

(2011) 09 CAL CK 0056

In the Calcutta High Court

Case No : GA No. 2238 and 2239 of 2007, C.S. 486 of 1991 and E.C. 83 of 2007

Khem Chand Dhingra and Another

APPELLANT

Vs

Prabir Roy Chowdhury and Others

RESPONDENT

Date of Decision : 28-09-2011

Acts Referred:

Civil Procedure Code Amendment Act, 1976 — Section 16
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, Order 23 Rule 3, 100, 11, 115
Constitution of India, 1950 — Article 136, 5
Income Tax Act, 1961 — Section 230A(1)
Registration Act, 1908 — Section 17, 17(1), 17(2)
Transfer of Property Act, 1882 — Section 53A
West Bengal Estates Acquisition Act, 1953 — Section 4, 6, 6(1)
West Bengal Estates Acquisition Rules, 1954 — Rule 4A

Citation : (2011) 09 CAL CK 0056

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Harish Tandon, J.—Two applications being GA No. 2238 of 2007 and 2239 of 2007 are assigned to me. One application being GA No. 2238 of 2007 is filed by one Santosh Kr. Agarwal, added Defendant No. 2 in the original suit being C.S No. 486 of 1991 seeking for following reliefs:

- (a) Leave, if necessary, to make the instant application;
- (b) An order of injunction be passed restraining the owners of the said tea estate from executing a conveyance in favour of AGR Plantations (P) Ltd;
- (c) An order of injunction be passed restraining each of the parties from alienating, encumbering and/or alienating the said tea estate in any manner whosoever;
- (d) A fit and proper person be appointed as Receiver to visit the said estate and make any inventory of the movable assets, including tea leaves plant &

machinery lying thereat and also file a report before this Hon''ble Court after seeing and noting the persons in possession in the said tea estate;

(e) An order be passed directing the parties to hand over possession and management of the said tea estate to the Petitioner;

(f) The time for making payment under the decree be extended and the Petitioner be given liberty to deposit the sum of Rs. 52 lakhs so that conveyance can be executed in his favour and pending the same the Petitioner be put into immediate management and possession of the said tea estate on such terms the Hon''ble Court may deem fit and proper;

(g) Ad-interim orders in terms of prayers above;

(h) Suitable order as to cost of and the incidental instant application be passed

(i) Such other order or orders be made and/or directions be given as would afford complete relief to your Petitioner.

2. Other application being GA 2239 of 2007 is filed by one Prabir Roy Chowdhury being the Defendant No. 1 in the original suit for following reliefs:

(a) Decree dated 5th April 2000 passed in CS No. 486 of 1991 be set aside;

(b) Decree dated 5th April, 2000 passed in CS No. 486 of 1991 be declared null and void and in executable;

(c) The Original Agreement for sale dated 12th March, 1998 and the terms of settlement on the basis whereof the said decree was passed be rescinded and the added Defendant be directed to pay all rents, issues and profits accrued in respect of the said tea estate from the date on which possession of the said tea estate was taken by the added Defendant AGR Plantations Pvt. Ltd, until restoration of possession on 20th June, 2007

(d) Direction upon the added Defendants to render true and faithful accounts of all dealings and transactions in respect of the said Tea Estate from the date of the terms of settlement till 20th June 2007 including accounts of all profits earned, liabilities outstanding and monies due to the tea estate and direction be made for payment of such sum as may be found due and payable after the accounts are taken;

(e) Stay of all further proceeding in connection with T.S No. 362 of 2007 for execution of the decree dated 5th April 2000 till disposal of the present petition;

(f) Injunction restraining the added Defendants from taking any step or further step on the basis of the said decree dated 5th April 2000;

(g) Ad interim order in terms of prayers above;

(h) Such further and/or other order or orders be passed and/or direction or direction be given as this Hon''ble Court may deem fit and proper.

3. Since the adjudication made in anyone of the aforesaid application shall have bearing upon the other. I decide to take up both the applications simultaneously.

4. The backdrop of the case is that one Bhupatish Roy Chowdhury was the owner of a tea estate known as "Toonbarrie Tea Estate". The said owner entered into an agreement on 12.3.1988 with one Khemchand Dhingra, the Plaintiff No. 1 in CS No. 486 of 1991 for sale of the said tea estate at a consideration of Rs. 55 lakh. The said agreement contains various terms and conditions to be performed by either of the parties to the agreement which includes Clause 4, the makeover of the peaceful possession of the tea garden to the said Khemchand Dhingra upon payment of certain sum. Admittedly, the possession of the said tea estate was handed over by the said Bupatish Roy Chowdhury, the original Defendant to the said Kemchand Dhingra, the Plaintiff No. 1 in the said suit. The said original Defendant also executed irrevocable power of attorney in favour of the said Plaintiff No. 1 authorizing and empowering him to run, manage and carry on the business of the said tea estate. One of the other terms and conditions of the said agreement dated 12th March, 1986 was that the said original Defendant shall obtain the necessary permission from the office of the Deputy Commissioner of Jalpaiguri for transfer of the said tea estate in favour of the said Plaintiff No. 1, the original nominee. However, the time to complete the sale was fixed within 1st January, 1989.

5. Subsequently the Plaintiff No. 1 by letter dated 1st April, 1990 entered into the Plaintiff No. 2 Toonbarrie Tea Company Pvt. Ltd. as is nominee to complete the purchase of the said tea estate. Plaintiff No. 1 entered into an agreement with Plaintiff No. 2 on 25th May 1990 by which the said Plaintiff No. 2 was allowed to enjoy the benefit of the earnest money and the part payment made by the Plaintiff No. 1. In terms of the aid agreement dated 25.5.1990 the possession was made over to the Plaintiff No. 2 by the Plaintiff No. 1 which he obtained in terms of an agreement dated 12th March, 1988 from the original Defendant. The act of nomination was accepted by the original Defendant on having received certain payments from the Plaintiff No. 2 in terms of the original agreement dated 12th March 1988.

