

(2008) 01 BOM CK 0015

In the Bombay High Court

Case No : Chamber Summons No. 231 of 2006 in Execution Application (LDG.)
No. 100 of 2006 in Suit No. 567 of 2007

Llalubhai Amichand Ltd.

APPELLANT

Vs

Akruti Nirman Ltd. and Others and Pandya and Poonawala

RESPONDENT

Date of Decision : 31-01-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 11, Order 20 Rule 11(2), Order 21 Rule 1(2), Order 21 Rule 2, Order 21 Rule 2(3)

Citation : (2008) 5 BomCR 793

Hon'ble Judges : Vazifdar S.J., J

Bench : Single Bench

Advocate : Sanjay Jain and Prakash Shinde, instructed by M. Dhruva and Co, for the Appellant; S.H. Doctor and P.K. Dhakeparkar, Sr. Counsels and Vijaykumar, instructed by . Prashan Kulkarni, for defendant Nos. 1 to 3, Subodh Joshi, Radhika Kalpatrai and Bharti Bhagwat, instructed by Parimal Shroff and Co. for defendant Nos. 4 and 5, Sirshika, for defendant No. 8-BMC, Y.B. Pandya, instructed by Pandya and Poonawala and Asha Bhambwani, for defendant No. 6-MMRDA, for the Respondent

Judgement

Vazifdar S.J., J.—It would be convenient to set out the prayers in the Notice of Motion as they are involved and the scope thereof were the subject matter of controversy. The prayers read as under:

(a) this Hon''ble Court be pleased to declare that the decree dated 7th July, 2005 and 11th July, 2005 passed in Suit No. 567 of 2005 has been adjusted and/or varied and/or modified to the extent that: (i) the plaintiff is required to surrender and/or handover the Amenity land and Additional Recreation Ground area to defendant No. 6 or defendant No. 8; (ii) that such surrender or handing over of possession has to be done on or before 25th February, 2006 or such other date as this Hon''ble Court may decide and (iii) the respondent has to pay the amount of Rs. 2,00,00,000/ to the plaintiff upon proof of possession of the Amenity space and Additional Recreation Ground;

(b) that the adjustment and/or modification and/or variation of the decree dated 7th July, 2005 and 11th July, 2005 as per prayer (a) above or to such extent as may be declared by this Hon"ble Court be certified on Decree dated 7th July, 2005 and 11th July, 2005 passed in Suit No. 567 of 2005;

(c) that this Hon"ble Court be pleased to declare that the plaintiff has complied with his obligation under Clause Nos. 6 and 8 of the Consent Terms dated 7th July, 2005 as adjusted and/or modified and/or varied;

(d) that this Hon"ble Court be pleased to direct the respondent/Garnishee to pay to the plaintiff the amount of Rs. 2,00,00,000/ alongwith accretions thereto from 1st January, 2006 or such other date as this Hon"ble Court may deem fit and proper;

(e) that this Hon"ble Court be pleased to order and direct defendant No. 6 to forthwith handover to the plaintiff, quiet, vacant and peaceful possession of the Service Industry land admeasuring 5245.83 sq. meters, more particularly described in the Schedule annexed hereto as Annexure I;

(f) in the alternative to prayer (e) above, this Hon"ble Court be pleased to appoint the Court Receiver, High Court, Bombay as Receiver of the Service Industry land admeasuring 5245.83 sq. meters, more particularly described in the Schedule annexed hereto as Annexure-I with power to take possession thereof from whosoever found in possession and with a direction to handover the same to the plaintiff forthwith;

(g) that upon receipt of the amount of Rs. 2,00,00,000/ by the plaintiff from the respondent, this Hon"ble Court be pleased to certify the same on the decree dated 7th July, 2005/11th July, 2005;

(h) that upon quiet, vacant and peaceful possession of Service Industry land being handed over to the plaintiff, this Hon"ble Court be pleased to certify compliance of the decree dated 7th July, 2005/11th July, 2005 in so far as respondent No. 6 is concerned.

2. The suit was filed for a declaration that the contract entered into between the plaintiff and defendant No. 1 is valid, subsisting and binding upon defendant Nos. 1 to 5. Defendant Nos. 2 to 5 are individuals. Defendant No. 6 is the Mumbai Metropolitan Regional Development Authority (MMRDA). Defendant No. 7 is the Union Bank of India and defendant No. 8 is the Bombay Municipal Corporation (BMC). The respondents were at the material time the Advocates of defendant Nos. 1 to 3 as well as the escrow agents appointed under the Consent Terms I shall refer to shortly.

3(A). It is not necessary to refer to the interlocutory proceedings taken out in the suit. By an order dated 7.7.2005, the suit was decreed in terms of the consent terms entered into between the plaintiff and defendant Nos. 1 to 3. By the said order, defendant Nos. 6 to 8 were directed to provide all cooperation to enable the plaintiff and defendant Nos. 1 to 3 to implement and act in pursuance of the

decree. The matter was directed to be put up on 11.7.2005 for further directions. Clauses 4 to 8 of the consent terms read as under:

4. Defendant No. 1 is Ordered and decreed to pay to the plaintiff an amount of Rs. 2,00,00,000/ (Rupees Two Crores Only) in full and final settlement of its claim in the Suit.

5. Defendant No. 1 undertakes to deposit the amount of Rs. 2,00,00,000/ (Rupees Two Crores Only) on or before 20th July, 2005 with M/s. Pandya and Poonawala, Advocates. In the event defendant No. 1 does not deposit the amount on or before 20th July 2005, then defendants No. 2 and 3 undertake to this Hon''ble Court to deposit the amount of Rs. 2,00,00,000/ with M/s. Pandya and Poonawala on or before 27th July, 2005. M/s. Pandya and Poonawala, Advocates will hold the amount as an escrow agent to be disbursed in the manner set out hereunder. In the event of the defendant Nos. 1 to 3 failing to deposit the sum of Rs. 2,00,00,000/ on or before 27th July, 2005, the decretal amount of Rs. 2,00,00,000/ shall carry interest at the rate of 15% per annum on and from 28th July, 2005 which interest will be the entitlement of the plaintiff.

6. The plaintiff and its Directors Mr. Paresh Shah and Mr. Sunil Shah undertakes to this Hon''ble Court to surrender and/or handover the amenity and additional recreation ground area to defendant No. 8 as contemplated under Condition No. 5 of the Letter of Intent dated 10th September 2003 issued by defendant No. 6 and to furnish proof on or before 31st December, 2005 of having handed over possession thereof to defendant No. 8. This undertaking shall come into effect upon compliance by defendant Nos. 1 to 3 of the deposit required under Clause 5.

7. In the event, the plaintiff commits default in producing receipt of defendant No. 8 having received possession of amenities space and additional recreational ground to M/s. Pandya and Poonawala then M/s. Pandya and Poonawala, Advocates will refund the amount of Rs. 2,00,00,000/ to defendant No. 1 after expiry of a period of 4 weeks from the time stipulated for performance under Clause No. 6 or within the extended time as set out hereunder and the Decree for the amount of Rs. 2,00,00,000/ shall stand cancelled. However all the other clauses of these consent terms shall continue to apply and bind the parties. The plaintiff shall be at liberty to apply to the Court for extension of time by making out an appropriate case and in that event the time for performance of the obligation will be as stipulated by this Hon''ble Court. It is clarified that defendants No. 1 to 3 will be entitled to oppose such application for extension of time.

8. In the event the plaintiff produces for inspection the original possession receipt of the defendant No. 8 having received possession of amenities space and additional recreational ground to M/s. Pandya and Poonawala, then M/s. Pandya and Poonawala, Advocates will pay the amount of Rs. 2,00,00,000/ to the plaintiff and interest accrued thereon to the defendant No. 1 forthwith and on such compliance and the decree for Rs. 2,00,00,000/ shall stand marked

satisfied and all other Clauses of these terms will continue to apply and bind the parties.

(B). By an order dated 11.7.2005, D.K. Deshmukh, J. recorded the statement on behalf of MMRDA that it would offer to the plaintiff possession of the area out of the larger property described in the possession receipt dated 11.8.2004 which is in its possession save and except the property which is conveyed to it under a conveyance dated 28.7.2004 within two weeks from the date of the order. The suit was accordingly disposed of.

4. By a letter dated 19.7.2005, MMRDA informed the plaintiff that it would be handing over possession of the excess land to the plaintiff. The letter was received by the plaintiff in September, 2005.

5. The plaintiff's case in a nutshell is that by about December, 2005 it was agreed between defendant Nos. 1 to 3 and itself that the plaintiff was at liberty to hand over possession of the amenities space and additional recreational ground to MMRDA (defendant No. 6) or the BMC (defendant No. 8) instead of only to the BMC as provided in Clause 6 of the consent terms. The consent terms stood accordingly varied/modified/adjusted by consent. Defendant Nos. 1 to 3 had agreed to an extension of time till 25.12.2006 for the plaintiff to hand over possession to MMRDA/BMC. Possession had in fact been handed over to MMRDA by the plaintiff long before on 11.8.2004. MMRDA had executed a writing of that day admitting the same, confirmed the same by a letter dated 8.2.2006, admitted the same in these proceedings and has no grievance that possession has not been handed over. Defendant Nos. 1 to 3 have derived full benefit under the consent terms. The plaintiffs therefore seek in this composite Chamber Summons inter alia to have the variation/modification recorded by the Court and to execute the decree as varied/modified.

