the title deeds. Thus, the excuse shown in the agreement for sale that Gyasiram was fed up with his domestic quarrels is wholly incredible.

(iv) Gyasiram had already in his favour the decree of the highest Court and had deposited a huge sum of Rs. 46,000/- odd. He had become entitled to

possession. What was he to get under the alleged agreement for sale? The sale was apparently to be for a consideration of Rs. 1,05,000/-. The agreement says that the amounts under the decree were settled for a lump sum of Rs. 50,009/-, which shows that Rs. 50,000/- was to be paid by the decree-holder to the judgment-debtor and it was provided in the agreement that this sum of Rs. 50,000/- would be adjusted towards the sale consideration. To put it differently, according to the agreement, Brijbhushandas was to pay Rs. 55,000/- to Gyasiram and Gyasiram was allowed to adjust Rs. 50,000/- (Payable by Gyasiram under the decree) towards the sale consideration. This shows that the agreement was drawn up by some one who was completely ignorant of Gyasiram having already deposited Rupees 46,000/- odd. Gyasiram could not possibly execute such an agreement; he could not agree to adjust Rupees 50,000/- after having been out of pocket by Rs. 46,000/-. There was no question of adjustment when he had paid the entire money payable under the decree.

(v) In the same context, it must be mentioned that there is no provision in the alleged agreement to enable Gyasiram to withdraw the amount deposited by him; and it could not be, because the first sum of Rs. 42,000/-, odd had been attached by an order dated February 8, 1959, in execution of a decree in favour of one Laxmichand against Brijbhushandas in Suit No. 27-A of 1961. Gyasiram was aware of that fact. The learned Additional District Judge very lightly brushed aside this significant feature by saying:--

"Laxmichand has a decree against Brijbhushandas and, therefore, when the amount will not be payable to Brijbhushandas as per agreement, Gyasiram will be entitled to withdraw it. Therefore, there was no necessity of its mention in the deed." This observation is without meaning. Laxmichand having attached that amount, it was not payable to Brijbhushandas. How could Gyasiram withdraw it?

(vi) Allegedly a sum of Rs. 5,000/- was paid as earnest and Gyasiram was to get only Rs. 50,000/- in cash at the time of the registration, total Rs. 55,000/-. He was not to get Rs. 1,05,000/-. Thus, the agreement was self-contradictory.

(vii) It is not possible to believe that a person would lose for Rs. 25,624/-, his property which fetched Rs. 576/- as monthly rent

(viii) It is not known who drafted this agreement. Gyasiram denies his signature. The judgment-debtor's case is that the agreement was brought by Gyasiram typed on a stamp paper. Apart from anything else, the fact that there was a provision for adjustment of Rs. 50,000/- towards the money payable to the judgment-debtor (it already having been deposited in the court and most of it having been attached under the decree of a third person) is enough to show that Gyasiram could not get this document prepared. It is not known who typed it. The evidence of Balkishan Stamp Vendor is that the stamp was purchased by one Hukumchand. There was no suggestion that Gyasiram is in any way connected with any such Hukumchand.

Bearing in mind the above features of Gyasiram's signature and the

improbabilities attending it, it must be held that the Courts below erred in finding the execution of the document proved. In second appeal, this Court is bound by a finding of fact arrived at by the first appellate Court, but it is not so bound if the lower appellate Court ignored important evidence or did not consider such important features as are present in this case. No judicial mind could have accepted the alleged agreement

This brings me to the second objection. Order 21, Rule 2, Civil Procedure Code, enacts as follows:--

"Rule 2 (1) Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted 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.

(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised by any Court executing the decree."

The agreement in question is executory. It has been held by the learned Additional District Judge that an executory agreement can be certified; and in support of this proposition, he had relied on several decisions.

