## HIGH COURT OF GUJARAT

## PATEL CHATURBHAI NANABHAI
## V/S
## PATEL MOHANBHAI NANABHAI AND ANR

**Date of Decision:** 14 December 1971

**Citation:** 1971 LawSuit(Guj) 110

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**Hon'ble Judges:** J M Sheth

**Eq. Citations:** 1972 AIR(Guj) 217

**Case Type:** First Appeal

**Case No:** 426 of 1970

**Subject:** Civil, Limitation

**Head Note:**

**Limitation Act 1963 - Art 136 - Code of Civil Procedure, 1908 - Or 23, R 3, Sec 47 - limitation - agreement for payment of specific amount at time of marriage by appellant - Executing Court held that Darkhast was not time-barred decree is executable -justification of - whether execution is barred by limitation - whether failure to observe Vahesevar militates against execution - whether decree is not executable as it is vague and uncertain - held, Executing Court cannot go behind decree as it is not a case of inherent lack of jurisdiction - Decree incorporating agreement by plaintiff to pay some amounts to defendant at time of marriages of D's sons - It cannot be said that matter did not relate to subject-matter of suit - appeal dismissed.**

**Acts Referred:**

Code Of Civil Procedure, 1908 Sec 48, Sec 47

Limitation Act, 1963 Sec 30

**Final Decision:** Appeal dismissed

**Advocates:** H C Jambusaria,K S Nanavati, S K Zaveri, S M Nanavati

**Reference Cases:**

Cases Cited in (+): **1**

Cases Referred in (+): **7**

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**Judgement Text:-**

J M Sheth, J

**[1]** This is an appeal filed by the appellant under Section 47 of the Civil P.C. against the order passed by the learned Joint Civil Judge, Senior Division. Nadiad, in Special Darkhast No. 54 of 1968, dated 26th February, 1970.

**[2]** The facts giving rise to this appeal, briefly stated, are as under:

> This Darkhast is filed by respondent No. 1, Patel Mohanbhai Nanabhai (original defendant No. 1) against the appellant-plaintiff for execution of the decree passed in Special Civil Suit No. 22 of 1951 - a partition suit between two brothers - on 15-3-1954. Respondent No. 2 (original defendant No. 2) was an alienee. We are not concerned with him in the present proceedings. Respondent No. 1 sought to recover Rs. 2,002/- plus the costs of the Darkhast, Rs. 7.88 plus the interest amount of Rs. 2,274.88 paise from the appellant. Under clause 6 of the decree, the appellant had undertaken an obligation to pay Rs. 1,001/- on the first occasion of the marriage or respondent No. 1's son or daughter. Rs. 1,001/- were also to be paid accordingly on the second occasion of such marriage. If these amounts are not paid, he has been given a right to recover the same from the moveable as well as immovable properties of the appellant by execution of the decree.

**[3]** In this Darkhast, several objections were raised by the appellant. One of them was that the Darkhast was time-barred. It was his contention that he was not informed of the

marriages having taken place and hence he was not entitled to pay the amounts claimed. The decree cannot be executed as it is vague and uncertain. Other provisions of the said decree which were to be complied with by the Darkhastar, have not been complied by him and, therefore, he cannot execute this part of the decree which he has sought to execute.

**[4]** The Executing Court held that the Darkhast was not time-barred and the decree is executable. In that view of the matter, it ordered the Darkhast to proceed.

**[5]** Being dissatisfied with that order, the appellant has preferred the present appeal to this Court.

**[6]** Mr. S.K. Zaveri, appearing for the appellant, made the following submissions:

(1) Whether the execution is barred by limitation.

(2) Whether the failure to observe the Vahevar militates against the execution.

(3) Whether the decree is not executable as it is vague and uncertain.

(4) Respondent No. 1's. failure to comply with the reciprocal promises will be a bar to execution.

(5) Disputed clause (6) being outside the subject-matter of the partition suit, can be enforced by filing a suit on the basis of the agreement and not by execution of the decree.

**[7]** To appreciate the rival contentions urged at the Bar. I first propose to refer to different clauses of the decree. Clause (1) recites that the alienation made by respondent No. 1 in favour respondent No. 2 in respect of lot No. 9, is confirmed and respondent No. 2 is recognised as the owner of that field.

**[8]** Clause (2) recites that the rest of the properties are divided between the two brothers, viz, the appellant and respondent No. 1. as stated in the paras that follow and a person in whose favour those properties are allotted, becomes the owner of those

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properties.