6. Mr. Doctor, the learned Senior Counsel appearing on behalf of defendant Nos. 1, 2 and 3 opposed the Chamber Summons on the following grounds:

i) The consent terms had not been varied/modified entitling the plaintiff to hand over possession to MMRDA or the BMC. Defendant Nos. 1 to 3 had only agreed not to object to an extension of time for handing over possession of the lands to the BMC till 25.2.2006.

ii) Assuming that the consent terms were modified/varied as alleged, possession of the land was not handed over/surrendered by the plaintiff to MMRDA. The nature of the possession of MMRDA is not of the kind contemplated by the parties in the consent terms.

iii) Assuming that the consent terms were modified/varied as alleged, possession was required to be handed over by 25.2.2006 which the plaintiff had failed to do.

iv) The plaintiff had abandoned its application for extension of time.

v) The alleged variation/modification cannot be considered as it has not been

recorded by the Court under Order XXI, Rule 2 of the C.P.C.

vi) The Executing Court does not have power to record a variation/modification under Order XXI Rule 2.

vii) The alleged variation/modification does not constitute an adjustment within the meaning of that term in Order XXI, Rule 2 and therefore cannot be recorded by the Court.

7. I find the plaintiff's application to be well founded. Defendant Nos. 1 to 3 having derived full benefit under the consent terms and having suffered no prejudice whatsoever have raised the objections to deny unfairly the benefit of the decree to the plaintiffs.

8. Mr. Doctor firstly denied that the Consent Terms had been varied or modified by permitting the plaintiff to hand over possession of the said two plots to MMRDA or the BMC. He submitted that defendant Nos. 1 to 3 had agreed only not to object to an extension of time till 25.2.2006 for the plaintiff to hand over possession of the said plots to the BMC and nothing more. The submission is belied beyond any doubt by the correspondence between the parties which I will refer to immediately.

9. The plaintiffs Advocates letter dated 19.12.2005 addressed to the Advocates for defendant Nos. 1 to 3 who were also the escrow-agents, is important and reads as under:

In pursuance of the discussions/negotiations between our respective clients it has been agreed that in terms of the Consent Terms filed in the Court on 7/11th July, 05 your clients shall give their consent to our clients for extending the time to surrender the land to BMC/MMRDA which was to be surrendered on or before 31st December, 05, for which time shall now stand extended for a period of 8 weeks i.e. till 25/2/6.

In view of the aforesaid mutual discussion, we would appreciate if you can send a letter of confirmation on behalf of your clients. Also please note that in pursuance of the said extension of time to surrender the land, you shall continue to hold/retain the amount of Rs. 2.00 crores which is lying in the "escrow" as deposited by your clients which shall be forth with handed over to our clients upon acceptance of the land by MMRDA/BMC (as the case may be).

(emphasis supplied)

10. By their reply dated 20.12.2005, the Advocates for defendant Nos. 1 to 3 stated inter alia as under:

2 Our clients shall have no objection for the extension of time to surrender the land to Municipal Corporation of Greater Mumbai/ Mumbai Metropolitan Region Development Authority, (MCGM/MMRDA), as required under Clause 6 of the Consent Terms dated 7th July, 2005 filed in the subject suit before His Lordship Mr. Justice D.K. Deshmukh in the Hon'ble High Court.

4. Kindly inform us as to the date and time on which you shall be making application for extension of time as stated in the first paragraph of your letter, since our clients have instructed us to remain present at the time when said application for extension of time is made on behalf of your clients.

11(A). On 28.12.2005 the plaintiff moved an urgent application by way of a precipe for extension of time to hand over and/or surrender possession. No orders were passed on the preceipe.

(B){i} The plaintiff therefore on 29.12.2005 took out Chamber Summons No. 27 of 2006 for extension of time by a further eight weeks to surrender and/or hand over the plots "to defendant No. 6 (MMRDA) or defendant No. 8 (BMC)". The Chamber Summons had actually been taken out on 29.12.2005. It was filed and numbered on 13.1.2006.

(ii). It is important to note that in paragraph 8 of the Affidavit in support of the Chamber Summons, the plaintiff expressly stated that defendant Nos. 1 to 3 had agreed and consented for extension of time by eight weeks to surrender the land "to defendant No. 6 (MMRDA) or defendant No. 8 (BMC)." The above letters dated 19.12.2005 and 20.12.2005 were referred to and annexed to the affidavit.

(C). The plaintiff made an urgent application during the Court vacation in terms of the said Chamber Summons. By an order dated 30.12.2005, the learned Judge declined to pass any order extending the time without giving the BMC an opportunity of being heard. It is pertinent to note that defendant Nos. 1 to 5 appeared before the learned Judge. The order indicates that there was no opposition on behalf of defendant: Nos. 1 to 5 to the said application.

(D). The Chamber Summons was ultimately dismissed for default on 14.2.2006. Suffice it to note at this stage that defendant Nos. 1 to 5 at no stage opposed the Chamber Summons. Nor did they deny any of the averments therein including the averment in paragraph 8 I have referred to namely "that it was agreed by defendant Nos. 1 to 3 that the plaintiff shall be entitled to surrender the land to defendant No. 6 (MMRDA) or defendant No. 8 (BMC)" and not merely to defendant No. 8 as provided in the consent terms.

12. MMRDA by a letter dated 28.12.2005 applied to the Government of Maharashtra for acquiring the land reserved for amenity on the grounds and for the reasons stated therein which are not material for the present purpose.

13. By a letter dated 30.12.2005, MMRDA informed the plaintiff that it intended taking over the land reserved for amenity space and additional recreation place against the TDR in accordance with the Government order dated 2.4.2005 and with the approval of the Government of Maharashtra.

14. It must be noted at this stage that the MMRDA was already in any event in possession of the amenity space and the additional recreation place. There is no dispute in this regard. It is evidenced by a possession receipt dated 11.8.2004. What was disputed by Mr. Doctor, was the nature of the possession. I shall deal

with this aspect later.

15. The plaintiffs Advocate by a letter dated 2.1.2006 informed the Advocates of defendant Nos. 1 to 3 about the letter dated 30.12.2005 and in view thereof called upon them to hand over the amount of Rs. 2.00 crores lying in escrow with them. It was further stated that a request was made pursuant to the discussion between the parties where at defendant Nos. 1 to 3 had confirmed that they were instructing their Advocates/ escrow agent to hand over the said amount to the plaintiff.

16. It was obviously in view of the above that by a letter dated 3.1.2006, the plaintiff informed the MMRDA that:

possession of the entire land be retained with MMRDA (defendant No. 6) which includes the land under reservation for amenity space and additional recreation space which is to be handed over to you (defendant No. 6.)

17(A). The Advocates of defendant Nos. 1 to 3 by a letter dated 5.1.2006 addressed to the plaintiff's Advocate in reply to the plaintiffs letter dated 2.1.2006 stated as under:

2. Our clients shall have no objection as to refund of the amount of Rs. 2,00,00,000/(Rupees Two Crores only) deposited by our clients with us, in escrow, on your clients, through you, furnishing to us proof of surrender and/or handing over possession of amenities and additional recreation ground area to defendant Nos. 8 (BMC) and/or 6 (MMRDA) and Conveyance in respect of the said amenities and additional recreating ground area executed by your clients in favour of defendant No. 8 and/or 6 as required in Clause 6 of the Consent Terms executed by our respective clients and filed on 7th July, 2005 in the subject matter.

(emphasis supplied).

(B) It is pertinent to note that defendant Nos. 1 to 3 did not deny that the land may be handed over to MMRDA or the BMC. The additional condition regarding execution of a conveyance by the plaintiff in favour of MMRDA and/or BMC was not a part of the consent terms and could not have been insisted upon.

18. In reply to the letter dated 5.1.2006, the plaintiffs Advocate by a letter dated 7.1.2006 referred to their earlier letter dated 2.1.2006 under cover of which the plaintiffs letter to MMRDA dated 30.12.2005 had been forwarded. The letter reiterated that defendant Nos. 1 to 3 had confirmed at the meeting between the parties that they would instruct their Advocates/escrow agent to hand over payment of the said sum of Rs. 2.00 crores.

19. The plaintiffs Advocate thereafter addressed letters dated 7.1.2006, 12.1.2006 and 18.1.2006 reiterating their earlier stand. In the letter dated 7.1.2006, it was stated that it was with the consent of the concerned defendants that the land continued to remain with MMRDA.

20. Thus upto this stage the only condition insisted upon by defendant Nos. 1 to 3 was for a conveyance in respect of the said lands to be executed by the plaintiff in favour of the BMC and/or MMRDA which clearly was not a requirement under the consent terms.

21(A). By a letter dated 18.1.2006 defendant Nos. 1 to 3 contended that MMRDA had not taken over possession of the land; that MMRDA was awaiting Government's approval for the same; that the plaintiff was required to obtain and produce the original possession receipt from MMRDA and to take immediate action to coordinate and complete due process of MMRDA taking over possession including the execution of the conveyance in favour of MMRDA as per Clause 7 of a Multi Party agreement dated 28.7,2004. It was further stated that MMRDA was ready to accept the possession of the land only after obtaining sanction from the State Government and that therefore, the plaintiff should obtain a possession receipt from MMRDA after such sanction and simultaneously execute in their favour the requisite conveyance.