The law contained in Order 21, Rule 2, is abundantly clear. No doubt, a decree can be adjusted by a lawful agreement, which may either be executed or be executory. But the crux of the matter is that the adjustment must extinguish the liability either in full or in part. The rule contemplates adjustment of existing decree, whereby the liabilities under the decree are extinguished, either in whole or in part. Where there is a mere agreement to adjust a decree on fulfilment of future condition and the decree continues to be in existence pending fulfilment of the condition, then there is no adjustment. In *Udham Singh v. Atma Singh*, AIR 1941 Lah 149 it was held by a Full Bench that if there is a completed contract, which immediately extinguishes and takes the place of the decree, that contract is an adjustment within the meaning of Order 21, Rule 2, Civil Procedure Code. If, on the other hand, there is only an agreement to adjust a decree on the fulfilment of a future condition and the decree is still left in existence pending the fulfilment of the condition, then there is no adjustment. It is of course a question to be decided in each case whether there has been a completed contract or not. In AIR 1948 35 (Nagpur) the Division Bench laid down thus:--

"Agreement to compromise a claim to execute a decree may be divided into

three classes. In the first class of agreements, the decree-holder agrees to give up all his rights under the decree on the judgment-debtor's doing something or other, and there is no adjustment until the judgment-debtor has done whatever he promised. The second class of agreements is where the decree-holder agrees to give up all his rights under the decree in return for a promise by the judgment-debtor to do something or the other; on the recording of such an adjustment, the decree becomes fully satisfied and the decree-holder can enforce the fulfilment of the judgment-debtors' promise only by a separate suit. The third class of agreements is one in which the parties agreed that the decree shall be modified in some way or other and that the decree-holder shall be entitled to execute the decree as modified but not the original decree."

When the above dictum is applied to the present case, it is abundantly dear, as I shall presently show, that it falls in the first category. In *Md. Bashir Vs. Abdul Fazl Siddiqui*, it was held:--

"A decree can be adjusted within the meaning of Order 21, Rule 2 of Civil Procedure Code by any lawful contract. Such a contract may be either executed or executory. If the liability remains as before, but conditional upon something to be done in future, that is not an adjustment which can be certified under Order 21, Rule 2. The adjustment must extinguish the liability either in full or in part. If the alleged adjustment creates a new decree which has to be executed, not as an adjustment of the old decree, but creating entirely new rights and liabilities, then again it is not an adjustment within the meaning of Order 21, Rule 2. Order 21, Rule 2 contemplates adjustment of an existing decree whereby the liabilities under the decree are extinguished either in whole or in part"

In the present case, the liability under the decree was not extinguished.

Learned counsel for the judgment-debtor relies on *P. Kunhikannan Nair Vs. N. Krishnan*, , *Pullareddigari Venkatasubba Reddi and Others Vs. Pullareddigari Peddasubbareddi and Another*, , *P.S. Gulam Mohamed Rowther Vs. Narendranath Reddi and Others*, , *Mara Ramanarasu Vs. Matta Venkata Reddi (died) and Others* represented by their mother and guardian *Matta Ademma*, , *Kurani Debya Vs. Jogamaya Debya*, , *Satya-badi Sahu v. Mani Sahu* AIR 1936 Pat 619. But the principle laid down in these decisions is not different from what I have said above, although they have expressed it in different words. For instance, in the Kerala case, cited above, it was observed:--

"If there were promises to be fulfilled, the next enquiry is as to whether the fulfilment of those conditions alone could operate as an adjustment or whether there was an immediate extinguishment of the decree (in part) the decree holder having accepted the promise as good consideration for the adjustment of the decree."

The agreement, in the present case, does not say specifically that the decree is extinguished thereby. All that is said is that there has been a "compromise" in respect of the decree in the manner indicated in it. It is incontestable that the

agreement is an executory one. A sale deed will be executed by the decree-holder in favour of the judgment-debtor and a sum of Rs. 50,000/- will be paid by the judgment-debtor to the decree-holder. Now, the following stipulations clinch the issue whether the decree is extinguished by the disputed agreement:--

(a) "If, within the time agreed, the decree-holder will not execute a sale deed, the judgment-debtor will have the right to get specific performance through Court."

(b) "If the judgment-debtor does not get a sale deed executed, the earnest shall be forfeited."