**[9]** Clause (3) recites the properties allotted to the share of the plaintiff-appellant. clause (4) recites the properties allotted to the share of respondent No. 1 (defendant No. 1). Clause (5) recites that defendant No. 1 (respondent No. 1) has to pay Rs. 250/- to the plaintiff within one month from the date of the decree, which is an excess amount, on considering the prices of the properties allotted to each other.

**[10]** clause (6) which is material for our purposes, reads:

> "Plaintiff has to pay to respondent No. 1 Rs. 2,002/- as sated hereunder:
>
> (1) When there is first occasion of marriage at the place of respondent No. 1, of his son or daughter, on that occasion the plaintiff-appellant has to pay Rs. 1,001/-. Similarly, when there is such second occasion of marriage of his son or daughter at his place. on that occasion also, Rs. 1,001 are to be paid. These amounts are to be paid by the plaintiff as an elder brother as suggested by the panchas."
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> It is further stated therein that if the plaintiff-appellant does not pay it accordingly, defendant No. 1 (respondent No. 1) would be entitled to recover it by any other properties of the plaintiff-appellant as well as the suit properties which are allotted to his share.

**[11]** Clause (7) recites that in drawing a lot, house bearing survey No. 91, Tika No. 2, has come to the share of respondent No. 1 for a sum of Rupees 6,002/-. Respondent No. 2 is, therefore, made the owner of it and consequently, he has to pay Rs. 3,001/- to the plaintiff-appellant within six months from today, and in case, if he does not pay it, the plaintiff is entitled to recover it from the said property as well as from the guarantor (Shankerbhai Kalidas), If there are any Kothis in that house, they are to be divided half to half and defendant No. 1 (respondent No. 1) has to give half of those Kothis, to the plaintiff.

**[12]** In clause (8) it is stated that the house referred to as lot No. 2 in para 3 (1) is in possession of the plaintiff, plaintiff being the owner of it. So, for mutation of that property to the name of plaintiff, in City Survey as well as municipal records. defendant No. 1 has

to give a statement. As regards the fields, described as lots Nos. 4 and 5, which are allotted to the plaintiff's share, are at present being cultivated by tenant Dahyabhai. In respect of it, rent-note for the share has got to be taken prior to Vaishakh Sudi 3 of Samvat Year 2010, and those fields are also got to be mutated to the name of the plaintiff and partition of lot No. 8 is also to be accordingly effected prior to Samvat Year 2010 Vaishakh Sudi 3 in respect of share coming to the share of plaintiff and defendant No. 1 has got to get them mutated and possession handed-over.

In clause 9, it is recited that in respect of the properties coming to the share of defendant No. 1, fields or houses, plaintiff or his attorney-holder has to give necessary Kabulat for mutating them to the name of defendant No. 1. Each party has to bear its own costs.

**[13]** These are the terms of the decree

It is urged by Mr. Zaveri that the date of this decree is 15-3-1954. The present darkhast has been filed on 11-11-1968. The execution of the decree is, therefore, barred. First he invited my attention to Section 30 of the Limitation Act. 1963 (which will be hereinafter referred to as "the new Act"). that section makes a provision for suits. etc. for which the prescribed period under the new Act is shorter than the period prescribed by the Indian Limitation Act. 1908 (which will be hereinafter referred to as "the old Act"). that being not the position in the instant case, that section has no application. when Mr. Zaveri's attention was drawn to that position. he gave up the contention in that behalf. He then invited my attention to s. 31 of the new Act, which makes provisions in regard to barred or pending suits. The relevant part of reads:

"Nothing in this Act shall,-

(a) enable any suit, appeal or application to be instituted, preferred or made, for which period of limitation prescribed by the Indian Limitation Act, 1908 (9 of 1908), expired before the commencement of this Act."

There is no quarrel with the principle that if the execution of the decree

> sought to be executed was barred under the provisions of the old Act at the time the new Act came into force, if under the new Act longer period was provided, that period could not be availed of.