6. Since the Plaintiff did not perform his part of an obligation the said Khemchand Dhingra as Plaintiff No. 1 along with the said Toonbarrie Tea Estate as Plaintiff No. 2 filed a suit being C.S 486 of 1991 in the Original Side of this Court for a decree for specific performance of the said agreement dated 12th March 1988 with following payers:

(a) Specific performance of the Agreement for sale dated 12th March 1988;

(b) Decree directing the Defendant to execute and register the Deed of Conveyance in respect of the said Toonbarrie Tea estate in favour of the Plaintiff No. 2 in accordance with the draft Deed of Conveyance already furnished to the Defendant or in such other form as to this Hon''ble Court seem fit and proper within such time to this Hon''ble Court may deem fit and proper and upon

payment of the balance consideration sum of Rs. 24,40,000/- by the Plaintiff No. 2 herein;

(c) In the event of the Defendant failing to execute and/or register the Deed of Conveyance in respect of the said Toonbarrie Tea Estate in terms of prayer (b) above, then in such event the Registrar, Original Side of this Hon"ble Court be directed to execute such conveyance within such time as to this Hon"ble court may deem fit and proper and upon the Plaintiffs depositing the balance consideration of Rs. 24,40,000/-;

(d) Declaration that the Defendant is not entitled in any manner to sell transfer or convey or otherwise deal with or dispose of the said Tea Estate except in favour of the Plaintiff No. 2 as per the said Agreement dated 12th March 1988;

(e) Permanent injunction restraining the Defendant from in any manner selling transferring or otherwise dealing with or disposing of the said Tea Estate in favour of any person or party exceeding the Plaintiff No. 2 as per the said Agreement dated 12th March 1988;

(f) Declaration that the pretended letters being Annexures "E","F" and "G" are void as against the Plaintiffs and/or the same are voidable at the instance of the Plaintiffs and that the Plaintiffs have duly evaded the same;

(g) Delivery up and cancellation of the said pretended letters being Annexure "E", "F" and "G" hereto;

(h) Injunction;

(i) Receiver;

(j) Attachment;

(k) Costs;

(l) Further or other reliefs.

7. During the course of the proceeding of the said suit the Defendant No. 2 and 3 namely Santosh Kr. Agarwal and M/s. AGR Plantations Pvt. Ltd. took out an application for addition as party Defendant in the said suit which was eventually allowed and they were added as Defendant No. 2 and 3 in the said suit.

8. According to the said added Defendant the said Bhupatish Roy Chowdhury executed an agreement dated 30.4.91 and appointed Santosh Kr. Agarwal, the added Defendant No. 2 as the managing agent of the said tea estate which was previously runned by the Plaintiff No. 1 in terms of an earlier agreement dated 12.3.88. It was specific case of the added Defendant No. 2 namely Santosh Kr. Agarwal that the Plaintiff No. 1 put him into possession of the said tea estate.

9. Ultimately, the said suit ended in compromise on the strength of a terms of settlement which apart from other postulates that the original Defendant namely Bhupatish Roy Chowdhury shall effect the sale in favour of the added Defendant

No. 3 namely M/s. AGR Plantations Pvt. Ltd. being the nominee of the added Defendant No. 2 namely Santosh Kr. Agarwal on payment of a consideration price of Rs. 63 lakhs. It is further recorded therein that out of the said consideration money a sum of Rs. 1 lakh has already been paid to the said Bhupatis Roychowdhury by M/s. AGR Plantations Pvt. Ltd. vide banker's cheque dated 11th March 2000 and a sum of Rs. 6 lakh shall be paid on the date of order passed in the said suit and a further sum of Rs. 4 lakh shall be paid within 60 days from the date of order of compromise and the balance sum of Rs. 52 lakh shall be paid simultaneously with the execution and the registration of the deed of conveyance. The bank liabilities was agreed to be borne by the said added Defendant. Along with the said terms of settlement an approved draft copy of the deed of conveyance duly countersigned by the advocates appearing for the respective parties was annexed wherefrom it is evident that the said Bhupatish Roy Chowdhury was arrayed as vendor and M/s. AGR Plantations Pvt. Ltd. As purchaser and Santosh Kr. Agarwal has confirming a party.

10. Now, M/s. AGR Plantations Pvt. Ltd. has filed the execution case No. 83 of 2007 for execution of the said comprise decree dated 5.4.2000. According to the said Santosh Kr. Agarwal in GA No. 2238 of 2007 the said M/s. AGR Plantations Pvt. Ltd. was the family company and his brother Sajjan Agarwal is trying to oust him from the said company. On 2nd November 2005 the said brother namely Sajjan Agarwal along with the son and other associates forcibly entered into the office of the M/s. AGR Plantations Pvt. Ltd. and removed all the important papers therefrom. It is further alleged that the nomination in favour of M/s. AGR Plantations Pvt. Ltd. is liable to be recalled as the warring brothers of the said Santosh Kr. Agarwal are trying to take the full control of the garden through M/s. AGR Plantations Pvt. Ltd. It is further alleged that a partition suit No. 88 of 2006 has been filed by the Petitioner in the court of Civil Judge (Senior Division), 4th Court at Alipur. The relief which is sought in the said application being GA No. 2238 of 2007 has been enumerated hereinabove. Between the period from the date of compromise decree and the filing of the execution the said Bhupatis Roy Chowdhury died making and publishing his last will and testament by appointing the joint executors namely Gopal Prasad Jain and Satyajit Sikdar and also left behind him surviving the said Prabir Roy Chowdhury and Rina Dutta Gupta as natural heirs. Some dispute cropped up between the said joint executors and the natural heirs and ultimately a compromise was effected by which the said Prabir Roy Chowdhury and Rina Dutta Gupta became the owner to the extent of half share each in respect of the said tea estate. It is a case of Prabir Roy Chowdhury that the said added Defendants failed to discharge their obligations under the terms of settlement in not paying the balance consideration money as well as not meeting out the other liabilities of the tea estate viz. provident fund, interest of provident funds, gratuity, labour wages, labour statutory obligations, unsecured creditors etc. It is further alleged that the fixed monthly rent of Rs. 50000/- was paid till May 2000. It is a specific case that the said terms of settlement is illegal and null and void as contrary to law and public policy inasmuch as the lease of

deed executed between the State of West Bengal and the original owner contains a restriction against subletting and/or transfer of the tea estate and permission to transfer is not provided under the West Bengal Estate Acquisition Act, 1953. It has been categorically asserted that the possession of the tea estate was amicably handed over to the representative of the said Prabir Roy Chowdhury by the said M/s. AGR Plantations Pvt. Ltd. through its manager Ratan Roy Chowdhury on 20th June 2007 which is duly recorded in a letter written by the said representation of M/s. AGR Plantations Pvt. Ltd. dated 20th June 2007 on the basis of the aforesaid fact the relief as enumerated above was sought in GA No. 2239 of 2007.