Adverting first to Clause (b), the words "earnest shall be forfeited" (BAYANA ZAPT HO JAWEGI) are emphatic and mandatory. The only consequence of the default of the judgment-debtor will be that the earnest shall be forfeited. In these words is deposited the intention of, and the agreement between, the parties. As will be seen presently, these words are eloquent enough to declare that the decree is not extinguished; it is kept alive and its execution will proceed further. The necessary implications of the stipulation (b) are these:--

(1) On the forfeiture of the earnest, the agreement itself will be extinguished. "Earnest money is part of the purchase price when the transaction goes forward; it is forfeited when the transaction falls through, by reason of fault or failure of the vendee." *Chiranjit Singh v. Har Swarup* AIR 1926 PC 1, *Maula Bux v. Union of India*, *Shri Hanuman Cotton Mills and Others Vs. Tata Air Craft Limited*,

(2) The forfeiture of earnest and falling through of the agreement will mean that the final decree for redemption will be executable and the decree-holder will be entitled to possession of the mortgaged property. On the forfeiture of the earnest, the decree-holder will have no other right. *Shri Naokar's* argument that the decree-holder can sue the judgment-debtor for recovery of Rs. 1,00,000/- after six months, cannot be accepted. The forfeiture of the earnest means that the agreement will have fallen through and the right of the vendee (judgment-debtor) to purchase the property will have come to an end. As a necessary concomitant of this, the vendor (decree-holder) cannot then sue for the recovery of the sale consideration from the vendee judgment-debtor.

(3) This means that during the stipulated period of six months, the decree will merely remain in suspense. It will not be executable, if the agreement is carried out and the sale deed is executed. But, if the agreement will fall through, the decree will be executed. To put it differently, the decree will during the stipulated period of six months, continue to be alive, though it will be dormant. There will be no extinguishment of the decree, unless the contract will be performed and completed.

Even under clause (a) above, if the decree-holder does not execute a sale deed, the judgment-debtor will have the right either to enforce the agreement by specific performance on his paying Rs. 50,000/-, or he may not exercise that

right, that is, he may choose not to pay the amount to entitle him to enforce the agreement. The wording of the stipulation is indicative of an option. In the latter case, by necessary implication, the decree-holder will be entitled to proceed further with the execution of the decree and obtain possession. This is because the respective parties will then stand in the following positions:--

(i) The judgment-debtor will have paid nothing to the decree-holder, except the alleged earnest of Rs. 5,000/-, while, to his credit, the decree-holder had deposited Rs. 46,000/-, out of which Rs. 42,000/- had already been attached in Laxmichand's decree against the judgment-debtor. In order to be entitled to continue in possession, the judgment-debtor had to pay Rs. 1,00,000/- more.

(ii) The decree-holder has already been Rs. 46,000/- out of pocket. He has already complied with the final decree for redemption. He will, therefore, be entitled to possession in execution of the decree.

(iii) This will mean that the decree will remain alive and will be executed in case the judgment-debtor will not exercise his right of specific performance of the agreement

17A. From the above analysis, it is abundantly clear that both these stipulations (a) and (b) keep the decree alive but dormant. The conclusion is that the decree is not extinguished. See also Solana Ramachandra Rao and Others Vs. Maddi Kutumba Rao and Another, (observations in Paragraph 3).

Shri Naokar laid a great deal of stress on the words:--

"Possession of party No. 2 which has so far been as that of mortgagee, shall, from today, be and continue to be as that of the owner."

(Jayadad sadar par abhi tak jo qabza muqir No. 2 ka bataur mutahin ke chala aa raha hai wah aaj bataur malik ka hoga wa rahega.)

This expression only means that when the condition will be fulfilled, vesting of ownership in the vendee will relate back to the date of execution of this agreement. It is not possible to interpret this clause as to mean that on mere payment of Rs. 5,000/- the vendor has at once become the owner of the property and his possession converted into that of the owner. He had yet to pay Rs. 1,00,000/- in the real sense, or he had apparently to pay Rs. 50,000/- according to the covenant. That is the only reasonable interpretation of the said clause.

In the same context, it must be remembered that the agreement being unregistered, ownership could not be transferred by it in praesenti.

If the decree was intended to be extinguished by the agreement, it was not possible to provide in it for forfeiture of the part consideration paid, Rs. 5,000/-.

The conclusion is that the alleged executory agreement, in the present case, did not extinguish the decree and falls within the first of the three categories

enumerated in AIR 1948 35 (Nagpur) . It could not, therefore, be certified under Order 21, Rule 2, Civil Procedure Code.

The appeal is allowed. The judgments and orders of the Executing Court and the first appellate Court are set aside, and the judgment-debtor's application under Order 21, Rule 2, Civil Procedure Code, is dismissed. The appellant shall get his costs in all the Courts from the respondent Brijbhushandas.