(B). This now was an additional ground on which defendant Nos. 1 to 3 refused to permit the release of the said sum of Rs. 2.00 crores to the plaintiff.

22(A). The Advocates of defendant Nos. 1 to 3 addressed another letter dated 20.1.2006 to the plaintiffs Advocate. The letter refers to defendant No. 2 having received a call from the Commissioner of MMRDA informing him about a meeting on 19.1.2006 in which it was agreed to grant the plaintiff time upto March, 2006 to complete the formalities of handing over possession of the said areas to the BMC/MMRDA as contemplated under the Letter of Intent dated 10.9.2003. It is stated that defendant Nos. 1 to 3 instructed their Advocates to cooperate in respect of the said amounts held in escrow in their capacity as escrow agent. The Advocates of defendant Nos. 1 to 3 stated as under .

However, as you are aware, we as escrow agent in the terms of the order of the consent terms of the Hon''ble Court, are bound to follow the letter of the said order/consent terms and are unable to release the said amount of Rs. 2,00,00,000/ to your clients without the permission of the Court and/or without your clients furnishing to us proof of handing over possession of the amenity and additional recreation ground area to defendant No. 8 (BMC) as contemplated under Condition No. 5 of the Letter of intent dated 10th September 2003 as required under Clause 6 of the Consent Terms. Your clients are once again requested to kindly furnish to us either proof of satisfaction of the said condition as contained in Clause 6 of the said Consent Terms and/or suitable order from the Hon''ble High Court in respect thereof.

(B). Pausing here I would only state that the escrow agent cannot really be blamed for insisting upon the strict compliance of the original unamended consent terms despite their knowledge of the fact that it had been agreed by their clients that the possession may now be handed over by the plaintiff to MMRDA or the BMC and not. merely to the BMC as provided in the consent terms

prior to the variation. Their difficulty appears to be on account of their having acted in a dual capacity namely as the Advocates for defendant Nos. 1 to 3 and as escrow agents. They probably correctly insisted on the plaintiff's furnishing proof of satisfaction of the conditions of the consent terms and/or suitable orders from the Court in respect thereof. It is indeed gratifying to note that the erstwhile Advocates of defendant Nos. 1 to 3 did not hurriedly or abruptly pay over the said amounts to their clients in purported compliance with the condition stipulated in Clause 7 of the consent terms. Their conduct as escrow agents in the matter, if I may say with respect, is commendable.

23(A). The plaintiff's Advocates by their letter dated 23.1.2006 in addition to reiterating their earlier stand referred to the said meeting held on 19.1.2006 between the parties herein in the office of the MMRDA whereat it was confirmed by MMRDA that they were holding possession of the land and upon which one Vimal Shah on behalf of defendant Nos. 1 to 3 had agreed and confirmed that by 20.1.2006 their Advocates would be instructed to hand over the amounts of Rs. 2.00 crores to the plaintiff. A copy of the Taba Patra confirming possession with MMRDA was also enclosed along with the letter.

(B). A reminder dated 27.1.2006 was also addressed. There was no denial to the letter dated 23.1.2006.

24. By a letter dated 8.2.2006, MMRDA confirmed that the said additional recreation ground and amenity space would be handed over by MMRD and a conveyance in regard thereto will be prepared after the receipt of the Government approval which was expected in due course of time. It is important to note that MMRDA expressly stated that the said plots were "already in possession of MMRDA". The MMRDA therefore, stated that it had no objection to the release of the amount as per the consent terms in favour of the plaintiff.

25. Despite all this, the plaintiff did not receive the said amount. It addressed letters dated 10.2.2006, 14.2.2006 and 20.2.2006 reiterating the above but to no avail.

26. As stated above, Chamber Summons No. 27 of 2006 was dismissed on 14.2.2006 on account of the plaintiff not having filed an affidavit of service within the prescribed time. In other words, the Chamber Summons was dismissed for default and not on merits.

27. It is in these circumstances, that the plaintiff filed the above Chamber Summons on 21.2.2006.

28. Two things are clear thus far.

(A). Firstly, the parties had agreed to amend/vary/modify Clause 6 of the consent terms under which the amenity and additional recreation ground areas (hereinafter referred to as the said plots) were to be handed over by the plaintiff to the BMC/ defendant No. 8 by agreeing instead that the plaintiff may hand over possession either to MMRDA/defendant No. 6 or the BMC/defendant No. 8. The

denial in this regard requires merely to be stated to be rejected. Starting with the letter dated 19.12.2005, this fact was not only stated by the plaintiff and not denied by the defendants but was in fact expressly admitted by the defendants. In the correspondence I have referred to defendant Nos. 1 to 3 have in every letter referred to surrender/handing over possession of the said lands to MCGM (defendant No. 8)/MMRDA (defendant No. 6) as required by Clause 6 of the consent terms. There is no doubt therefore that the stipulation in Clause 6 of the consent terms was varied to this extent by the express consent of the parties. The doubt, if any, in this regard is removed by the fact that to the express averments to this effect of the plaintiff in its affidavit in support of Chamber Summons No. 27 of 2006 there was no denial.

(B). Secondly, there is also no doubt that possession of the land had been with MMRDA as of 11.8.2004 as is evidenced by the document titled "possession receipt" of that date executed by the plaintiff and the MMRDA. The document clearly states that possession of the lands were handed over to the representative of MMRDA on 11.8.2004 for the purpose of rehabilitation of the project affected persons by the representative of the plaintiff. This is further corroborated by MMDRA's said letter dated 8.2.2006 referred to earlier wherein it stated that the lands "are already in possession of MMRDA.

(C). Thirdly, the plaintiffs assertion in the letter dated 7.1.2006 that it was with the consent of the concerned defendants that the land continued to remain with the MMRDA appears to be correct. There is no other explanation for the plaintiff having agreed to the MMRDA retaining possession of the land despite its statement recorded in the order dated 11.7.2005 to hand over possession of the lands to the plaintiff. This in turn would have enabled the plaintiff to comply with Clause 6 of the Consent Terms without the modification. In any event, the modification having been established, it matters little even if it was for the benefit of the plaintiff.

29. Faced with this, Mr. Doctor raised the second contention namely that the nature of possession referred to and admitted by MMRDA is not of the kind contemplated in the consent terms and in particular Clause 6 thereof. I am unable to agree.

30. The consent terms including Clause 6 thereof, do not specify the "nature of possession". They merely refer to possession being handed over meaning thereby physical possession. Clause 6 of the consent terms states that possession is to be handed over as contemplated under condition 5 of the Letter of Intent dated 10.9.2003 issued by MMRDA which reads as under:

5. That the Developer shall hand over 7.5% amenity plot and 10% additional R.G. plot, as per lay out, to MCGM (defendant No. 6).

This Clause too does not state the nature of the possession or the manner of handing over possession of the said plots.

31. Mr. Doctor then submitted that if the existing possession of MMRDA was all that was required, it was not necessary for the parties subsequently agreeing to hand over possession to MMRDA and/or BMC of the said plots. He further relied upon paragraph of the plaintiffs affidavit in support of Chamber Summons No. 27 of 2006 which reads as under:

7. I say that the defendant No. 6 (MMRDA) or 8 (BMC) have to follow certain procedure before taking over the possession of the amenity and area/land. The defendant No. 6 or 8 has to visit the site area for survey and have to take inspection of the amenity of which possession is to be taken. I further say that this procedure will take further time of two months.

32. This submission is clearly unfounded. It must be remembered that the parties had agreed subsequently that possession may be handed over to MMRDA or BMC. If possession was to be handed over to the BMC, obviously certain modalities would have been required to be followed and arrangements made. For instance, the plots to be handed over were not the entire lands owned by the plaintiff and in possession of MMRDA. As stated above, a certain portion of the land is to be returned to the plaintiff. This is clear even from the order dated 11.7.2005, the correspondence between the plaintiffs and the Affidavits filed by MMRDA in these proceedings.

33. Now, if possession was to be handed over to the BMC as per the consent terms, it would have been necessary first for MMRDA to transfer possession of the entire land to the plaintiff and the plaintiff in turn would have had to transfer only the two plots to the BMC. In that event, it would have been necessary for the parties to first demarcate the two plots and thereafter hand over the same to the BMC. When Chamber Summons No. 27 of 2006 was filed, it was still not clear whether MMRDA would be permitted by the State Government to retain the land or not. Indeed, the permission admittedly has not to date been granted by the State Government although the parties expect it to be granted shortly. If the plaintiff chose to hand over the possession to the BMC as originally provided in the consent terms, certain conditions would have been required to have been fulfilled. It is pertinent to note that when Chamber Summons No. 27 of 2006 was taken out on 29.12.2005 (it was registered/ numbered on 13.1.2006), MMRDA had not confirmed that it would be taking over the land. It did so only by the letter dated 30.12.2005. It is probably for this reason that in paragraph 7 of the affidavit in support of Chamber Summons No. 27 of 2006 that the reference to possession being required to be handed over was made. This is clear from the averment referring to MMRDA or the BMC. It is in this light that the averments including those in paragraph 7 of the affidavit in support of Chamber Summons No. 27 of 2006 ought to be construed.

