

(1914) 01 MAD CK 0017
In the Madras High Court

S. Sabapathy Pillay and Others		APPELLANT
	Vs	
Vanmahalinga Pillay and Another		RESPONDENT

Date of Decision : 16-01-1914

Acts Referred:

Citation : (1915) ILR (Mad) 959 : (1914) 26 MLJ 331

Hon'ble Judges : Sadasiva Aiyar, J;Ayling, J

Bench : Full Bench

Judgement

Sadasiva Aiyar, J.—The judgment debtor is the appellant in this appeal preferred against the order of the Subordinate Judge's Court of

Mayavaram passed on the execution petition filed by the 2nd and 3rd defendants as decree holders.

2. The facts are a little complicated but it is necessary to set out many of them in order to understand the contentions in this appeal.

3. The plaintiff and the 1st defendant are brothers. They effected a partition of their properties about July 1897. In that partition, about 34 items of

landed properties (among other properties) were divided between the plaintiff and the 1st defendant, the plaintiff obtaining for his share certain

specific properties out of the 34 properties and the 1st defendant the remaining properties. In June 1899, the 1st defendant and the father of the

defendants 2 and 3, since deceased, executed a simple bond for Rs. 10,000 in favour of the plaintiff. It has here to be mentioned that though the

plaintiff got in the partition of 1897 certain specific properties out of the 34 items of land, all the 34 items had been mortgaged by the 1st defendant

before the partition in favour of a third person whom I will call the mortgagee. This mortgagee brought suit No. 66 of 1905 on the file of the

Kumbakonam Sub-Court for sale of those 34 items against both the plaintiff and the 1st defendant; the plaintiff (without protest apparently from the 1st defendant) seems to have raised the plea in the mortgagee's suit that one half share in all the 34 items belonged to him and that the said half share was not liable for the mortgage as the sum advanced by the mortgagee to the 1st defendant was not a debt incurred by the 1st defendant for the benefit of both the plaintiff and the 1st defendant. The plaintiff, if the debt was not a proper debt, might have had those particular items (out of the 34 mortgaged items) which fell to the plaintiff's share released from liability under the mortgage, but, as I said above, he seems to have attempted to get one half share in every one of the 34 items released from the mortgage. One other complication in the case is that in January 1903, the 1st defendant seems to have sold some of those properties which fell to his share (out of the 34 properties) to the plaintiff for Rs. 13,000 and asked the plaintiff to pay that Rs. 13,000 to the mortgagee in part satisfaction of the mortgage debt.. The plaintiff had failed to pay that Rs. 13,000 to the mortgagee and hence the mortgagee brought his suit No. 66 of 1905 to recover the entire amount due under his mortgage by sale of all the 34 properties.

4. That suit No. 66 of 1905 was decreed only for the sale of one half share in all the 34 properties and the Court released the other half share on the footing that the plaintiff was entitled to the said half share in all the 34 properties. The partition under which the plaintiff got certain specific items out of the 34 properties was thus ignored by that decree. It is not clear whether it was ignored because the partition was held invalid or not proved or because the partition was not relied upon and put forward by any of the parties.

5. The present suit was brought by the plaintiff in 1906 as O.S. No. 38 of 1906 (in the Kumbakonam Sub-Court) on the, simple bond for Rs. 10,000 executed in June 1899 by the 1st defendant and the father of the defendants 2 and 3 for the recovery of Rs. 18,000 and odd due under that bond. This suit No. 38 of 1906, of the Kumbakonam Sub-Court, afterwards became suit No. 29 of 1907 on the file of the Mayavaram Sub-Court. On the 9th April 1908, a Razinamah petition was filed in this suit by the plaintiff and by the defendants 1 to 3 compromising all the disputes

between the plaintiff and the defendants. The Court on that same date decreed in terms of the Razinamah "" so far as those terms related to the suit"as detailed below"". It is doubtful (and it is a matter of dispute between the parties) whether by detailing all the terms of the Razinamah in the decree after stating that the Court decreed in terms of the Razinamah in "" so far as those terms related to the suit"" whether all those terms were intended by the Court as relating to the suit and as decreed in the suit or whether all the terms were detailed merely for the purpose of recording the terms of the Razinamah and only those terms which directly related to the right to recover moneys due under the bond of 1899 were intended to be decreed in that suit.