11. Before proceeding to decide the aforesaid applications it would be pertinent to record that only the aforesaid two applications have been assigned to me and the execution case being EC No. 83 of 2007 has not been assigned and as such my adjudication is restricted to the aforesaid applications only.

12. Mr. Saktinath Mukherjee, learned Senior Advocate appearing for Prabir Roy Chowdhury, the applicant in GA No. 2239 of 2007 submits that the purported compromise decree is not capable of being executed as it is mere recording of the settlement which can at best be said to be a further agreement entered into by and between the parties. He further submits that the court has not applied its mind judiciously while recording the compromise and as such it does not partake the character of a decree but a mere agreement which is inexecutable. He strenuously argued that there is a restriction and/or prohibition in the original lease deed which was executed between the State of West Bengal and Bhupatis Roy Chowdhury relating to transfer and/or subletting of the tea garden. Section 6(1)(f) of the West Bengal Estate Acquisition Act provides restriction and a prior permission which should be obtained in terms of Rule 4A of the Estate Acquisition Rules 1954. According to him there is a prescribed mode of seeking prior permission being Scheduled F appended to the Estate Acquisition Rules 1954 and paragraph 13 of the said Form contains a restriction on transfer. Lastly he argues that the Collector has refused to grant permission which would be evident from paragraph 14 of the affidavit in opposition filed by Debasish Dey dated 22.1.2011. He thus concludes that the terms of settlement is not executable but may be capable of being enforced by a separate suit.

13. Mr. Jayanta Mitra, learned Senior Advocate appearing for the decree-holder namely M/s. AGR Plantations Pvt. Ltd. contends that the scope of enquiry by the court in an application of such nature is very limited. According to him, this is an application u/s 47 of the CPC where the powers conferred upon the executing court is not wide enough to enquire the reappraisal and/or reconsideration of the matter in its entirety. He strenuously argues that the ground on which such application is founded does not warrant invocation of powers by the executing court u/s 47 of the Code. In support of such contention he relies upon the judgment of the apex court in case of Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others, and in case of Dhurandhar Prasad Singh Vs. Jai

Prakash University and Others, . He strenuously argued that a consent or compromise decree is valid and binding upon the parties and cannot be termed as mere recording of the terms of settlement. By contending so he relies upon the judgment of the apex court in case of Byram Pestonji Gariwala Vs. Union Bank of India and others, He further submits that if there is any inconsistency and/or repugnancy between the clauses in the deed and in such event the earlier clause shall prevail as has been held in case of Uma Devi Nambiar and Others Vs. T.C. Sidhan (Dead),

14. Mr. Mitra submits that a compromise decree is not compulsorily registrable u/s 17(2)(vi) of the Registration Act, 1908 upon relying a judgment of the apex court in case of K. Raghunandan and Others Vs. Ali Hussain Sabir and Others, He further submits that even if there is an obligation imposed in the terms of settlement to obtain a permission of the collector, in absence of such permission the contract does not become unenforceable and relies upon a judgment of the apex court in case of Mrs. Chandnee Widya Vati Madden Vs. Dr. C.L. Katial and Others, . Lastly he argued that if the possession is taken in violation of the order or a decree of the court it is the duty of the court to restore back the possession and relies upon the Division Bench judgment of this Court in case of Sujit Pal Vs. Prabir Kumar Sun and Others, and a judgment of the apex court in case of Delhi Development Authority Vs. Skipper Construction Company (P) Ltd. and another,

15. Mr. Mukherjee, in reply argued that the compromise decree is nothing but recording of an agreement between the parties having a seal of the court and relies upon the following judgments:

1. Pulavarthi Venkata Subba Rao and Others Vs. Valluri Jagannadha Rao and Others,

2. The Oudh Commercial Bank Ltd. Fyzabad v. Thakurani Bind Basni Kuer and Ors. 43 CWN 501

3. Bibekananda Bhowal (dead) by L.Rs. Vs. Satindra Mohan Deb (dead) by L.Rs.,

4. Baldevdas Shivilal and Another Vs. Filmistan Distributors (India) P. Ltd. and Others,

5. Prithvichand Ramchand Sablok Vs. S.Y. Shinde,

16. He strenuously argued that if the compromise/consent decree provides a mutual obligation to be performed in such a way that a performance by one was conditional on performance by the other, the execution could not be ordered unless the party seeking execution not only offers to perform his part but in case of any objection to be taken, should satisfy the executing court that he was in a position to do so. To buttress such submission he relies upon a judgment of the apex court in case of Chen Shen Ling Vs. Nand Kishore Jhajharia, , Jai Narain Ram Lundia Vs. Kedar Nath Khetan and Others, .

17. He reiterates that the compromise decree is noting but recording of an

agreement of contact between the parties and the same required to be stamped under the Indian Stamp Act, unless the requisite stamp is put it cannot be enforced in court of law.

18. It is contended that if the property is situated outside the jurisdiction of the court, it is the court, within whose jurisdiction the property situates, is the competent court to execute the decree relating to possession. Reliance is placed upon a judgment of the Supreme Court in case of Mohit Bhargava Vs. Bharat Bhushan Bhargava and Others, . Lastly he argued that the tea garden is owned by the government and there is a restriction imposed in the lease deed as well as under the West Bengal Estate Acquisition Act for transfer without the prior permission of the competent authority, any act done in violation of such restriction is illegal and is unenforceable. In support of such contention he relies upon a judgment of the apex court in case of Escorts Farms Ltd., Previously known as Escorts Farms (Ramgarh) Ltd. Vs. The Commissioner, Kumaon Division, Nainital, U.P. and Others, Hajee S.V.M. Mohamed Jamaludeen Bros. and Co. Vs. Govt. of T.N., . Thus he concludes that the decree which is sought to be executed is unenforceable in the eye of law.