**[14]** clause 6 of the decree, to which a detailed reference has been made by me earlier, clearly indicates that the liability under that clause was to arise on happening of certain events. Liability undertaken by the appellant to pay those two sums of Rs. 1,001/- was to arise on happenings of the event. viz. celebration of the marriage of the son or daughter of respondent No. 1 on the first occasion. Admittedly, such first marriage occasion was on 8-2-1966 when the marriage of Jagdish, son of respondent No. 1, took place. The second occasion was dated 2-3-1967 when marriage of another son of his, named Harish took place. Application for execution is filed on 11-11-1968. It is, therefore, evident that this execution application has been filed for execution of the aforesaid decree within three years from the two events happening when those liabilities arose. In my opinion, as this Darkhast has been filed on 11-11-1968 and the events having taken place after the new Act came into force, the article which would govern the period of limitation would be Article 136 and the period provided is twelve years. Furthermore, that period of limitation commences from the date when the decree or order becomes enforceable. In the instant case, this part of the decree could have been said to be enforceable only when these events took place. Period of limitation would commence from those dates referred to above. It is, therefore, evident that the execution of this decree is not barred by limitation. Assuming for the sake of argument that the old Act governed the period of limitation, it was Article 181 which would have governed the period of limitation.

**[15]** It is evident that the payments were to be made when the aforesaid marriage occasions took place. It is, therefore, evident that in the decree itself, the dates of these payments were not specified. That could not be specified as it was not certain as to when these marriages would take place. Article 182 of the Old Act provided for the period of limitation for the execution of the decree or order of any Civil Court not provided for by Article 183 or by S. 48 of the Code of Civil Procedure, 1908, and that period was three years, and it was six years in case a copy of the decree or order has been registered. That period was to commence from the date of the decree or order under certain circumstances. Clause 7 which was material for our purposes, read:

> "7. (Where the application is to enforce any payment which the decree or order directs to be made at a certain date) such date."

In the instant case. date being not certain, clause 7 could not have any application. The present case being not a case where under the old Limitation Act, it could be said that the period of limitation would be governed by Article 182 of the old Act for filing such execution application, it is residuary Article 181 which would govern the period of limitation. That article reads:-

"Applications for which no period of limitation is provided elsewhere in this schedule or by Section 48 of the Code of Civil Procedure, 1908," - period of limitation was three years, and that period was to commence when the right to apply accrued.

Right to apply would accrue practically when the cause of action would arise. In the instant case, it was only on the happening of those events that the cause of action would arise and consequently, right to apply would arise. Admittedly, from those dates, this execution application was filed within three years. Even if the old Act was to govern the period of limitation. it cannot be said that this application is time-barred.

**[16]** Mr. Zaveri invited my attention to the decision of the Privy Council in Khulna Loan Co. Ltd v. Jnanendra Nath, wherein it is observed:

"A decree directing that the mortgaged property should be sold and if the proceeds of the sale were insufficient, the balance should be realised from the other properties and the persons of the judgment-debtors, does not give 12 years to the decree-holder, for proceeding against the person and other properties of the judgment-debtor dating from the time when the mortgaged property has been sold not can such a decree be regarded as one in which the payment of money is directed to be made at certain date, namely, after the mortgaged property had been sold".

In that decision, the position that obtains in the present case was not envisaged. That decision has, therefore, no application.

**[17]** Another decision relied upon by Mr. Zaveri was the decision of a Full Bench of the Calcutta High Court in Ranglal Agarwalla v. Shyamlal Tamuli. the ratio of that decision is:

> "A date which may or may not occur and which when it occurs, does so be chance, cannot be a 'certain date'." There is no quarrel with this proposition. It is further observed:
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> "A provision which declares that an amount shall become payable on a certain date, does not 'direct its payment' on that date.
>
> For the purpose of limitation, an application must be taken as it is and an application must be taken as it is and an application for execution relating to instalments whether it is maintainable or not cannot be treated as one made on the footing of a default clause. The maintainability of such an application depends upon the construction of the particular decree concerned. But so far as the recovery of instalments as such is concerned, the application for that purpose clearly comes under Article 182 (7) and there is no room whatever for the application of the residuary Article 181 in such a case."
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> In my opinion, this decision does not help Mr. Zaveri. At page 507, in para. 18. in terms it is stated by the Judges of the Calcutta High Court:
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> "We are further of opinion that the exception cannot assist the opposite parties for a clear difference in the present case on the facts. The application of the decree-holders was for the recovery of certain instalments only. The opposite parties could not point to any article in the Limitation Act which could be said to apply to the application and under which the starting point to any article in the Limitation Act which could be said to apply to the application and under which the starting point was 'when the cause of action arose'. They relied upon Article 181 and the starting point there mentioned, viz., 'when the right to apply accrues' and contended that for the present purposes it was practically of the same effect. Although 'when the right to apply accrues' may mean 'when it first accrues' and may be practically

synonymous with 'when the cause of action arose.' we can see no reason for the assumption that Article 181 could apply to the application made by the petitioners. So far as recovery of the instalments, as such, is concerned, an application for that purpose comes clearly, as we have pointed out under Article 182 (7) and there is no room whatever for application of the residuary Article."