34. I appreciate that the averment is with respect to "defendant No. 6 or 8". Mr. Doctor has sought to take advantage of what may at the highest be described as an inaccuracy and a lack of clarity in the pleadings. I am not inclined to read the averments in this regard as strictly and technically as suggested by Mr. Doctor.

Mr. Doctor has not indicated anything to suggest that possession as required by MMRDA has nor been handed over. What is most important to note is that MMRDA has made no grievance in this regard either.

35. In view of the variation, the plaintiff was entitled to contend that it had already complied with its obligations under the decree as modified and varied inasmuch as possession of the plots have already been handed over to MMRDA. Indeed, MMRDA was in possession of a much larger area which included the plots required to be handed over. Surely, this cannot be held against the plaintiff. Indeed again, the demarcation to be carried out is for the benefit of the plaintiff, who is entitled to the return of lands other than those forming the said two plots.

36(A). It is useful to note that the handing over of possession of the plots was necessary in view of the Letter of Intent dated 10.9.2003. The Letter of Intent issued by the MMRDA provided that there was no objection to allow the user of the adjoining lands as per the provisions of the Development Control Regulations, 1991 subject to the conditions stipulated therein. One of the conditions viz. condition No. 5 provided that the developers i.e. defendant Nos. 1 to 3 hand over 7.5% amenity plot and 10% additional recreation ground plot as per the layout plot to the BMC/defendant No. 8. It was to ensure compliance of this condition that the consent terms included Clause No. 6 requiring the plaintiff to surrender and/or hand over the said two plots as contemplated under the said condition No. 5 of the Letter of Intent.

(B). It is important to note that admittedly the development/construction of the adjoining plots has not been hampered in any manner whatsoever for noncompliance of condition No. 5 of the Letter of Intent. In other words, defendant Nos. 1, 2 and 3 have derived full benefit under the consent terms. It is unfortunate that despite the same, technical contentions are raised to deprive the plaintiff of the amounts admittedly due to it.

37. Mr. Jain also rightly submitted that in fact demarcation of the plots must necessarily have been carried out. The submission was based on the admitted fact that the development on the remaining portion of land had not only commenced but is now over. Without such demarcation, it would not have been possible for the development to be carried out. It would not have been possible to obtain permission from the Planning Authority/B.M.C. for the same.

38. This brings me to Mr. Doctor's third contention namely that even assuming that there was any variation and that possession of the said plots were handed over as required, they were required to be handed over by 26.2.2006, which the plaintiff had failed to do.

The submission is unfounded.

39. This was so under the unamended Clause 6 of the consent terms. However, in view of the variation, it is ex facie clear that Clause 6 had been complied with inasmuch as possession was already with the MMRDA even prior to the consent

terms, as is evidenced by the possession acknowledgment dated 11.8.2004, referred to earlier. That the MMRDA had been in possession is admitted by the BMC and MMRDA.

40. Mr. Doctor submitted that due to possession not having been handed over to the BMC, defendant Nos. 1, 2 and 3 have been unable to avail of the TDR in relation to the said two plots.

41. Even assuming the same to be so, defendant Nos. 1 to 3 agreed to the variation permitting the plaintiff to hand over the plot to MMRDA or BMC. It is not open to them now to raise this contention.

42. Moreover, there is nothing on record which suggests that defendant Nos. 1, 2 and 3 are entitled to any TDR in relation to the said two plots. The necessity of the plaintiff handing over the said two plots to the BMC/ MMRDA was to ensure compliance with condition No. 5 of the Letter of Intent.

43. Mr. Doctor's fourth contention is that the plaintiff had abandoned its application for extension of time in view of the dismissal of Chamber Summons No. 27 of 2006 of 14.2.2006.

44. The Chamber Summons was not dismissed on merits. Soon after the Chamber Summons was taken out, MMRDA by its letter dated 30.12.2005 confirmed that it intended taking over the said two plots. In view thereof, and in view of the changed circumstances brought about by defendant Nos. 1 to 3 agreeing to the plaintiff handing over possession of the said plots to MMRDA or the BMC, it was strictly not even necessary for the plaintiff to have sought extension of time in Chamber Summons No. 27 of 2006 or in the present Chamber Summons.

45. Even assuming it was necessary for the plaintiff to seek extension, in my view, an application in this regard is clear from prayer (a)(ii) of the present Chamber Summons itself. The averments in the affidavits filed on behalf of the plaintiff contain all the facts that are necessary to support such an application. Had I found it to be necessary for the plaintiff to apply for extension, I would readily have granted it for virtually any period of time as the plaintiff has complied with every one of its obligations. To refuse the plaintiff reliefs would be extraordinarily unjust and unfair.

46. In the circumstances it must be held that Clause 6 of the consent terms stood varied/modified by the consent of the parties thereto entitling the plaintiff to hand over possession of the said two plots to either the BMC or MMRDA and not merely to the BMC as provided originally. Further the plaintiff has complied with the obligation as varied/ modified by virtue of the fact that MMRDA had been and continues to be in possession of the said plots even prior to the variation/ modification.

47. This brings me to the legal issues raised by Mr. Doctor.

48. Mr. Doctor submitted that even assuming that Clause 6 of the consent terms had been varied and that the plaintiff had handed over possession of the plots to MMRDA in accordance therewith as contended by the plaintiff, the plaintiff would not be entitled to the reliefs claimed in the Notice of Motion. Mr. Doctor based this submission on the ground that the variation had not been recorded by the Court as required by Order XXI, Rule 2(3) of the Code of Civil Procedure, 1908. According to Mr. Doctor, the variation alleged, cannot be considered by the Court as there is no order of this Court varying the decree. He further submitted that the present Chamber Summons is taken out in execution and that the Executing Court does not have the power or jurisdiction to record the variation. He also submitted that the variation does not fall within the scope/ambit or Order XXI, Rule 2. The variation cannot therefore, according to him, even be recorded or the satisfaction thereof be certified under Order XXI, Rule 2 and can be enforced only by filing a separate suit.

I am unable to agree.

49. The first contention does not arise in this case as the plaintiff has in this Chamber Summons sought an order recording and certifying the variation/modification/adjustment. It is a composite application for recording and certifying the variation/modification/adjustment and for execution of the decree so varied/modified/adjusted.

50. It would be convenient to deal with the other legal submission together as the authorities cited deal with both aspects.

51. Section 47(1) of the C.P.C. reads as under:

47. Questions to be determined by the Court executing decree. - (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

52. Rule 2 of Order XXI of the CPC reads as under:

2. Payment out of Court to decree-holder.-(1) Where any money payable under a decree of any kind is paid out of Court, 1 [or the decree of any kind 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 2 [or any person who has become surety for 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.

[(2-A) No payment or adjustment shall be recorded at the instance of the judgment debtor unless.

(a) the payment is made in the manner, provided in Rule 1; or

(b) the payment or adjustment is proved by documentary evidence; or

(c) the payment or adjustment is admitted by, or on behalf of, the decree holder in his reply to the notice given under Sub-rule (2) of Rule 1. or before the Court.]

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

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In Order XXI, Rule 2, for the existing (2), substitute the following as Sub-rule (2): (2) The judgment debtor or any person who has become surety for judgment debtor may also inform the Court by an application in writing supported by an affidavit of such payment or adjustment and apply to the Court to issue a notice to the decree holder to show cause on a date 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. (1-10-1983).

53. It would be convenient to deal with the authorities cited based on which, in my view, the plaintiff's application ought to be allowed. I will thereafter deal with the authorities relied upon by Mr. Doctor.

54. In Kalyanji Dhana Vs. Dharamsi Dhana and Co., Broomfield, J. considered inter alia whether the defendant can plead adjustment and satisfaction before the Executing Court. In that case, the respondent who had obtained a decree, commenced proceedings for executing the same. The appellant made an application in which he contended that there had been an adjustment of the decree. The alleged adjustment had taken place on 4.11.1930 and the appellant's application founded on the adjustment was made on 19.12.1930. The learned Subordinate Judge held against the defendant. The learned District Judge dismissed the Appeal.

The appellant challenged the said order in Second Appeal before this Court. The learned Judge noted that the appellant's application based on the adjustment was made within time. In fact, the learned Judge held that the fact that the information was given to the Court by the appellant/judgment debtor in a written statement put in by him in answer to an application for execution, may be regarded as sufficient compliance with the terms of Order XXI. The learned Judge then held as under:

4. ...

I can see no justification for the contention of the learned Advocate for the respondent that the law requires that the judgment debtor must certify an adjustment before execution proceedings begin. The Full Bench case is no authority for the proposition that an application to record an adjustment cannot be entertained by the Executing Court, if it is made within time. On the other hand, Rampopal v. Shivnarayan is an authority, if any be needed, for the proposition that the Sub-Court at Andheri, to which this decree had been transferred, was the Court whose duty it was to execute the decree and the Court which could properly entertain a request from the judgment debtor for the recording of an adjustment.

(emphasis supplied)

55. The judgment clearly supports the plaintiff's case. The learned Judge has clearly held that an application to record an adjustment can be entertained by the Executing Court and that the Executing Court could properly entertain a request for recording an adjustment.