19. From the rival submissions of the parties as indicated above, following points emerges for consideration:

(i) Whether a consent/compromise decree is mere recording of an agreement and/or averments of the parties to the proceeding and does not partake a character of a decree which is capable of being executed under the provision of law;

(ii) Whether the terms of settlement resulting into a compromise decree is required to be stamped under the Indian Stamp Act;

(iii) Whether the transferee pendente lite without obtaining a prior permission as mandated in the lease deed as well as West Bengal Estate Acquisition Act invalidates the compromise decree so as to render it in executable;

(iv) Whether the executing court can travel beyond the decree to consider the rights of the parties on the basis of a post decretal facts.

Point No. 1.

20. Admittedly the parties have filed the terms of settlement before the court and the said terms of settlement was taken as a part of the decree by which the aforesaid suits were disposed of.

21. It would be profitable to quote Order 23 Rule 3 of the CPC which reads thus:

Order XXIII Rule 3. Compromise of suit. - Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the Defendant satisfies the Plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall order such agreement, compromise or

satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit:

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded thinks fit to grant such adjournment.

22. On a bare reading of the aforesaid provision, it is the duty of the court to record its satisfaction as to the adjustment of the claim made in the suit either wholly or in part by a lawful agreement or compromise. By insertion of an explanation an agreement or compromise shall not be deemed to be lawful if it is void or voidable under the Indian Contracts Act 1872. The court while passing a compromise decree duly recorded its satisfaction as follows:

This suit being treated as appearing on this day's list for final disposal before the Hon'ble Amitava Lala one of the Judges of this Court, in the presence of the advocates for the parties. and sufficient court fees having been paid. and both the suits being suit No. 486 of 1991 and suit No. 404 of 1993 be and the same are disposed of in terms of the terms of settlement filed on the Fifth day of April Two Thousand and the said terms of settlement are being not out in the Schedule hereunder written and hereinafter referred to as the said terms of settlement and the same is ordered and decreed accordingly. and the parties having agreed to the terms of the said terms of settlement. It is declared with the consent of the parties by the signatures of the Plaintiff No. 1 Khem Chand Dhingra by the Pen of his constituted Attorney an the Plaintiff No. 2 Toon Barrie Tea Company Private Limited, by the pen of its Director and also by the signatures of the advocates for the Plaintiffs and also by the signatures of the Defendant No. 1 Bhupatish Roychowdhury, for self and by his advocate and also by the signatures of added Defendant No. 2 Sri Santosh Kumar Agarwalla for elf and as Director of the added Defendant No. 3 M/s. AGR Plantations (P) Ltd. and also by their advocate at the foot of the said terms of settlement that the said terms of settlement be recorded and ought to be carried out and the same are ordered and decreed accordingly. and it is further ordered that all interim orders passed at the interlocutory stage in respect of these two suits be and the same shall stand vacated. and since both the suits are disposed of as a course quantial effect both the applications being Interlocutory Application arising out of the suit No. 486 of 1991 and the matter No. 1 2881 of 1993 (Contempt application) arising out of suit No. 404 of 1993 are also disposed of and in terms of settlement undertaking of the parties to withdraw the appeal arising out either of the suit the same hall be formally mentioned before the Appellate Bench.

23. The apex court in case of Subba Rao (supra) held that the compromise decree is not a decision by the court but sets the seal of the court on the

averments of the parties in following words:

The compromise decree was not a decision by the Court. It was the acceptance by the Court of something to which the parties had agreed. It has been said that a compromise decree merely sets the seal of the court on the agreement of the parties. The court did not decide anything. Nor can it be said that a decision of the court was implicit in it. Only a decision by the court could be *res judicata*, whether statutory u/s 11 of the Code of Civil Procedure, or constructive as a matter of public policy on which the entire doctrine rests. The Respondents claim to raise the issue over again because of the new rights conferred by the Amending Act, which rights include, according to them, the re-opening of all decrees which had not become final or which had not been fully executed. The Respondents are entitled to take advantage of the amendment of the law unless the law itself barred them, or the earlier decision stood in their way. The earlier decision cannot strictly be regarded as on a matter which was "heard and finally decided." The decree might have created an estoppel by conduct between the parties; but here, the Appellants are in an unfortunate position, because they did not plead this estoppel at any time. They only claimed that the principle of *res judicata* governed the case or that there was an estoppel by judgment. By that expression, the principle of *res judicata* is described in English law. There is some evidence to show that the Respondents had paid two sums under the consent decree, but that evidence cannot be looked into in the absence of a plea of estoppel by conduct which needed to be raised and tried. The Appellants are, however, protected in respect of these payments by the proviso to Clause (iii) of Section 16 of the Amending Act.

24. The same view is reiterated in a later judgment in case of *Baldevdas (supra)*. Although in case of *Subba Rao (supra)* the three-judge Bench of the apex court held that the compromise decree is not a decision of the court but the court merely sets the seal of it on the basis of the averment made by the parties, failed to take notes of a five-judge Bench of the apex court in case of *Raja Sri Sailendra Narayan Bhanja Deo Vs. The State of Orissa*, .

25. It is settled law that in case of a conflicting decision, the decision delivered by a Bench having larger quorum has a binding effect. The Division Bench of the apex court in case of *Subba Rao (supra)* did not consider the case of the five-judge Bench delivered by the apex court in case of *Sailendra Narayan Bhanja Deo (supra)* and thus cannot have any binding effect.

26. Subsequently the view of the larger bench was accepted and relied upon by the apex court in case of *Byram Pestonji Gariwala (supra)* in following manner:

41. In the present case, the notice issued under Order XXI Rule 22 was personally served on the Defendant, but he did not appear or show cause why the decree should not be executed. The notice was accordingly made absolute by order dated January 23, 1990 and leave was granted to the Plaintiff to execute the decree. The decree passed by the High Court on June 18, 1984 in terms of

the compromise was a valid decree and it constituted *res judicata*. As stated by this Court in *Shankar Sitaram Sontakke and Another Vs. Balkrishna Sitaram Sontakke and Others*,):

... It is well settled that a consent decree is as binding upon the parties thereto as a decree passed by *invitum*. The compromise having been found not to be vitiated by fraud, misrepresentation, misunderstanding or mistake, the decree passed thereon has the binding force of "*res judicata*".

42. S.R. Das, C.J., in *Raja Sri Sailendra Narayan Bhanja Deo Vs. The State of Orissa*,) states:

... a judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the court exercises its mind on a contested case....