This decision, therefore, does not lay down any ratio indicative of the position that in case of such liability which arises under the decree on the happening of certain events, if an application to execute that decree is to be filed. Art. 181 of the old Act would not govern the period of limitation. I need not dilate further on this point, as there are clear decisions which support my conclusion.

**[18]** In Chunilal Motiram v. Shivram Naguji Ghule. a Full Bench of the Bombay High Court has in terms observed:

"Where an instalment decree provides that on the failure of payment of certain instalments the whole amount due may be recovered, the decree-holder is not entitled to exercise his option to recover the whole amount then recoverable when the first default has occurred more than three years before the filing of the execution application.

"It is no doubt open to a decree-holder to waive the benefit of a default clause and although a default may take place, he may treat the decree as still a decree for instalments and he may pursue in execution his right to obtain the instalments as and when they fall due. But once the right to enforce the default clause accrues to the decree-holder for the first time and there is no waiver of such right, time begins to run from the date of such accrual and would not be stopped by reason of subsequent defaults. An execution application to enforce the default clause filed more than three years from the date of such accrual would be barred under Article 181."

It is thus evident that the Full Bench of the Bombay High Court has expressed an opinion that the period of limitation in such a case would be

governed by Article 181 of the old Act.

**[19]** In Sree Bank Ltd. v. Sarkar Dutt Roy and Co., 1965 3 SCR 708 , the Supreme Court has made the position crystal clear in this behalf and settled the conflict prevailing in several High Courts at rest. It is observed therein:

> "First, as to the effect of the default clause, no real difficulty arises. It obviously gave an option to the appellant. As was said in Ram Culpo Bhattacharij v. Ram Chunder Shome. "The proviso by which the whole amount of the decree becomes due upon default in payment of any one instalment is a proviso which look at it how you will, is put in for the benefit of the creditor, the decree-holder, and his benefit alone; and when a proviso is put into a contract or security, and in 'security' I include 'decree', for the benefit of one individual party, he can waive it if he thinks fit". There is not the least doubt that the default clause in the case in hand was intended for the benefit of the appellant bank; the clause had no operation till the appellant bank wanted to take advantage of it. The High Court took that view and with that I am in full agreement. the High Court further held that the appellant bank had not exercised the option to enforce that clause. Bachawat, J. expressly said that the appellant 'in fact has waived the benefit of the option'. the learned Chief Justice held in view of the option, that 'the starting point of limitation will be the dates on which each instalment became due.' He could have held this only in the view that the option had not been exercised. None of the parties appears to have contended to the contrary in the High Court. This being a question of fact, it cannot be raised for the first time in this Court. this being a question of fact, it cannot be raised for the first time in this Court. On such a question of fact, it cannot be raised for the first time in this Court. On such a question of fact, the High Court's finding is binding on us. Furthermore, undoubtedly, if the respondents wished to contend that the option had been exercised, it was for them to have given evidence of such exercise but they did not do so. No such evidence has been brought to our notice from the records of the case. It has, therefore, to be held that the right to apply for execution in respect of the instalments under the decree arose on the dates on which they respectively fell due."

**[20]** the decision of a Division Bench of Kerala High Court in State of Kerala v. Kesavan

Govindan Potti., 1966 AIR(Ker) 104 , is very instructive on this very point. It is observed therein:

> "Article 182 is not exhaustive of applications for execution of decrees. where a decree is not immediately executable, and the right to apply for execution depends on the expiry of any period fixed in the decree or provided for in any statute Article 182 (1) does not apply and the execution is governed by the residuary Article 181."