6. Now the terms of the Razinamah are again of a complicated character, but as it is necessary to refer to them for understanding the dispute, I shall set them out briefly. The terms are (A1), that, within the 9th August 1909, the three defendants should fulfil a condition which I will call condition No. 1; (A2), that the three defendants, should before that same date (9th August 1909) fulfil another condition which I will call condition No. 2; (A3), that upon plaintiff depositing Rs. 13,000 and interest thereon from January 1903 into Court for payment to the mortgagee the decree-holder in (suit) No. 66 of 1905, the defendants 1 to 3 should within the 9th August 1909 get released from liability under that decree the two sets of properties which belonged to the plaintiff out of the 34 mortgaged properties, those two sets being (firstly) the properties which fell to the plaintiff's share in the division of 1899 and (secondly) the properties which had been included in the sale to the plaintiff by the first defendant in January 1903 ; (B), that if the three defendants fulfilled the above conditions (A1, A2 and A3) the amount due to the plaintiff under the simple bond of 1899 for Rs. 10,000 and the sum due to the plaintiff of Rs. 3,000 and odd should be set off against the sum of Rs. 16,000 and interest due to the 1st defendant by the plaintiff and that the plaintiff should pay Rs. 2,200 to the 2nd and 3rd. defendants (which sum would be the balance due to the defendants 2 and 3 after such set off) with interest from May 1899 ; (C), that if the defendants failed to fulfil conditions A1, A2 and A3 the plaintiff should recover Rs. 20,000 as due to him under the plaintiff's bond with interest from the date of the Razinamah by execution against

defendants 1 to 3. (There are certain other minor terms in the Razinamah which need not be stated here.)

7. Now, the defendants 1 to 3 have fulfilled the conditions A1 and A2. They say that they offered and were ready and willing to fulfil the condition

A3 and that their such offer, readiness and willingness should be treated as, legally of the same effect as if" they had actually fulfilled the condition

A3 also. Then, they contend that under Clause (B) of the Razinamah decree, the plaintiff ought to pay Rs. 2,200 to them and that the defendants 2

and 3 are entitled in execution of this same decree to recover this Rs. 2,200 and interest from the plaintiff. On these conteritions, they filed the

execution petition No, 193 of 1910 on the 26th November 1910 and prayed for the arrest of the plaintiff for the recovery of the Rs. 2,200 and

interest. The plaintiff raised several objections to the grant of the prayer of this execution petition of the defendants 2 and 3. Two of these

objections, namely, that the defendants 1 to 3 did not fulfil conditions A 1 or A2 are useless as the Sub-Court and also a Bench of this Court

(when this appeal came on first before this Court) have found that the conditions A1 and A2 had been fulfilled by the defendants before this

execution petition was put in. Two other objections of the plaintiff remain to be considered. The first objection is that the 3rd condition (A3) had

not been fulfilled by the defendants before this execution petition was filed and not only that the third condition had not been fulfilled before the

execution petition was filed but the defendants had precluded them-selves from fulfilling that condition by certain accts of the 3rd defendant The

second objection was that even if the defendants had fulfilled all the three conditions, the term (B) of the Razinamali petition, namely, that on the

defendants fulfilling those conditions the 2nd and 3rd defendants should recover Rs. 2,200 from the plaintiff was not a term which related to the

dispute in the plaintiff's suit brought on the bond of Rs. 10,000 and that therefore there was and could be no decree passed for that amount in the

suit No. 29 of 1907 ; in other words, the gist of that objection is that the defendants 2 and 3 should bring a separate suit on the promise recorded

as term (B) in the Razinamah decree and cannot claim that an executable decree for that amount has been passed in this suit No. 29 of 1907.