43. A judgment by consent is intended to stop litigation between the parties just as much as a judgment resulting from a decision of the court at the end of a long drawn out fight. A compromise decree creates an estoppel by judgment. As stated by Spencer-Bower and Turner in *Res Judicata*, (2nd edn., page 37):

Any judgment or order which in other respects answers to the description of a *res judicata* is nonetheless so because it was made in pursuance of the consent and agreement of the parties.... Accordingly, judgments, orders, and awards by consent have always been held no less efficacious as estoppels than other judgments, orders, or decisions, though doubts have been occasionally expressed whether, strictly, the foundation of the estoppel in such cases is not representation by conduct, rather than *res judicata*.

* * *.

See also *Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others*,).

44. The consent decree made on June 18, 1984 remained unchallenged. None questioned it. The Appellant never raised any doubt as to its validity or genuineness. He had no case that the decree was vitiated by fraud or misrepresentation or his counsel lacked authority to enter into a compromise on his behalf. Nevertheless, after six years he questioned its validity by means of chamber summons. This was an unsuccessful challenge by reason of delay, estoppel or *res judicata*, and was rightly so held by the High Court.

27. Thus, in view of the ratio laid down in the above-noted reports the compromise/consent decree cannot be said to be a mere recording of the averments of the parties but as a trapping of a decree capable of being executed under Order 21 of the Code of Civil Procedure.

Point No. 2:

28. This point was argued on the strength that the terms of settlement which forms part of an application for recording the compromise is required to be

stamped as it contemplates an agreement to transfer an immovable property. It is further argued that any instrument which purports to transfer the right, title and interest in respect of immovable property and which is compulsorily registrable u/s 17 of the Registration Act 1908 is not admissible before the court and as such cannot be executed by the executing court. Reliance was placed upon Article 5(d) of Schedule 1A of the Indian Stamp Act that in case of an agreement or a memorandum of agreement relating to the sale or lease-cum sale of the immovable property attracts the stamp duty as of a convenience upon market value. Before embarking upon a journey to adjudicate the point it would be necessary to quote the relevant provisions of the Statute for such purposes.

29. Section 17 of the Indian Registration Act 1908 provides thus: 17. Documents of which registration is compulsory - (1) the following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:

- (a) instruments of gift of immovable property;
- (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;
- (c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and
- (d) leases of immovable property from year to year, or for any terms exceeding one year, or reserving a yearly rent;
- (e) non-testamentary instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

Provided that the State Government may, by order published in the Official Gazette, except from the operation of this Sub-section any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

(1A). The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement,

then, they shall have no effect for the purposes of the said Section 53A.

2. Nothing in Clauses (b) and (c) of Sub-section applies to -

(i) any composition deed; or

(ii) any instrument relating to shares in a joint stock company, notwithstanding that the assets of such company consist in whole or in part of immovable property; or

(iii) any debenture issued by any such company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(iv) any endorsement upon or transfer of any debenture issued by any such company, or

(v) any document other than the documents specified in Sub-section (1A) not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

(vi) any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding; or

(vii) any grant of immovable property by government; or

(viii) any instrument of partition made by a Revenue Officer; or

(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883; or

(x) any order granting a loan under the Agriculturists, Loans Act, 1884, or instrument for securing the repayment of a loan made under that Act; or

(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money under a mortgagee when the receipt does not purport to extinguish the mortgage; or

(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue-Officer

(3) Authorities to adopt a son, executed after the 1st day of January, 1872, and not conferred by a will, shall also be registered.

30. Firstly, it must be reminded that the terms of settlement which was filed by the parties as culminated into a consent/compromise decree passed by the court upon satisfaction that the same is lawful. There is no distinction, artificial or actual, made between a consent decree or a compromise decree as has been held in case of Sailendra Narayan Bhanja Deo (supra) by the five-judge Bench of the Supreme Court that the compromise/consent decree is a decree which binds the parties and is executable by the court.

31. Before the amending Act of 1976 the scope under Order 23 Rule 3 was limited to such compromise which relates to the subject matter of the suit but by amendment act of 1976 the provision under Order 23 Rule 3 have undergone a sea change which envisage that compromise can be effected in respect of a subject matter not similar to the subject-matter of the suit. In other words the compromise can be effected by the parties in respect of a subject matter which is not similar to the subject matter of the suit. Section 17(2)(vi) of the Registration Act postulates that any decree passed by the court on compromise comprising immovable property other than the subject matter of the suit or proceeding does not attract the provision of Section 17(1)(b) and (c) of the Indian Registration Act.

32. It has been held by the apex court in case of K. Raghunandan (supra):

22. Sub-section (1) of Section 17 of the Act specifies the documents of which registration is compulsory; Clauses (b), (c) and (e) whereof read as under:

17. Documents of which registration is compulsory.-(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been examined on or after the date on which, Act 16 of 1864, or the Indian Registration Act, 1866 (20 of 1866), or the Indian Registration Act, 1871, or the Indian Registration Act, 1877 (3 of 1877), or this Act came or comes into force, namely-

(a) * * *

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) * * *

(e) non-testamentary instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one

hundred rupees and upwards, to or in immovable property:

Provided that the State Government may, by order published in the Official Gazette, exempt from the operation of this Sub-section any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

23. Sub-section (2) of Section 17 of the Act, however, carves out an exception therefrom stating that nothing in Clauses (b) and (c) of Sub-section (1) of Section 17 would inter alia apply to "any decree or order of a court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding". Even if the passage was not the subject-matter of the suit, indisputably, in terms of the CPC (Amendment) Act, 1976, a compromise decree was permissible.

24. A plain reading of the said provision clearly shows that a property which is not the subject-matter of the suit or a proceeding would come within the purview of exception contained in Clause (vi) of Sub-section (2) of Section 17 of the Act. If a compromise is entered into in respect of an immovable property, comprising other than that which was the subject-matter of the suit or the proceeding, the same would require registration. The said provision was inserted by Act 21 of 1929.

25. The CPC (Amendment) Act, 1976 does not and cannot override the provisions of the Act. The purported passage being not the subject-matter of the suit, if sought to be transferred by the Respondent-defendants in favour of the Appellant-plaintiffs or if by reason thereof they have relinquished their own rights and recognised the rights of the Appellant-plaintiffs, registration thereof was imperative. The first appellate court held so. The High Court also accepted the said findings.