**[21]** In Maharaia of Darbhanga v. Homeshvar Singh the Privy Council has also observed:

> "Article 182 of Schedule I of the Indian Limitation Act, 1908, which limits the time within which a decree can be executed, applies only if the decree is in such a form as to render it capable in the circumstances of being enforced.
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> In 1906 a decree was made which did not provide that the judgment-debtor should be personally liable, but was confined to ordering that the decretal sum should be realized by the sale of the property of his deceased brother in his possession. the judgment-debtor did not obtain possession of the property in question until 1914, after a decision of the Privy Council in his favor; he had in 1908 obtained a decree for its possession from a Subordinate Judge, but that decree had been stayed and afterwards set aside by the High Court. In December, 1914, application was made to execute the decree of 1906:
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> "It was held, that execution of the decree was not barred, (1) since until 1914 it was not capable of execution, and Article 182 consequently did not apply; and (2) since an application to enforce it was necessary, and under Article 181 that application could be made within three years of the time when the right to apply first accrued, which was in 1914."

**[22]** In Maung Sin v. Ma Tok the Privy Council had a similar question to decide. It is observed:

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"In 1916 the respondent obtained against the appellant, her husband, a decree in the terms of an award. The decree provided that certain properties were to remain in the possession of the defendant. 'who will pay to the plaintiff annually the sum of Rs. 2,000/- in the month of Kason, on default of payment of the same (Rs. 2,000/- annually) the said properties will be made over to the plaintiff.' The payments for 1923 and 1924 not having been made, the respondent applied in 1924 to execute the decree in respect of them, also by delivery of possession of the properties on the defaults so made. There was no certification under Order 21, Rule 2, of any payments for the years before 1923.

By the Indian Limitation Act, 1908, Sch. I, Art. 182, the period of limitation for executing a decree is three years from the date of the decree, but, by clause 7, where any payment is directed to be made at a certain date, from the date when the right to apply accrues:

It was held, that the application was not barred as to the payments for 1923 and 1924 having regard to clause 7 of Article 182; nor as to delivery of possession, since upon the true construction of the decree the right to possession arose on a default in making any annual payment.

**[23]** In Yeshwant Deorao v. Walchand Ramchand., 1950 SCR 852 , the Supreme Court has observed:

"Where a decree provides that the decree-holder should pay the deficit Court-fee on the decretal amount before its execution the decree is not a conditional one in the sense that some extraneous event is to happen on the fulfillment of which alone it can be executed. The payment of Court-fees on the amount found due is entirely in the power of the decree-holder and there is nothing to prevent him from paying it then and there. Thus it is a decree capable of execution from the very date it is passed."

In the instant case, that is not the position. Decretal part with which we are concerned was not immediately capable of execution. The liability of the appellant arose only when the events specified therein took place.

**[24]** In Yerramilli Satyanandan v. Yerramilli Rudra Raju, 1963 AIR(AP) 49 , a Division Bench of the Andhra Pradesh High Court has also taken a similar view observing:

> "The petition was not barred since it was only after ascertainment of the outstanding that the decree was in a form capable of being executed."

**[25]** Mr. Zaveri relied upon the decision of the Privy Council in Nagendra Nath Dey v. Suresh Chandra Dey. It is observed therein.

> "By Article 182(2) of Sch.I of the Indian Limitation Act,1908, the three years period of limitation thereby prescribed for an application for the execution of a decree or order. 'where there has been an appeal.' is to run from the date of the final decree or order of the appellate Court.
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> It was held that any application by a party to an appellate Court to set aside or revise a decree or order of a Court subordinate thereto is an 'appeal' within the meaning of the above provision, even though (a) it is irregular or incompetent, or (b) the persons affected by the application to execute were not parties, or (c) it did not imperil the whole decree or order."
>
> In the instant case, we are not concerned with any such position.

**[26]** Mr. Zaveri has not been able to point out any decision in support of his argument that as some parts of the decree were enforceable earlier, and more than three years having been passed therefrom, this part of the decree which is separable also becomes time-barred, even though this execution application has been filed within three years when this part of the decree became enforceable. I. therefore, reject that submission made by Mr. Zaveri. I am of the opinion that the Executing Court has rightly negatived the contention raised by the appellant that the execution of the decree is barred by limitation. As said earlier by me, Article 136 of the new Act makes the position crystal clear. Period of limitation commences when the decree becomes enforceable. In the instant case, this part of the decree which is sought to be executed, became enforceable only on the happening of the events specified in the decree, viz celebration of the marriage of the son or daughter of respondent No.1.