8. I shall shortly deal with the second objection. Having regard to the nature of the pleadings in the suit No. 29 of 1907, I think that the term (B) of

the Razinamah was intended to be one of the considerations which moved the defendant's I to 3 in consenting to the term (C) of the Razinamah

which directly related to the plaintiff's claim. It has also to be noted that the amount of the plaintiff's claim is set off even under the provisions of the

term (B) against the plaintiff's claim. I therefore hold that the term (B) is a part of the decreed provisions in the suit No. 29 of 1907 and not merely

one of the recorded provisions. In this view, the law laid down in the cases reported in Joti Kuruvetappa v. Izari Sirusappa ILR (1906) Mad 478

and Purna Chandra Sarkar v. Nil Madhub Nandi (1908) 5 C.W.N 485 applies and the term (B) can be lawfully made part of the decree and the

liability created by that term can be enforced in execution proceedings. As, on this question, I agree with the observations in Gobinda Chandra Pal

v. Dwarka Nath Pal ILR (1908) Cal. 837. I shall quote certain passages therefrom.

9. "" The question whether any particular term of a petition of compromise incorporated in a decree, made under a power given by Section 375 of

the Code of Civil Procedure, relates to the suit, or is covered by its subject matter must be decided from the frame of the suit, the relief claimed,

and the relief allowed by the decree on adjustment by lawful agreement. The mutual connection of the different parts of the relief granted by a

consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit.

No hard-and-fast rule can be laid down, each case being governed by its own facts."" ""In Jasimuddin Biswas v. Buban Jelini ILR (1907) Cal. 456.

Brett and Sharfuddin JJ., recognised the binding effect of the term in a decree which was the consideration for the relief granted in a suit as decreed

on agreement of parties. The same view was taken in Gupta Narain Dass v. Bijoya Sundari Debya (1897) 2 C.W.N. 663 and Puma Chandra

Sarkar v. Nil Madhub Nandi (1901) 5 C.W.N. 485. In the latter case, Ghose and Pratt, JJ., held that a decree passed on a compromise cannot

be regarded as ultra vires simply because it goes beyond the subject matter of the suit and contains other conditions, and that, if those other

conditions are the consideration for the compromise of the subject matter of the suit, they must be incorporated in the decree.

10 . Even if the term (B) could not lawfully be made part of the decree once it has been so made part of the decree as I think it has been in this

case, the person bound by the decree cannot, in execution, object to that term as not binding upon him. The appellant's vakil relied upon a passage in *Gurdeo Singh and Chandrika Singh v. Bash Behari Singh* ILR (1908) Cal. 193 where Mookerjee J. says that if a compromise decree gives effect to the settlement touching properties extraneous to the litigation, the decree is to that extent clearly without jurisdiction and is inoperative. I respectfully dissent from that dictum as it is opposed to the decision of this Court in the *Manager of Sri Meenakshi Devasthanam, Madura v. Abdul Kasim Sahib* ILR (1906) Mad. 421 where Benson and Wallis JJ. Held that any objection to such a decree giving reliefs in respect of such matters not relating to the suit, ought to have been taken by way of appeal and could not be urged when execution of the decree is sought.

11. Now I shall deal with the first and the principal objection of the plaintiff. This objection has again to be divided under two heads. The first head is that defendants have not fulfilled the third condition (A3) and hence cannot take advantage of the provision (B) in their favour. The second heading of the, objection is that they have absolutely precluded themselves from fulfilling that third condition. Taking the first head of the objection, the reply of the defendants 2 and 3 is, as I said before, that they had made an offer to fulfil the third condition and as the plaintiff did not accept that offer, the defendants are in as good a position as if they had fulfilled the third condition. It seems to me that in execution of a decree which gives a particular relief to the defendants 2 and 3 only if a condition is fulfilled, they cannot get that relief unless they fulfil that condition or unless the fulfilment of that condition has been made impossible by the plaintiff. I also think (a) that the offer to fulfil that condition should be kept always open and (6) that the offer relied upon ought to be an unconditional offer. Again the second head of the objection seems to me to be clearly valid. The defendants not only have not fulfilled the condition of getting the plaintiff the two sets of properties out of the 34 properties released from the mortgage decree but the third defendant obtained a transfer of the mortgage decree, brought a half share in those two sets of properties belonging to the plaintiff to sale in execution of that decree and purchased them himself. Thus, that mortgage decree has fully operated on and destroyed

plaintiffs rights in those properties and the third defendant by his acts has rendered it impossible for the defendants 1 to 3 to get those properties

released from the effects of that decree, effects which were threatened at the time of the compromise and consummated afterwards. Of course, as

the plaintiff neglected to perform his part of the agreement forming the third condition in the Razinamah, namely, the payment of Rs. 13,000 before

the 9th August 1908, the defendants 1 to 3 were not bound to fulfil before the 9th August 1909 their part of that agreement and they could under