33. The compromise/consent decree cannot be said to be a mere agreement effecting the immovable property so as to attract the provisions of the Indian Stamp Act.

Point No. 3.

34. An argument has been advanced at the instance of the judgment-debtors that the terms of settlement which was arrived at by and between the parties was in contravention to the restriction clause in the parent lease deed. It is further argued that Schedule appended to the West Bengal Estate Acquisition Act prohibits the transfer without prior permission of the competent authority. It is sought to be argued further that the land comprising the tea garden is owned by the State Government and the said land has been settled in favour of the predecessor-in-interest of the judgment-debtor on the basis of the registered deed of lease executed in this regard which puts a fetter on the part of the judgment-debtor being the original lessee in transferring or sub-leasing the said

tea garden without prior permission of the collector.

35. The parent lease deed is annexed with the affidavit-in-opposition to an application of M/s. AGR Plantations Pvt. Ltd. On perusal of the said deed one can gather an impression that the transfer is permissible subject to the prior permission of the competent authority. Even if there is any violation or breach in such clause there is no provision for reentry by forfeiting the said lease by the state government. What is provided is a monetary penalty for such breach. It is sought to be argued by the judgment-debtor that the rights of the intermediaries which stood vested u/s 4 of the West Bengal Estate Acquisition Act 1953 was saved u/s 6 of the said Act as the land is comprised of tea garden u/s 6(1)(f) of the said Act. It is further argued that there is statutorily prescribed format of the terms and conditions to retain such land by the intermediaries and Clause 13 of Schedule F of the West Bengal Estate Acquisition Act 1954 prohibits such transfer unless a prior permission of the competent authority is obtained.

36. One of the terms and conditions of the said terms of settlement is that the decree-holder shall obtain the permission from the Collector, Jalpaiguri for effecting such sale.

37. It appears from the rival contentions of the parties that an application was filed by the judgment-debtor for seeking permission of such transfer. The judgment-debtor later on raised objection to grant of such permission.

38. As has been held earlier that the judgment-debtor was aware of the restriction being imposed for effecting transfer without prior permission of the competent authority, agreed to transfer or sell the said land and incorporate a specific clause in the terms of settlement before the court. The judgment-debtor later on cannot turn round and say that such an agreement is not lawful. There is no absolute fetter put in the said lease relating to transfer but such transfer is contingent upon the prior permission of the competent authority. If the statute put an absolute embargo/bar upon transfer of the said land under any circumstances, the judgment-debtor may have some say in the matter but such is not the position in the instant case. The judgement-debtor while entering into the compromise was conscious of such restriction and as such is stopped from contending that such agreement is not lawful. Further point has been taken by the judgment-debtor that the collector has not granted permission for transfer and as such the decree is not executable.

39. Similar point cropped up in case of Mrs. Chandnee Widya Vati (supra) where it has been held:

4. The main ground of attack on this appeal is that the contract is not enforceable being of a contingent nature and the contingency not having been fulfilled. In our opinion, there is no substance in this contention. So far as the parties to the contract are concerned, they had agree to bind themselves by the terms of the document executed between them. Under that document it was for the Defendant-vendor to make the necessary application for the permission to

the Chief Commissioner. She had as a matter of fact made such an application but for reasons of her own decided to withdraw the same. On the findings that the Plaintiffs have always been ready and willing to perform their part of the contract, and that it was the Defendant who wilfully refused to perform her part of the contract, and that time was not of the essence of the contract, the Court has got to enforce the terms of the contract and to enjoin upon the Defendant-Appellant to make the necessary application to the Chief Commissioner. It will be for the Chief Commissioner to decide whether or not to grant the necessary sanction.

5. In this view of the matter, the High Court was entirely correct in decreeing the suit for specific performance of the contract. The High Court should have further directed the Defendant to the Chief Commissioner, which was implied in the contract between the parties. As the Defendant vendor, without any sufficient reasons, withdrew the application already made to the Chief Commissioner, the decree to be prepared by this Court will add the clause that the Defendant within one month from to-day shall make the necessary application to the Chief Commissioner or to such other competent authority as may have been empowered to grant the necessary sanction to transfers like the one in question, and further that within one month of the Plaintiffs the property in suit. In the event of the sanction being refused, the Plaintiffs shall be entitled to the damages as decreed by the High Court. The Appellant sought to raise certain other pleas which had not been raised in the High Court; for example, that this was not a fit case in which specific performance of contract should be enforced by the Court. This plea was not specifically raised in the High Court and the necessary facts were not pleaded in the pleadings. It is manifest that this Court should not allow such a plea to be raised here for the first time.

40. The decree cannot be said to be unlawful in view of the embargo created in the lease deed or under the west Bengal Estate Acquisition Rules 1954.

Point No. 4

41. Admittedly one Bhuptish Roy Chowdhury, the original Defendant was the owner of the said tea garden. It is also admitted that the said owner entered into an agreement with the Plaintiff No. 1 for sale of the said tea garden. Two suits were filed. One civil suit No. 486 of 2007 by the Plaintiffs seeking for specific performance of an agreement for sale of the said tea garden and another by M/s. AGR Plantations Pvt. Ltd. being money suit No. 404 of 1993 for recovery of money. Both the suits ended into a compromise by one composite compromise decree. The judgment-debtor tried to assail the said compromise decree on the ground that the terms of settlement which culminated into a compromise decree provided certain obligations on the part of Santosh Kr. Agarwal and M/s. AGR Plantations Pvt. Ltd. to be performed. According to the judgment-debtor they have not performed their obligation and as such the decree is inexecutable It has been specifically contended by the judgment-debtor that bank's liability has not been cleared, payment to the labourers were not done, provident fund dues were

not paid, gratuity of the retired workmen and the workmen who were on the verge of the retirement is not cleared, payment to unsecured creditors not made and the plantation uprooted was not planted. Above all the main attack to the decree is that the compromise decree recording the terms and conditions is noting but a mere agreement and is not executable. The further case which is made out in the said application is that the decree-holder has abandoned their claim by handing over back the possession of the tea garden. According to him, M/s. AGR Plantations Pvt. Ltd. have exchanged series of correspondences with the labour union expressing their inability to run the tea garden due to various reasons indicated in such letters. Ultimately by a letter dated 20.6.2007 the possession is handed over to the judgment-debtor by the decree-holder.