56. Before referring to the next judgment relied upon by Mr. Jain viz. Moti Lal Banker Vs. Mahraj Kumar Mahmood Hasan Khan, , it is pertinent to note that in that case the Supreme Court had overruled the judgment of the Full Bench of the Allahabad High Court reported in Maharaj Kumar Mahmud Hasan Khan Vs. Moti Lal Banker, . Almost every submission made by Mr. Doctor is to be found as the basis for the judgment of the Allahabad High Court. The judgment was overruled by the Supreme Court in appeal. 57. In Moti Lal Banker Vs. Mahraj Kumar Mahmood Hasan Khan, case, the money suit ended in a compromise. Under the terms of the compromise dated 24.3.1953, one Amir Ali Khan was liable to pay Rs. 16,500/ within a year which he did. The decree also directed the respondent to pay within six months Rs. 22,500/ with interest at 6% per annum which the respondent failed to. On 23.5.1954 the appellant took out execution for the said amount together with interest and attached an Immovable property. The execution proceedings ended in a compromise. The appellant agreed not to execute the decree for two months and the respondent agreed to pay the same with interest at 1% per month i.e. 12% per annum until realisation. In default, the appellant was authorised to realise the amount due under the compromise arrived at in the execution proceedings.

It is important to note that it was the Executing Court that recorded the compromise. It is not as if the compromise was recorded in independent proceedings not connected with the execution proceedings. The respondent having failed to pay the amount as per the compromise arrived at in the execution proceedings, the appellant filed a fresh Execution Application for realising the said amount. The same was objected to by the respondent.

The matter was referred to a Full Bench on the question whether it was open to the parties in execution proceedings to enter into a compromise postponing the execution of the decree on condition of paying enhanced interest. The Full Bench

re-framed the question thus:

Is a compromise entered in a proceeding for execution of a decree by which the judgment debtor undertakes to pay interest at a rate higher than the decree rate of interest, enforceable in a proceeding for execution of the decree?

The Full Bench by a majority judgment answered the question in the negative. The Supreme Court overruling the judgment in appeal held as under:

2. It is open to the parties to enter into a compromise with reference to their rights and obligations under a decree. There is nothing in the CPC which prevents the parties from entering into such a compromise. If the compromise amounts to an adjustment of the decree, it must be recorded under Order 21, Rule 2 and if not so recorded, it cannot be recognised by any Court executing the decree. The compromise of May 29, 1954 was so recorded within the prescribed period of limitation. The compromise was a fair bargain to postpone the execution of the decree on payment of reasonable interest. The terms of the compromise related to the execution of the decree. The Executing Court has power to determine all questions arising between the parties to the suit relating to the execution of the decree and to give appropriate relief on such determination. Exclusive power to determine such questions is given to the Executing Court by Section 47 of the Code of Civil Procedure. The Executing Court can determine all questions relating to the agreement postponing the execution of the decree and the incidental term as to payment of the higher rate of interest. The agreement to pay the higher interest is enforce-able in execution of the decree, see (The Oudh Commercial Bank Ltd. v. Thakurain Bind. Basin Kuer) 1939 I.R. 66 : I.A. 84 100103. On the question whether the agreement to pay interest at a rate higher than the rate provided in the decree can be enforced in execution proceedings there was a conflict of judicial opinion. The Privy Council decision settled the law on this point. There were also earlier decisions which held that execution could issue both for the sum decreed and for the interest promised, see (Sreeshteedhur Shaha v. Woomeshnath Roy) 1866 (5) W.R. (Miscellaneous Appeals) 1 and (Lakshmana v. Sukiya Bai) ILR 1884 Mad. 400.

3. The jurisdiction of the Executing Court to enforce such a compromise is not taken away by Order 23, Rule 4 of the Code of Civil Procedure. The effect of Order 23, Rule 4 is that Order 23, Rule 3 does not apply to execution proceedings. Independently of Order 23, Rule 3, the provisions of Order 21, Rule 2 and Section 47 enable the Executing Court to record and enforce such a compromise in execution proceedings. Nor does Order 20, Rule 11(2) affect this power of the Executing Court. Order 20, Rule 11 enables the Court passing the decree to order postponement of the payment of the decretal amount on such terms as to the payment of interest as it thinks fit on the application of the judgment debtor and with the consent of the decree holder. It does not affect the power of the Executing Court u/s 47 and Order 21, Rule 2.

(emphasis supplied)

58. Mr. Doctor sought to distinguish the judgment by emphasizing the words "such a compromise" in the first sentence in paragraph 3 of the judgment quoted above. He submitted that it is only a compromise which extinguishes or satisfies the decree that falls within the ambit of Order XXI, Rule 2 and which can be recognized. I do not agree. Whether the variation/modification/adjustment in the present case falls within the ambit of Order XXI, Rule 2 is a separate question which I will deal with later. Suffice it to note at this stage that if it does, the Supreme Court has clearly held that the Executing Court not only can but must determine all questions relating thereto, including whether the variation was arrived at or not and if the answer is in the affirmative, to record and to enforce the same.

59. Mr. Doctor also submitted that the variation/modification pleaded by the plaintiff does not fall within the ambit of Order 21, Rule 2 and cannot therefore be recorded or certified. He raised this submission on the basis that the variation/modification does not fall within the ambit of the term "adjusted".

60. Mr. Jain relied upon the judgment of a Full Bench of the Madhya Pradesh High Court in *Rajeev Khandelwal Vs. Arun Pannalal*, . The Full Bench held that one of the meanings attributed to the word "adjust" in the Oxford Dictionary, is "refashioning". The Full Bench also held as under:

7. Having heard learned Counsel for the parties at some length, we are of opinion that the decision of the Division Bench of this Court in the case of *Bahadur Singh {supra}* lays down the correct legal proposition in regard to the scope of Order XXI, Rule 2 of the Code of Civil Procedure. The question which really arises for consideration is about the scope and purport of the term "adjustment" used in Order XXI, Rule 2, Code of Civil Procedure. In this connection it would be pertinent to notice that Section 47, C.P.C. does not use the word "adjustment" but uses the words "relating to the execution, discharge or satisfaction of the decree." If the purpose of enacting Order XXI, Rule 2, C.P.C, was to confine its applicability to "satisfaction" of the decree alone as seems to be the view taken in *Bhurelal's* case (*supra*) there was no difficulty in using the word "satisfied" in Order XXI, Rule 2, C.P.C. The Legislature, however, purposely made a departure in this behalf and in place of using the word "satisfied" used the word "adjust". Not only that, it also prefixed the word "adjusted" with another word of significance, namely "otherwise". The purpose of Order XXI, Rule 2 of the CPC obviously, therefore, was that an agreement which had the effect of adjusting the decree in any manner had to be got recorded as certified and on failure to do so, the Executing Court was prohibited by Order XXI, Rule 3 CPC to recognize any agreement which had the effect of adjustment of a decree in the manner stated above. The word "adjust" or "adjustment" had not been defined in the Code of Civil Procedure. One of the meanings attributed to the word "adjust" in the Oxford Dictionary is "a refashioning."

8. ...

Since Order XXI, Rule 2, Code of Civil Procedure, uses the words "in whole or in part "after the words" "Otherwise adjusted," even a partial adjustment of the decree is clearly permissible under this rule. Consequently, where a decree has been adjusted in whole or in part, it has to be got recorded as satisfied under Order XXI, Rule 2, of the Code of Civil Procedure.

14. ...

As seen above, Rule 2 of Order XXI places emphasis not on the decree being satisfied but on the same being adjusted. In our opinion, the term "adjusted" is obviously wider than the term "satisfied". There may be an agreement which merely satisfies the decree and nothing more, whereas there may be another agreement which apart from satisfying the decree as it stands does something in addition to it, in the sense that it re-fashions the decree. Such an agreement would amount to an adjustment falling under the second a category of agreements referred to in the case of AIR 1948 35 (Nagpur) . Indeed, certain observations of the Supreme Court in *Moti Lal Banker Vs. Mahraj Kumar Mahmood Hasan Khan*, even though made in a slightly different context would, in our opinion, be helpful. That was a case where there was a compromise postponing execution on the judgment debtor agreeing to pay higher rate of interest than the decretal one, such a compromise was found to be enforceable in execution proceedings and it was held:

It is open to the parties to enter into a compromise with reference to their rights and obligations under a decree. There is nothing in the CPC which prevents the parties from entering into such a compromise. If the compromise amounts to an adjustment of the decree, it must be recorded under Order 21, Rule 2 and if not so recorded, it cannot be recognised by any Court executing the decree.

In that case, as pointed out by the Supreme Court, the compromise which was dated May 29, 1954 had been recorded under Order XXI, Rule 2, Code of Civil Procedure, within the prescribed period of limitation.

(emphasis supplied.)

61(A). In *Sultana Begum Vs. Prem Chand Jain*, the Supreme Court held as follows:

16. Interpreting the provisions of Section 47 and Order 21, Rule 2 in the light of the above principles, there does not appear to be any antithesis between the two provisions. Section 47 deals with the power of the Court executing the decree while Order 21, Rule 2 deals with the procedure which a Court whose duty it is to execute the decree has to follow in a limited class of cases relating to the discharge or satisfaction of decrees either by payment of money (payable under the decree) out of Court or adjustment in any other manner by consensual arrangement.