**[27]** Submission No.2 of Mr. Zaveri is whether the failure to observe the Vahevar militates against the execution. Mr. Zaveri developed this argument by urging that this obligation undertaken by the appellant as the elder brother of respondent No.1, was not any legal obligation. Under Hindu Law, he was not bound to pay any such sums on the occasion of the marriage of his brother's son or daughter. In the decree itself, it was made clear that he agreed to pay these sums at the instance of the panchas, as an elder brother. Without there being any legal obligation to pay any such sums, he had agreed to pay such sums on the first and second occasion of the marriage of the son or daughter of respondent No.1 (at respondent No.1's place). It is the appellant's version that he had not received any invitation on such occasions of marriages. He has stated in his evidence that even though his children were staying opposite to the door of respondent No.1's house, they were not invited. It was submitted by Mr.Zaveri that it was only if such invitation was received on the marriage occasions, the appellant had to pay such sums, being the elder brother of respondent No.1, on those marriage occasions.

**[28]** In my opinion, this argument is not well founded. There is no such condition imposed in clause 6 of the decree. Obligation undertaken is not conditional. It is an absolute obligation undertaken to pay these sums on the aforesaid marriage occasions. It is no doubt, true, that it is made clear in this clause 6 that he had agreed to perform these obligations as an elder brother at the instance of panchas. It is in terms ments are not made on these marriage occasions, respondent, No. 1 will be parties of the appellant as well as the suit properties allotted to his share. Non- sending of the invitation. even if it is true, would not, therefore, militate against the execution.

**[29]** Submission No. 3 made by Mr. Zaveri is that the decree is not executable as it is vague and uncertain. It is submitted by him that the date of the events was uncertain. Son or daughter of respondent No. 1 may marry or may not marry. It was uncertain as to when the first occasion of marriage would take place and when the second occasion of marriage would take place. It was, therefore, submitted by him that the decree is vague and uncertain. This submission made by Mr. Zaveri is devoid of any merits. Liability arises only when the specified events take place. When such marriages took place, liability was contemplated to arise. Amount was definite. Such amounts were agreed to be paid on such marriages occasions and if not paid on such marriage occasions and if not paid, right was given to respondent No. 1 to recover them, as said earlier, I, therefore, reject this contention urged by Mr. Zaveri.

**[30]** Submission No. 4 was that respondent No. 1's failure to comply with the reciprocal promises, will be bar to execution. It was his contention that the appellant has raised a contention that some part which respondent No. 1 under different clauses, was required to perform, was not performed. This decree-in-invitum. For each and every promise, there was consideration. If respondent No. 1 had not performed some part of his promise, this decree becomes inexecutable. This argument of Mr. Zaveri also in my opinion is based on the assumption that there are mutual and inter-dependent obligations as stated by him. I have already referred to the decree in its entirety. it is difficult to accept his argument that there are any such inter-dependent obligations. As stated in Clause 6, there is absolute obligation undertaken by the appellant, It is nowhere stated therein that, that obligation will arise in case respondent No. 1 performs other parts of the obligation undertaken by him in the clauses that precede or that follow. Even if we refer by way of illustration to clause 5 , whereunder respondent No. 1 had undertaken to pay Rs. 250/- to the appellant, it was clearly stipulated that the amount was to be paid by him to the appellant, it was clearly stipulated that the amount was to be paid by him to the appellant within one month. for ever obligation undertaken in the decree, the mode for enforcing the obligation or as to when such obligation becomes liable to be enforced, has been stated therein. In paragraph 7 also, clear stipulation is made that defendant No.1 has to pay Rs. 3001 to the plaintiff appellant within six months from the date of the compromise, and in case it is not so paid, it could be realised by sale of survey No. 91 as well as from the guarantors.

**[31]** Mr. Zaveri invited my attention to the decision of a single Judge of the Allahabad High Court in Lakshmi Prasad v. Gopi Prasad, 1964 AIR(All) 526. It is observed:

> "A compromise is ordinarily intended to be a final settlement of a dispute and the Court should avoid an interpretation of its obscure part which is inconsistent with the intention of the parties to make a full and final settlement of their dispute and/or which contains the seeds of future discord and litigation. If the terms of the settlement of a dispute over the partition of undivided property are that the house in possession of each party shall be transferred to the other, the only reasonable interpretation consistent with equity and common sense is that the rights and obligation under the compromise are not only reciprocal but simultaneous and each party must be ready and willing to fulfill its obligation when seeking to enforce the rights
>
> In the case before common sense and the words of the agreement require

that the two obligations must be treated as inseparable and one cannot be enforced without the other. The agreement contemplates a simultaneous exchange of houses. Therefore, if one of the parties without lawful excuse refused to perform his part of the agreement, he is in breach and must face all the inevitable consequences; and if the house by accident or is major before possession is delivered to the other party, the compromise becomes void."