42. It is a specific case of the decree-holder namely M/s. AGR Plantations Pvt. Ltd. that the possession of the said tea garden was handed over by the said owner in pursuance of the said agreement. It is not disputed that while running the said tea garden they were facing several problems which they wanted to sort out with the labour union but the same does not lead to inference that they were not interested in purchasing the said tea garden. It is further contended that they have performed their part of an obligation under the terms of settlement and the judgment-debtor raised objection before the Collector, Jalpaiguri for granting permission of such transfer. They further contended that the judgment-debtor with the help of his manager and other associates forcibly driven them out of the said tea garden and the said incident is diarised in the local police station.

43. According to them, they have paid initial sum which was agreed to be paid in terms of the terms of settlement and the balance sum was agreed to be paid simultaneously with the execution or registration of the tea estate which they are ready and willing to pay to the judgment-debtor. It is further stated that they have liquidated the bank loans and other dues of the judgment-debtor and there is no negligence or laches on their part in performing in terms of the said terms of settlement. On the basis of the aforesaid fact it is required to be seen whether the executing court can entertain such claim u/s 47 of the Code of Civil Procedure.

44. The scope of Section 47 is limited and microscopic. It relates to the discharge, satisfaction and execution of a decree. Anything beyond these three parameters set up u/s 47 of the Code could not be entertained by the executing court. In case of *Dhurander Prasad Singh* (supra) the apex court held:

23. u/s 47 of the Code, all questions arising between the parties to the suit in which the decree was passed or their representatives relating to the execution, discharge or satisfaction of decree have got to be determined by the court executing the decree and not by a separate suit. The powers of the court u/s 47 are quite different and much narrower than its powers of appeal, revision or review. A first appellate court is not only entitled but obliged under law to go into the questions of facts as well, like the trial court, apart from questions of law.

Powers of the second appellate court under different statutes like Section 100 of the Code, as it stood before its amendment by Central Act 104 of 1976 with effect from 1-2-1977, could be exercised only on questions of law. Powers under statutes which are akin to Section 100 of the Code, as amended and substituted by the aforesaid Central Act, have been further narrowed down as now in such an appeal only a substantial question of law can be considered. The powers of this Court under Article 136 of the Constitution of India, should not be exercised simply because substantial question of law arises in a case, but there is further requirement that such question must be of general public importance and it requires decision of this Court. Powers of revision u/s 115 of the Code cannot be exercised merely because the order suffers from legal infirmity or substantial question of law arises, but such an error must suffer with the vice of error of jurisdiction. of course, the revisional powers exercisable under the Code of Criminal Procedure and likewise in similar statutes stand on entirely different footing and are much wider as there the court can go into the correctness, legality or propriety of the order and regularity of proceeding of the inferior court. It does not mean that in each and every case the revisional court is obliged to consider questions of facts as well like a first appellate court, but the court has discretion to consider the same in appropriate cases whenever it is found expedient and not in each and every case. Discretion, undoubtedly, means judicial discretion and not whim, caprice or fancy of a Judge. Powers of review cannot be invoked unless it is shown that there is error apparent on the face of the record in the order sought to be reviewed.

24. The exercise of powers u/s 47 of the Code is microscopic and lies in a very narrow inspection hole. Thus it is plain that executing court can allow objection u/s 47 of the Code to the executability of the decree if it is found that the same is void ab initio and a nullity, apart from the ground that the decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its passing. In the case on hand, the decree was passed against the Governing Body of the College which was the Defendant without seeking leave of the court to continue the suit against the University upon whom the interest of the original Defendant devolved and impleading it. Such an omission would not make the decree void ab initio so as to invoke application of Section 47 of the Code and entail dismissal of execution. The validity or otherwise of a decree may be challenged by filing a properly constituted suit or taking any other remedy available under law on the ground that the original Defendant absented himself from the proceeding of the suit after appearance as he had no longer any interest in the subject of dispute or did not purposely take interest in the proceeding or colluded with the adversary or any other ground permissible under law.

45. It is further held in case of Vasudev Dhanjibhai Modi (supra) that the court executing a decree cannot go behind the decree and must take the decree according to its tenor and cannot entertain any objection that the decree was

incorrect in law or in facts.

46. There is no dispute with regard to the settled proposition that the executing court cannot go behind the decree and must take the decree with its full tenor unless the objection warrants the interference on law as on facts.

47. The compromise/consent decree is of such nature which imposes certain obligations to be performed by either of the parties. In absence of non-performance/non-observance of the decree or a part thereof, the executing court can direct the parties to perform such obligations. Admittedly the decree-holder was under obligation to pay a monthly rent of Rs. 50,000/- to the judgment-debtor it is paid upto the month of May 2001. It is a specific case of the decree-holder that such payment could not be made because of the fact that the judgment-debtors have raised objection before the Collector, Jalpaiguri for grant of the sanction for transfer of the tea garden. Such objection was raised by the judgement-debtor on the ground that they have not applied for grant of the permission for transfer. Thus it goes without saying that the judgment-debtor was not intended to perform his part of an obligation under the compromise decree. The explanation to Order 23 Rule 3 of the Code provides that the compromise decree cannot be said to be lawful if it infringes the provisions of the Contract Act. From the rival contentions it appears that none of the parties have raised objection to the grant of the compromise decree being unlawful under the Indian Contract Act. What is sought to be contended is that the parties are not performing their obligation under the compromise/consent decree. For such reason the decree cannot be set aside u/s 47 of the Code of Civil Procedure.

48. Another application being GA 2238 of 2007 filed by one Santosh Kr. Agarwal, the added Defendant No. 2 in the original suit for such an order mainly an order not to permit M/s. AGR Plantations Pvt. Ltd. to proceed with the execution of the decree. In the said application the said Santosh Kr. Agarwal, the applicant therein contends that the terms of settlement was entered into with him and the judgment-debtors was directed to execute the deed of transfer in his favour and not in favour of M/s. AGR Plantations Pvt. Ltd. He relied upon certain clauses on the terms of settlement forming the compromise decree. In support of such contention it would be trite to narrate the terms of settlement which reads thus:

(a) Shri Santosh Kumar Agarwal and M/s. AGR Plantations Pvt. Ltd. Both of 240B, AJC Bose Road, Calcutta- 29 are added as party Defendants.