20. The words "or the decree of any kind is otherwise adjusted" are of wide amplitude. It is open to the parties namely, the decree-holder and the judgment

debtor to enter into a contract or compromise in regard to their rights and obligations under the decree. If such contract or compromise amounts to an adjustment of the decree, it has to be recorded by the Court under Rule 2 of Order 21. It may be pointed out that an agreement, contract or compromise which has the effect of extinguishing the decree in whole or in part on account of decree being satisfied to that extent will amount to an adjustment of the decree within the meaning of this Rule and the Court, if approached, will issue the certificate of adjustment. An un-certified payment of money or adjustment which is not recorded by the Court under Order 21, Rule 2 cannot be recognised by the Executing Court.

(emphasis supplied.)

(B). It is pertinent to note two things. Firstly, the Supreme Court has held that the expression "or the decree of any kind is otherwise adjusted are of wide amplitude". Secondly, the adjustment to fall within the ambit of Order XXI, Rule 2 does not necessarily have to be in respect of the entire decree. The parties are also at liberty to adjust some and not all aspects of the decree. There is nothing in the C.P.C. which prevents them from doing so.

(C). Mr. Doctor had in fact relied upon paragraph 16 of this judgment. This he did while relying upon the judgment of the Supreme Court in Padma Ben Banushali and Another Vs. Yogendra Rathore and Others, wherein paragraph 16 from Sultana Begam's case was cited with approval by the Supreme Court. The observations therein in fact support the plaintiff including on the point that Order XXI, Rule 2 deals with the procedure which a Court whose duty it is to execute the decree has to follow. This clearly indicates that the powers under Order XXI, Rule 2 are exercised by the Court whose duty it is to execute the decree, to wit the Executing Court.

62. To the same effect, is the judgment of the Supreme Court in Padma Ben Banushali and Anr. v. Yogendra Rahore and Ors. 2006 (12) S.C.C. 138 (paragraph 20). In fact, this judgment was cited by Mr. Doctor. It not only does not assist him but is in fact against him.

63. I am in respectful agreement with the judgment of the Full Bench of the Madhya Pradesh High Court that the words "otherwise adjusted" are wider than the term "satisfied". Indeed the term "adjusted" is of wide amplitude and there is nothing in the CPC that warrants narrowing the scope or ambit of the term. The term in the Random House Unabridged Dictionary is defined to include : "to settle or bring to a satisfactory state, so that parties are agreed in the result : to adjust our differences". The facts of the present case squarely fall within the ambit of the term "adjusted".

64. From the aforesaid authorities, certain aspects relating to this mater emerge clearly.

Firstly, the term "adjustment" and the expression "otherwise adjusted" are of

wide amplitude. Secondly, the adjustment must be considered and if found established recorded and executed by the Executing Court. Thirdly the adjustment may be restricted to only a part or portion of the decree and not necessarily to the entire decree.

65. In the present case the plaintiff has applied for an order recording the said variation/modification of Clauses 6 and 8. It falls within the ambit of Order XXI, Rule 2. The Executing Court is entitled to consider the question as to the existence/formation of the variation and to record the same if established. All this is under Order XXI. The next step is the relief seeking the payment of the sum of Rs. 2.00 crores. This would depend on whether the plaintiff has complied with the consent terms as per the recorded adjustment. This pertains directly to the execution of the decree and must therefore be decided by the Executing Court u/s 47 of the C.P.C.

66. I will now deal with the authorities relied upon by Mr. Doctor.

67. The judgment in (Hari Valabhdas v. Bhai Jivanji) I.L.R.1902 707 is of no assistance to defendant Nos. 1 to 3. The modification sought in that case did not arise as a result of the consent of the parties. The respondent was under the terms of the decree, entitled to the payment of money in two installments. It was contended that the amount payable after December, 1900 under the decree was not liable to be paid as after December, 1900 she had left the residence provided for her by her husband. It was contended on behalf of the husband that the respondent had waived her right of maintenance by so leaving her residence without his consent or any justification. The Division Bench held that the decree having contained no such provision, the objection was not valid.

68(A). Mr. Doctor relied upon the following observations of the Division Bench of the Madras High Court in (Ladd Govindoss Krishna v. Ramdoss Vishnadoss) 1915 IC 376 in support of his submission that an agreement to vary the mode of performance under a decree does not fall within the jurisdiction of the Executing Court.

I am clear that the adjustment referred to in Order XXI, Rule 2 (old Section 258) of the Code of Civil Procedure, is a transaction which extinguishes the decree as such in whole or in part and results in a satisfaction of the whole or a portion of the decree in respect of the particular relief or reliefs granted by the decree. A transaction by which the parties agree to vary the mode by which the reliefs granted by the decree are to be realised in execution in that suit or the time when the decree becomes executable, is not an adjustment of the decree but is a transaction which attempts to vary the terms of the decree, leaving the altered terms to stand in the place of the terms of the decree so as to constitute a new executable decree see the observation of Turner. C.J., in the Full Bench decision in Mallamma v. Venkappa (1). bottom of page 282 as to the meaning of the word "adjustment." To allow such a variation is clearly against the policy of the CPC as shown by the Privy Council decision in (Kotagiri Venkata Subbamma Rao v.

Vellanki Venkataraman Rao) 24 M.1 (P.C.) : 4 C. W.N. 725 : 27 I.A. 197. It is only under the provisions of Order XX, Rule 11, and the provisions relating to appeals and reviews that the terms of a decree could be varied. Order XXIII, Rule 4, also makes it clear that compromises after decree cannot be recorded and cannot form the foundations of orders affecting the rights of parties under the decree. The argument of Mr. Seshachariar (the appellant's learned Vakil), that the terms of Section 47 of the CPC give jurisdiction to Executing Courts to inquire into the terms of agreements varying the stipulations in a decree, ignores the consideration that enquiries in a suit or in execution proceedings should be confined to matters the decision with reference to which matters could be taken advantage of by the parties in the proceedings in the suit or execution itself.

(B). I am, with respect, unable to agree with the judgment. It is contrary to the above judgments by which I am bound. I am in any event, even on principle, unable to agree. There is nothing in the provisions of Order XXI, Rule 2 which warrants restricting its scope and ambit.

Nor do I, with respect, agree with the analysis of the judgment of the Privy Council in 27 I.A. 197. The judgment if read fully is to the contrary. The judgment of the Privy Council referred to therein (27 I.A. 197) does not support the propositions enunciated by the Madras High Court.

69(A). In *Rajah Kotagiri Venkata Subbamma Rao v. Rajah Vellanki Venkatrama Rao* 27 Indian Appeals 197 the Privy Council held that the High Court had no power to alter its decrees except under the provisions of the C.P.C. It is important to note that this again was not a case where there was any agreement/compromise pursuant to which the decree was amended by the Court. The following observations of the Privy Council are important:

A plausible explanation of the extraordinary order made by the High Court is that it was really based on an agreement between all the parties to the litigation, including the first, second, and fourth defendants, as well as the third defendant who made the compromise to which effect was given by the order. But no such agreement was proved or even suggested at any stage of the proceedings which followed the amendment of the decree, and neither the order of February 1, 1988, nor the amended decree is expressed to be made by the consent of any party other than the third defendant; nothing of the kind is to be found in the record or proceedings before Their Lordships, nor was any suggestion of the kind made at the hearing of the appeal. It is too late now for Their Lordships to listen to any suggestion of such an agreement even if it could regularly be put in evidence in the execution proceedings, and the case must be dealt with on the footing that no such agreement existed.

(B). Two things are therefore clear. Firstly, that the facts in that case were entirely different from the facts in the present case. Secondly, the above observations of the Privy Council in fact indicate that even under the provisions of the C.P.C. at that time, the amendment to the decree would have been

possible provided it was based on an agreement between all the parties to the litigation. It is clear from the above observations that it was due to the absence of such an agreement, that the amendment to the decree by the High Court was not approved by the Privy Council. The case therefore is clearly distinguishable from the present case. In fact, the Division Bench of the Nagpur High Court in AIR 1948 35 (Nagpur) also distinguished the judgment of the Privy Council on the same basis. I will deal with this judgment again shortly.

70(A). The judgment of the Full Bench of the Madras High Court in (Palaniappa Chettiar and Ors. v. Narayanan Chettiar and Ors.) AIR 1936 Mad 34 is not of any assistance to Mr. Doctor either. It has no relevance to this case at all. The question referred to the Full Bench there was as follows:

Where a preliminary decree in a mortgage suit has provided and reserved liberty to the plaintiff to apply for a personal decree if the proceeds of the sale of the suit mortgaged property are found to be insufficient to satisfy the decree amount and a final decree for sale has been passed and an application under Order 34, Rule 6, Civil P.C., for personal decree for the balance is made, a payment or adjustment come to after the final decree has been passed, can be reorganised?