Sections 51 and 54 of the Contract Act refuse to perform their part of the promise and even claim compensation (besides) from the plaintiff for any

loss which they have sustained by the plaintiff's non-performance of his preliminary promise to pay Rs. 13,000; but if both the parties to a contract

(whom we might call A and B) fail to perform their reciprocal promises, the one (A) wilfully and the other (B) because he was not bound to fulfil

his part unless A had fulfilled his preliminary part, the contract itself clearly comes to an end by the acts of both parties A and B except for the,

purpose of enabling the innocent party (B) to claim compensation from A.B, however, cannot, claim the performance of the specific obligation

undertaken by A under the contract after B had himself (though lawfully) put an end to it. If B wants to hold A to the specific performance of A's

contract, B must fulfil his own promise or make an unconditional continuing offer to fulfil his promise. u/s 38 of the Contract Act, an offer equivalent

to performance in the eye of the law must be unconditional. In the present case, the offer under letter Exhibit D is not unconditional as it says that

the third defendant was ready to release plaintiff's properties under the decree in suit No. 66 of 1905 only if plaintiff paid Rs. 13,000 and the

interest within one week's time. Further, an offer u/s 38 (see Clause 3 of Section 38) must be such that the promisee must have a reasonable

opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver. Now the English and Indian cases

have established that a mere offer by registered posted letter to deliver something or rather, the expression by a letter of a willingness or readiness

to deliver is not a proper offer. As Shepherd J., says in his Contract Act, "" A sufficient tender of money is not made if the money is locked-up in a

box, nor of goods if they are enclosed in a cask which the other party is not allowed to open."" Following that analogy, a mere offer by posted letter

that the 3rd defendant is ready to execute a release without having a document of, release ready, to be delivered is not a proper offer. Again as

said in, Haj Abdul Rahman v. Haj Noor Mahomed ILR (1884) B. 141 and Behari Lal v. Ram Ghulam ILR (1902) All. 461. the plea of tender is

incomplete as an answer to an action (and, by analogy, as an answer to a defence) unless accompanied by a tender in Court.

12. In the present case, the third defendant who obtained the transfer of the decree in suit No. 66 of 1905 did not execute a release deed, did not

show it to the plaintiff and did not offer any such deed unconditionally or even make his mere expression of willingness and readiness unconditional.

Hence the offer under Exhibit D was not a legal or proper offer. When the plaintiff failed to pay the Rs. 13,000 the defendants had two courses

open to them. They might refuse to perform their part of the promise (namely, the procuring of the release), and claim compensation for plaintiff's

breach of contract (see Section 54 of the Contract Act) or they might notwithstanding the plaintiff's breach fulfil their (defendants') part of the

contract by performing their reciprocal promise and then claim all their rights under the contract as a subsisting contract. The plaintiff in not having

paid the money broke the contract wrongfully and the 3rd defendant in not having got the plaintiff's properties, released and in obtaining transfer of

the decree and executing it also broke the contract though rightfully and must be deemed u/s 54 of the Contract Act as having also himself avoided

the contract. In the result, I hold that the defendants 2 and 3 cannot obtain any relief in pursuance of the term (B) of the Razinamah decree as they

have not fulfilled the condition (A 3) which is preliminary to their obtaining that relief, as they have never made an unconditional offer to fulfil that

condition, as they have never made an offer which gave a reasonable opportunity to the plaintiff of seeing that the thing offered is the thing which he

was entitled to get (Section 38 Clause 3 of the Contract Act), and lastly as the offer has not been a continuing offer, the defendants having, by the

third defendant's conduct, precluded themselves from fulfilling that condition which involves the release of the plaintiff's properties from a decree

which subsists no longer as a decree but has resulted in the fruits which have been gathered by the third defendant. In the result, in reversal of the

Lower Court's order, which allowed the execution of the decree in favour of the 2nd and 3rd defendants, I would direct that their Execution

Petition shall stand dismissed. As the plaintiff relied upon several invalid and even dishonest pleas besides the pleas on which he has succeeded 1
would make no order as to costs in either Court.

Ayling, J.

13. I agree.