In the instant case, we are not faced with any such position. The provision with which we are concerned, is an independent provisions. It is quite separable. The other two decisions relied upon by therefore, not necessary to refer them. I, therefore, reject this argument of Mr. Zaveri

**[32]** Coming next to his last submission. viz. this disputed cause 6 being outside the subject matter of the partition suit, can be enforced by filing a suit on the basis of the agreement and not by execution of the decree. This argument of his is also, in my opinion, not well founded. In support of his argument. Mr. Zaveri relied upon the decision of a Division Bench of the Calcutta High Court in Trilok Chand Kapur v. Dayaram Gupta, 1967 AIR(Cal) 541. It is observed therein:

" Consent decree must be confined to matters which relate to suit. It must not travel beyond that though compromise petition may deal with matters extraneous to suits on which parties may agree. Terms of the compromise not relating to suit cannot be incorporated in operative part of decre and cannot be enforced in execution."

It is further observed in para 10. at page 545:

". . . . . . . . . . . . .If a contract embodied in the compromise petition, does not relate to the suit, then such a contract does not become executable as a decree merely because of its fortuitous embodiment in the inoperative (really operative) part of the decree. The person against whom such a contract is sought to be enforced, by process of execution, may justly object to the execution and try to stop such abuse of the process of the Court. On the merits, however, their Lordships held that the compromise related to the suit

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and allowed the execution to proceed."

**[33]** Learned Author Mulla, in his book. "Code of Civil Procedure", 13th Edition Volume II, at page 1304, under Note No. 17 to Order 23, Rule 3, under the caption. "Next, where a consent decree embraces matters that do not relate to the suit", has commented:

"Where a decree passed on a compromise includes terms that relate to the suit all the terms may be enforced in execution of the decree. But where it contains terms that do not relate to the suit, there is a conflict of opinion whether those terms can be enforced in execution. According to the Allahabad and Madras decisions, such terms can be enforced in execution of the decree. It is not open to the party against whom the decree is sought to be executed to object to the decree on the ground that it contains matters foreign to the suit. Such an objection, it has been said by the Madras High Court, must be taken by way of appeal from the decree and now by way of appeal under Order 43, Rule 2, from the order recording the compromise, and it cannot be taken in execution of the decree. The High Courts of Andhra Pradesh, Madhya Pradesh, Patna, Punjab and Rajasthan have also taken the same of Calcutta has said that such terms cannot be enforced in execution of the decree, but they may be enforced as a contract by a separate suit."

It thus appears that only the Calcutta High Court has taken a different view. Mr. Zaveri contended before me that the Bombay High Court has taken a similar view. He invited my attention to two decisions of the Bombay High Court in support of his submission. One was the decision in Vishnu Sitaram Auchat v. Ramchandra Govind Joshi. It is observed therein:

"Under Order 23, Rule 3, the Court has a duty and not a discretion to record a lawful compromise subject possibly to an inherent power of refusal where a substantial injustice would be worked. When the compromise is plainly outside the suit the Court may refuse to incorporate it in a decree; but when it is consideration of the compromise and therefore intimately connected with it, the words "relates to the suit" are wide enough to embrace such a term of compromise, as for instance, the consideration of the compromise, even though the consideration may be entirely outside the scope of the suit and

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relate to property which is never in question in the suit itself. The proper and effectual method of carrying out the terms of the compromise of O. 23, R. 3, is for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that is the subject-matter of the suit or to introduce the agreement in a schedule to the decree but the operation of the decree should be confined to the subject-matter of the suit. The operative part of the decree so confined to the subject-matter of the suit can be enforced as between the parties to the suit under Section 47. Any agreement as to matters extraneous to the suit can be enforced in a separate suit."

This decision does not lay down any ratio that Executing Court can go behind the decree and see by itself whether there is any matter extraneous to the suit which has been referred to in the compromise and incorporated in the operative part of the decree and if so, it could refuse to execute that part of the decree.