It is in this context that the judgment must be considered. Mr. Doctor relied upon the following observations of the Full Bench:

The terms of Order 21, Rule 2, Civil P.C., must be understood in the light of the scheme of the Code above set forth and with due regard to the scope of Order 23, Rule 3. If the stage after the sale of the hypotheca and before the passing of the decree under Order 34, Rule 6 is a stage when one part of the plaintiffs claim, viz. that relating to the personal decree, is awaiting adjudication, it must prima facie be open to the parties to settle it between themselves and have a compromise decree in respect of it passed under Order 23, Rule 3. In such a case, it is this compromise decree that will be the decree for further execution. There is no justification for saying that such a course is precluded by Rule 4 of Order 23. Comparing the terms of Order 23, Rule 3, with Order 21, Rule 2, one difference is noteworthy; under the former the Court may not merely order the agreement, compromise or satisfaction to be recorded, but also pass a decree in accordance therewith, whereas under Order 21, Rule 2, the Court can only record the adjustment. A Court acting under Order 21, Rule 2, cannot pass a fresh executable decree on the agreement of parties, but further proceedings, if any, in execution, as for instance, when part satisfaction has been recorded, can only take place on foot of the original decree. It will thus be clear that a settlement between the parties fixing the liability of the defendant under the "personal relief claim can appropriately be dealt with only under Order 23, Rule 3 and not under Order 21, Rule 2. Again, Clause 3 of Order 21, Rule 2 provides that a payment or adjustment which has not been certified or recorded shall not be recognised by any Court executing the decree. These words can relate only to an adjustment of the decree "under execution" and not to an agreement in respect of a claim which remains to be investigated by the Court as in the

position in respect of the "personal liability" before a decree is passed under Order 34, Rule 6. Ex hypothesi the stage contemplated by Order 34, Rule 6 is reached only after the "final decree for sale" has been completely executed or for special reasons, the rights under that decree have been given up....

(emphasis as per Mr. Doctor's submission)

(B). The question that falls for consideration in this case did not fall for the consideration of the Full Bench at all. The sentence emphasised by Mr. Doctor do not support his submission either. It in fact suggests that a compromise after the decree if recorded can take place albeit "on the foot of the original decree". As I have observed earlier, the Chamber Summons is a composite application for recording the adjustment and for executing the decree as modified/adjusted.

Even assuming that the judgment holds to the contrary, it would make no difference in view of the judgments of this Court and of the Supreme Court I have referred to earlier and which are binding on me.

71. The judgment of the Division Bench in AIR 1948 35 (Nagpur) not only does not support Mr. Doctor's submissions but is in fact against him. The error in Mr. Doctor's reliance upon the judgment arises from the fact that he read only the first two sub-paragraphs of paragraph 6. The second sub-paragraph is a quotation from a judgment of the Madras High Court which also relied upon the judgment of the Privy Council in 27 I.A. 197 in a manner similar to the Division Bench of the Madras High Court in Ladd Govindoss's case. The Division Bench of the Nagpur High Court in fact dissented from this view. Paragraph 6 of the judgment of the Nagpur High Court reads as under:

[6] The question then remains whether the parties to a decree can, by agreement, vary that decree and ask the Court to record such an agreement and whether the Court will then have jurisdiction to execute that agreement. In 56 Mad. 198, Anantakrishna Ayyar, J. remarked:

The Court would not accept that new contract as a satisfaction of the decree when in essence it purports to vary the terms of the decree with a view to enable the parties to carry out in execution something contrary to the provisions of the decree.

For that remark, which was obiter, the learned Judge relied on the decision of the Judicial Committee in 27 I.A. 197 : 24 Mad. 1, but that decision does not, in our opinion, support that proposition. It was a case in which the title of the plaintiff, who was suing for possession of an estate, was admitted by defendants 1 and 4 and contested by defendants 2 and 3. After the plaintiff had obtained a decree and died, his widow came to an agreement with defendant 3 by which she accepted a sum of money from him and agreed to give up her claim against him. This was embodied in the decree and Their Lordships of the Judicial committee stated that the High Court had no power to alter its own decree except under the provisions of either Section 206 (now Section 152) or Section 623 (now Order

47, Rule 1), Civil P.C. They went on however to say:

A plausible explanation of the extraordinary order made by the High Court is that it was really based on an agreement between all the parties to the litigation including defendants 1, 2 and 4 as well as defendant 3 who made the compromise to which effect was given by the order. But no such agreement was proved or even suggested.

And subsequently they stated:

The petition asked only that the razinama might be placed on the files of the Court, and the decree amended accordingly, i.e., so as to give effect to the compromise between the appellant and defendant 3 only. It was no doubt erroneous in asking for any amendment of the decree, and the only order which should have been made on it was to make the razinama a Rule of Court, and stay all further proceedings on the decree against defendant 3 except for the purpose of enforcing the compromise.

This does not indicate that the decree, as modified, cannot be executed.

72. The Nagpur High Court also relied upon the judgment of the Privy Council in *Oudh Commercial Bank Ltd. v. Bind Basani Kuer* 66 Indian Appeals 84 in paragraph 8 as follows:

[8] More recently, in 1939, the Judicial Committee again considered the matter in 14 Luck. 192. In repelling the argument that the original decree cannot be altered or varied by the parties even with the sanction of the Court and that in any case mere consent of the parties cannot confer such a jurisdiction to the Executing Court, Their Lordships remarked:

This line of reasoning is not without support from other decisions of Indian High Courts though authority and practice to the contrary is also to be found. On this difficult and important question Their Lordships are not in agreement with the view taken by the Chief Court. They do not consider that it takes sufficient amount of the facts that the Code contains no general restriction of the parties' liberty of contract with reference to their rights and obligations under the decree and that if they do contract upon terms which have reference to and affect the execution, discharge or satisfaction of the decree, the provisions of Section 47 involve that questions relating to such terms may fall to be determined by the Executing Court....

If it appears to the Court, acting u/s 47, that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the Court will not have occasion to enforce the agreement in execution proceedings, but will leave the creditor to bring a separate suit upon the contract. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with u/s 47. In such a case to say that the creditor may perhaps have a separate suit is to misread the Code,

which by requiring all such matters to be dealt with in execution discloses a broader view of the scope and functions of an Executing Court. Their Lordships are in agreement with the statement in 54 All. 573 that "in numerous cases a compromise between the decree-holder and the judgment debtor entered into in the course of execution proceedings, which was duly recorded, has been enforced" and they are not of opinion that the practice, which is both widespread and inveterate, is contrary to the Code.

We are, therefore, of opinion that it was open to the parties to the decree in this case to agree that the decree should be executed by placing Meghraj in possession and that the Executing Court therefore had jurisdiction to place him in possession.

73. The Pull Bench of the Madhya Pradesh High Court in Rajeev Khandelwal's case (supra) cited with approval the further observations of the Division Bench of the Nagpur High Court in Meghraj's case (supra) as under:

8. In regard to the scope of agreements to compromise a claim to execute a decree, a Division Bench of this Court in Meghraj v. Kesarimal AIR 1948 Nag. 35 held as follows:

Agreements to compromise a claim to execute a decree may be divided into three classes. In the first class of agreement, 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 agreement 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 debtor's promise only by a separate suit. It has in some cases been doubted whether such an agreement termed an "executory agreement," could amount to an adjustment of the decree, but it is now well settled that it can; see for example, AIR 1956 Mad. 198 AIR 1922 Lah. 383 and (Abdul Karim v. Aminabai) AIR 1935 Bom. 308 where the point has been discussed at length, and also 14 Luck 192. The third class of agreement 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. The question of the class in which the compromise falls is a question of fact.

In our opinion, the agreement of a nature such as is said to have been entered into in the instant case will fall in second class of agreements referred to above. Apparently it was an agreement where, according to the judgment debtor the decree-holder had agreed virtually to give up his right of evicting the judgment debtor under the decree in return for a promise by the judgment debtor to enhance the monthly rent. What has been laid down in the case of Meghraj (supra), therefore, apparently is that if an agreement falls within the second

category, it will be tantamount to an adjustment of the decree and "on the recording of such an adjustment the decree becomes fully satisfied.

74. I do not read the observations of the judgment of the Full Bench and the observations of the Division Bench in AIR 1948 35 (Nagpur) as laying down an absolute proposition that in every case belonging to the second class of agreements referred to in Meghraj's case, the compromise can be enforced only by filing a separate suit. The observations must be confined to the nature of the facts in those cases. I do not read the judgments as implying that in every case where a decree is modified or varied, the same can be enforced only by a separate suit. That would depend on the facts of the case even in cases falling in the second class of cases. The question would be whether the parties intended that the promise and its acceptance per se discharged the obligations under the decree and that they would independently enforce the same or whether the parties intended that even this promise would be enforced by executing the decree as adjusted. This is clear from the observations of the Privy Council in Oudh Commercial Bank quoted in paragraph 8 of the judgment of the Nagpur High Court in Meghraj's case extracted earlier.

75. It is pertinent to note that a learned Single Judge of this Court in Prataprai Trumbaklal Mehta Vs. Jayant Nemchand Shah and Another, while referring to the judgment of the Nagpur High Court in Meghraj's case observed that the decided cases referred to in the commentaries indicate inter alia that in certain situations the varied terms can be enforced in the execution of the same decree and in some other situations the same are liable to be enforced by a separate suit. That must depend on the facts of each case.

76. In any event, the facts in the case before me would fall under the third class of agreements. There is nothing to suggest that the parties merely relied upon and were satisfied by accepting the promise. The tenor of the variation as well as the conduct of the parties as is evidenced inter alia by the correspondence, indicates beyond any doubt that the parties were desirous of and had agreed to execute the consent terms as modified and the plaintiff was not to be relegated to filing a suit to recover the sum of Rs. 2 crores upon fulfilling its obligation under the decree as modified.