(b) Shri Bhupatish Roychowdhury agrees to sell and Shri Santosh Kumar Agarwal agrees to buy Toonbarrie Tea Estate which is the subject matter of the above litigations

(c) At the request of Shri santosh Kumar Agarwal herein and for the consideration price of Rs. 63,00,000 to be paid to Shri Bhupatish Roychowdhury, the Defendant herein has agreed that the sale is to be made in favour of M/s. AGR Plantations Pvt. Ltd. Nominee of Shri Santosh Kumar Agarwal with the consent of the party.

(d) Out of the said agreed consideration, the sum of Rs. 1,00,000 has duly been paid to the Defendant by M/s. AGR Plantations Pvt. Ltd. Vide Banker's cheque No. 429902 dated 11th March, 2000 issued by Allahabad Bank, Elgin Road Branch, and it has been agreed that the balance consideration amount shall be payable in the manner following:

(i) Rs. 6 lacs on the date of the order to be passed herein;

(ii) Rs. 4 lacs within 60 days from the date of the order to be passed herein;

(iii) The balance sum of Rs. 52 lacs simultaneously on the execution and registration of the proposed deed of conveyance in respect of the said Tea Estate.

(e) the liability of Vijaya Bank and any other liability including provident fund A/C. Toonbarrie Tea Estate shall be borne and paid by Shri Santosh Kumar Agarwal, the Plaintiff herein and his nominee company M/s. AGR Plantations Pvt. Ltd.

(f) Shri Bhupatish Roychowdhury, the Defendant herein would complete the sale by executing and registering appropriate deed of conveyance in respect of the said Tea Estate within 90 days from the date hereof and the same may be extended for such further period as may be agreed upon between the parties.

(g) Shri Bhupatish Roychowdhury, the Defendant herein would arrange to obtain with the assistance of Shri Santosh Kumar Agarwal necessary clearance u/s 230A(1) of the Income Tax Act, 1961 as also necessary permission from the Deputy Collector, Jalpaiguri as may be required for completion of sale of the said Tea Estate.

(h) Shri Santosh Kumar Agarwal the Defendant herein shall render all his help and assistance to the Defendant as may be required by him in obtaining the necessary permission of the Deputy Collector of Jalpaiguri as also necessary Tax Clearance Certificate u/s 230A(1). To render help and assistance in obtaining necessary permission from the Commissioner of Income Tax and Deputy Collector Jalpaiguri is the essence.

(i) M/s. AGR Plantations Pvt. Ltd. Shall bear and pay the stamp duty on the Deed of Sale in respect of the said Tea Estate, the draft whereof has duly been approved and countersigned by the Advocates for the parties and the same is annexed hereto and marked "X". Until the execution of the Deed of Conveyance M/s. AGR Plantations Pvt. Ltd. shall run and manage the Tea Estate from the date of signing of this terms of settlement.

(j) Shri Santosh Kumar Agarwal is agreeable to reimburse the legal expenses incurred through Leslie & Khetry on the basis of the Bill given by them.

(k) Sri Santosh Agarwal, the added Defendant herein shall continue making payment of reserved monthly lease rent and/or monthly rent of Rs. 50,000/- only to Mr. Bhupatish Roy Chowdhury in respect of the suit property without any abatement and/or deduction whatsoever for the period until the sale in respect of the said suit property is completed by execution and registration conveyance in

favour of Mr. Santosh Kumar Agarwal.

(l) The shortfall on account of payment of monthly lease rent and/or monthly rent shall be made good on or before the execution of the Conveyance Deed.

(m) Save as hereinbefore stated, the parties shall have no claim against each other. Such party would bear and pay their own legal costs.

49. Much stress is made on Clause (k) of the said terms of settlement to contend that the said tea garden was agreed to be sold in favour of the said Santos Kr. Agarwal. It is his further case that he was under obligation to pay a monthly rent of Rs. 50,000/- to the judgment-debtor until the execution and registration of the conveyance in his favour. It is a specific case that the nomination in favour of M/s. AGR Plantations Pvt. Ltd. was under a bona fide belief that the said company is a family company comprising him and other family members.

50. It appears from clause c of the said terms of settlement that the said Santosh Kr. Agarwal nominated M/s. AGR Plantations Pvt. Ltd. with a clear stipulation that the sale should be effected in favour of the said company.

51. As it appears from the statement made in the said application that the said Santosh Kr. Agarwal has some internal disputes relating to the administration and management of M/s. AGR Plantations Pvt. Ltd. On a meaningful reading of the said terms of settlement which culminated into a compromise decree one can have a clear impression that the judgment-debtor is required to execute the conveyance or sale in favour of M/s. AGR Plantations Pvt. Ltd. Otherwise M/s. AGR Plantations Pvt. Ltd. should not saddle itself with an obligation of bearing the stamp duty on the deed of sale. Though in a latter clause it is written that Santosh Kr. Agarwal shall continue making payment of monthly rent of Rs. 50,000/- until execution and registration of the conveyance in his favour but he could not produce iota of evidence evidencing the payment of the monthly rent to the judgment-debtor. On the other hand M/s. AGR Plantations Pvt. Ltd. have paid the monthly rent till the month of May 2001 which admitted by the judgment-debtor.

52. Apart from the same the law is settled that in case of any repugnancy or inconsistency in the different clauses of a deed the earlier clause shall prevail as has been held in case of Uma Devi Nambair (supra) by the apex court in the following:

12. This rule of interpretation can be invoked if different clauses cannot be reconciled. (See AIR 1935 187 (Privy Council)). It is to be noted that rules of interpretation of Will are different from rules which govern interpretation of other documents like sale deed, or a gift deed, or a mortgage deed, or for that matter, any other instrument by which interest in immovable property is created. While in these documents, if there is any inconsistency between the earlier or the subsequent part or specific clauses, inter se contained therein, the earlier part will prevail over the latter as against the rule of interpretation applicable to a Will

under which the subsequent part, clause or portion prevails over the earlier part on the principle that in the matter of Will the testator can always change his mind and create another interest in place of the bequest already made in the earlier part or on an earlier occasion. Undoubtedly, it is the last Will which prevails.

53. Thus, the application of Santosh Kr. Agarwal is devoid of any merit and is liable to be dismissed.

54. Accordingly, both the applications being GA No. 2238 of 2007 and 2239 of 2007 are dismissed.

55. Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.