**[34]** Another decision relied upon by Mr. Zaveri was the decision of the Single Judge of the Bombay High Court in Nanalal Bhogilal v. Ambalal Somnath. Therein also, no such ratio has been laid down. It is stated therein also:

"The expression "so far as it relates to the suit" is a very wide expression and may include something which was extraneous to the suit and which was never in question in the suit itself".

It is also observed therein:

"An executing Court cannot question the validity, legality or correctness of a decree. Its duty is to execute the decree except where it is shown that the Court passing a decree had no inherent jurisdiction to pass it."

In the instant case, even if it is assumed that this part of the decree was extraneous to the subject-matter of the suit, the Court had power to decide about it and even if it is wrongly decided, it cannot be said that there was inherent lack of jurisdiction and consequently, this part of the decree was null

and void. The Executing Court cannot go behind the decree. The Executing Court can ignore the decree only if the decree is a nullity, meaning thereby, that the Court passing a decree had inherent lack of jurisdiction. I need not dilate further on this point as a Division Bench of this Court in an unreported decision, in Second Appeal No. 1037 of 1965, etc., decided on 11-11-1970 (Guj) has made the following pertinent observations after referring to Order 23, Rule 3 of the Civil Procedure Code, which are material for our purposes:

"The expression 'so far as it relates to the suit" has been given a wide interpretation as so to include matters which form a consideration and are thereby intimately connected with the subject-matter and the Court need not confine operative part of the decree only to what is strictly speaking the subject-matter of the suit as seen from the frame of the suit or the reliefs claimed. Besides, even if the trial Court wrongly in-corporated in the consent decree even a portion which did not relate to the suit, the question would arise whether such an error was only one in the exercise of the jurisdiction or one which would make the decree a nullity in the true sense. As for the latter class of errors it was pointed out at page 444 that if the Court recording compromise had no jurisdiction for incorporating any part of the compromise into the decree, the decree would be ultra vires and, therefore, void and a nullity, because the Court would lack inherent jurisdiction to entertain the compromise. Therefore, it was held that such an objection of nullity in the context of a consent decree under Order 23, Rule 3 could be urged even before the executing Court if the trial Court lacked inherent jurisdiction over the subject-matter itself to entertain such a compromise as the matter was one on which the Civil Court's jurisdiction was wholly excluded or because it was the Court of limited jurisdiction and it had no jurisdiction over the subject-matter on which it sought to pass a consent decree or because the suit as instituted was inherently incompetent. It was, therefore, held that every Court in this connection must approach this problem on the settled principles as indicated in Hiralal Patni , 1962 2 SCR 747 keeping in mind those objections which are of a technical nature and which can be waived and the real or substantial objection on the score of the competence of the Court which could not be waived and which struck at the very authority of the Court to pass any such consent decree or any decree on mertis as well. It is only when the Court lacked such inherent competence over the subject-

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matter or the parties that the decree would be nullity and the question could be urged even before the executing Court. If, however, the Court did not lack such inherent competence or jurisdiction to record a compromise and the error which it had committed was one in incorporating the entire compromise in the operative decree or such an error which was merely anillegality, the error would be one in the exercise of jurisdiction, such an objection would be one which could be waived and so if no appeal or revision or writ proceeding was filed, it would not be open to the executing Court, in any event, to go into any such objection."

In the instant case, it is not suggested that there was no competence of the Court over the subject-matter covered by this C1. (6). So, even assuming for the sake of argument that this did not relate to the suit, and the Court committed a mistake in incorporating it in the operative part of the decree, the Executing Court cannot go behind the decree. It is not open to it as it is not a case of inherent lack of jurisdiction so that the decree can be treated as a nullity. Apart from that, in my opinion, this assumption that this did not relate to the subject-matter of the suit, is without any basis. As said earlier, this phrase has got a wide import. In such a partition suit, parties can provide for such terms. Sometimes, marriage expenses of children of one of the coparceners have been already incurred by the family prior to the disruption of the family. At the time of the partition, one coparcener may, therefore, agree to provide for the marriage expenses of the children of another coparcener, that may take place in future. It can, therefore, hardly be said that this did not relate to the subject-matter of the suit. I, therefore, reject this submission No. 5 also.

**[35]** The result is that all the submissions raised by Mr. Zaveri, fail.

**[36]** The appeal, therefore fails.

**[37]** Appeal is dismissed. The appellant to pay the costs of respondent No. 1 in the appeal. Interim stay granted in Civil Application No. 1563 of 1970 is vacated.

**[38]** Appeal dismissed.

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