77. The judgment of the Supreme Court in V. Ramaswami Ayyangar and Others Vs. T.N.V. Kailasa Thevar, and the judgment of the Punjab and Haryana High Court in Gurdev Singh and Another Vs. Punjab National Bank and Others, relied upon by Mr. Doctor are of no assistance to him. In neither of these cases was there any compromise or agreement between the parties to vary or modify a decree. In V. Ramaswami's case the judgment debtor sought to be absolved of his liability under the decree in view of the provisions of the Madras Agriculturists Relief Act. In Gurudev Singh's case too, the judgment debtor contended that the decree holder could claim interest in excess of 6% per annum as a loan was taken for agricultural purposes.

78. The judgment of a learned Single Judge of this Court in *The Sangli Bank Limited Vs. M/s. Timblo Pvt. Ltd. and others*, , cited by Mr. Doctor in fact supports the plaintiffs case. This is evident from paragraph 8 of the judgment which reads as under:

8. Considering the law that the Executing Court has power to determine the rights arising between the parties relating to the execution of the decree and to give appropriate relief on such determination and that the exclusive powers to determine such questions having been given to the Executing Court u/s 47 of C.P.C. certainly it will be within the domain of the Executing Court to give effect to the compromise arrived at between the parties in relation to the decretal amount. Any adjustment pertaining to the decretal amount shall also be a question relating to the execution of the decree and therefore if an agreement is arrived for adjustment in relation to the payment of the decretal amount, the question relating to enforcement of such adjustment would be within the jurisdiction of the Executing Court. It was also held by the Full Bench of Allahabad High Court in the matter of *Chaube Mahendra Rao and Others Vs. Lala Bishambhar Nath and Others*, that an Executing Court has jurisdiction to record an adjustment entered into between the decree holder and the judgment debtor and to ascertain its legal effect and to order accordingly. No doubt, another Full Bench of the Allahabad High Court in the matter of *Maharaj Kumar Mahmood's* case had held that this was not a good law. However, the Apex Court in *Sultana Begum v. Prem Chand Jain* reported in 96 DGLS 2054 referring to the expression "or the decree of any kind is otherwise adjusted" in Rule 2 of Order 21 held that the said words are of wide amplitude and it is open to the parties namely the decree holder and the judgment debtor to enter into compromise relating to their rights and obligations under the decree. Being the compromise, it has to be recorded by the Court under Rule 2 of Order 21. It was also held by the Apex Court that an agreement, contract or compromise which has the effect of extinguishing the decree in whole or in part on account of a decree being satisfied to that extent, will amount to adjustment of a decree within the meaning of the said rule and the Court, if approached, will issue a certificate of adjustment. Necessarily demand for money of adjustment which is not recorded by the Court under Order 21, Rule 2 cannot be recognised by the Executing Court. It was further held that in a situation of that type the Executing Court can hold inquiry to find out whether the plea taken on its face value amounts to adjustment or satisfaction of the decree wholly or in part and whether such adjustment had the effect of extinguishing the decree to that extent and if the Executing Court comes to the conclusion that the decree was adjusted wholly or in part but the compromise or adjustment or satisfaction was not recorded and or certified by the Court, the Executing Court may not recognize them and proceed to execute the decree. The Apex Court has further held therein that Section 47 gives full jurisdiction and power to the Executing Court to decide all questions relating to execution, discharge and satisfaction of the decree and these general powers can be exercised subject to restrictions placed by Order 21,

Rule 2 including Sub-rule (3) which contains special provisions regulating payment of money due under the decree outside the Court or in any other manner adjusting the decree. At this stage, it is also worth noting that a party is not entitled to file a separate suit for declaration that a decree has been fully satisfied and is incapable of execution, as such a suit is barred under the provisions of Section 47 of C.P.C. The decision of the Full Bench of the Lahore High Court in the matter of (Ram Labhoya v. Firm Mukanda MulKapur Chand through Balkishen) reported in AIR 1922 Lah 428 is clear in that regard. Being so, there is no substance in the first contention sought to be raised by the petitioners.

79. I have already dealt with the judgment of the Supreme Court in Padma Ben Banushali's case and held that the observations therein in fact support the plaintiffs case.

80. Even if I were to have accepted Mr. Doctor's contention to the effect that possession could not have been handed over to MMRDA and could have been handed over only to the BMC, or that the Executing Court cannot take cognizance of the variation, it would have made no difference. In any event, by virtue of the order dated 11.7.2005 MMRDA was bound and liable to hand over to the plaintiff possession of the larger property which included the said two plots mentioned in Clause 6 of the consent terms within two weeks. In that event, the plaintiff would then have been entitled to take possession of the land including the said two plots and hand over the same to the BMC in compliance with the consent terms. It is nobody's case that the plaintiff did not desire to do so or would not have done so after receiving possession of the land pursuant to the order dated 11.7.2005. The plaintiff refrained from enforcing the order dated 11.7.2005 only in view of the variation. Thus, even if there was any technical or legal obstacle in the way, all that is required to be done is to order MMRDA to hand over possession of the entire property to the plaintiff. MMRDA has not taken any contentious or dishonest stand. MMRDA did not even contend before me that if required to comply with the order dated 11.7.2005, it would not do so. MMRDA has not done so only in view of its awaiting formal approval from the State Government. Surely, the plaintiff cannot be expected to fall between two stools. In that event the plaintiff would in these facts undoubtedly have been entitled to extension of time. However considering the view that I have already taken it is not necessary to follow this course.

81. Mr. Doctor commented adversely on the conduct of the Commissioner of the MMRDA in agreeing that the amount in escrow may be handed over to the plaintiff.

The criticism is totally unfounded and unwarranted. It is true that the opinion of the MMRDA is not binding on the parties. The correspondence fairly read, merely indicate that MMRDA considered the plaintiff as having complied with its obligations under the consent decree as well. MMRDA was not a stranger to the matter. It was defendant No. 6. Joint meetings were held between the parties.

There is nothing on record which calls for any adverse comment against MMRDA or its Commissioner. In fact, the Commissioner's stand was honest and fair.

82. The last question is whether the plaintiff is entitled to the interest accrued on the said sum of Rs. 2,00,00,000/ with the escrow agent from 1.1.2006 as claimed in prayer (d) of the Chamber Summons. I am of the opinion that the plaintiff is entitled to interest.

83. It is true that under Clause 8 of the consent terms whereas the sum of Rs. 2,00,00,000/ is to be paid to the plaintiff the interest accrued thereon is to be paid to defendant No. 1. In awarding interest, I am not amending or altering the consent terms at all. I cannot amend the consent terms but I am bound to interpret them. The amount was liable to be paid to the plaintiff by the escrow agent latest by 2.1.2006. By the letter dated 2.1.2006, referred to earlier, the plaintiff informed the respondent/Advocates of defendant Nos. 1 to 3 who were the escrow agents about MMRDA's letter dated 30.12.2005 acknowledging that it intended taking over possession of the land and calling upon them to hand over the amount of Rs. 2,00,00,000/ lying in escrow with them. The plaintiff also recorded that during the discussions defendant Nos. 1 to 3 had confirmed that they were instructing their Advocates/escrow agent to hand over the said amount to them. In fact, possession of the property was already with the MMRDA on 11.8.2004 and therefore the plaintiff would have been entitled to interest immediately upon the modification, which was agreed to in December, 2005 itself as is evident inter alia from the letter dated 19.12.2005 addressed by the plaintiff to defendant Nos. 1 to 3 and by the letter dated 20.12.2005 addressed by the Advocates of defendant Nos. 1 to 3.

84. Thus, the amounts ought to have been paid to the plaintiff latest by 2.1.2006. The amounts were however not handed over in view of the contentions raised by defendant Nos. 1 to 3 necessitating the above Chamber Summons. Proceedings take their own time to be decided. While it is not open to me to alter a decree I am bound to interpret it. To my mind, the stipulation in Clause 8 for payment of interest to defendant No.] must be restricted only upto the date on which the plaintiff was entitled to payment of the sum of Rs. 2 crores but not thereafter. Surely, it cannot be contended that though the Court has accepted the plaintiffs contention that payment sought to have been made latest by January, 2006, the interest thereon ought not to be paid even from that date merely due to the pendency of proceedings necessitated by the wrongful stand taken by defendant Nos. 1 to 3. This would be a travesty of justice. By ordering payment of interest with effect from 2.1.2006, I have not altered the decree but interpreted it and granted the plaintiff the benefit of the logical consequence of the finding that the plaintiff was entitled to the money in January, 2006.

85. As far as prayer (e) of the Chamber Summons is concerned, there really is no dispute between the parties. MMRDA has fairly and responsibly not disputed the plaintiffs entitlement to the said land. This admission is contained not only in the correspondence but also in the affidavits filed in these proceedings.

86. In the circumstances, the Chamber Summons is made absolute in terms of prayers (a), (b), (c), (d), (g), g(i) and (h). Defendant Nos. 1, 2 and 3 shall pay the costs of this Chamber Summons fixed at Rs. 25,000/ within eight weeks from today.

The order is stayed for a period of eight weeks from today to enable the parties to challenge the same. The learned escrow agent/respondent is requested to ensure that the amounts deposited as escrow are kept invested at all times till payment, pursuant to the orders of this Court.