

(1960) 04 MP CK 0018

Madhya Pradesh High Court

Case No: Miscellaneous Second Appeal No. 38 of 1958

Kalyandas Anantlal

APPELLANT

Vs

Gangabai and Others

RESPONDENT

Date of Decision: April 25, 1960

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 3, 47, 6

Citation: AIR 1961 MP 67 : (1960) ILR (MP) 1047 : (1960) 5 MPLJ 1287

Hon'ble Judges: T.P. Naik, J

Bench: Single Bench

Advocate: A.R. Choubey, for the Appellant; P.S. Khirwadkar, for the Respondent

Final Decision: Dismissed

Judgement

T.P. Naik, J.

The order of this appeal shall also dispose of Misc. (Second) Appeal No. 40 of 1958 and Misc. (Second) Appeal No. 69 of 1958.

For understanding the question involved in the three appeals, a few facts relevant for the purpose may shortly be stated. Sunderlal and three others, plaintiffs Nos. 1 to 4, formed a joint Hindu family. Kashiram, Champalal and Anant-lal (defendants Nos. 1 to 3) were members of another joint Hindu family. All the aforesaid members of the two joint families were partners in a partnership owning a Ginning and Pressing Factory at Khirkia (hereinafter called the partnership property).

In execution of a decree against the joint Hindu family consisting of Sunderlal and three others (plaintiffs Nos. 1 to 4), Gopaldas, Purshot-tam and Khatau (plaintiffs Nos. 5 to 7) purchased the Interest of Sunderlal and others in the partnership property. Thereafter, plaintiffs Nos. 5 to 7 as transferees of the interest of the first four plaintiffs in the partnership property filed Civil Suit No. 10-B of 1940 for an account of profits of their transferors' interest in the said property and for its

payment to them. This suit failed because plaintiffs Nos. 1 to 4, the original partners in the partnership concerned, were not parties to the suit.

Plaintiffs Nos. 1 to 4 then served a notice on the defendants Nos. 1 to 3 for a dissolution of the partnership and for an account of the dissolved partnership and thereafter plaintiffs 1 to 4 together with plaintiffs Nos. 5 to 7 who were transferees of their interest filed a suit (Civil Suit No. 2-A of 1944) against defendants 1 to 3 for an account of the dissolved partnership, or, in the alternative, for dissolution of the partnership and accounts. In this suit a preliminary decree was passed on 21-11-1946 for dissolution of the partnership and for accounts. It was held that the partnership stood dissolved as from 21-8-1943, the date of the notice, and that a Commissioner be appointed for taking accounts.

While the proceedings before the Commissioner for taking of accounts were going on, an appeal against the preliminary decree was filed in the Court of the District Judge, Hoshangabad, which was dismissed. Thereafter, a second appeal was filed in the High Court against the aforesaid dismissal. While the second appeal in the High Court was pending, the parties entered into a compromise settling all their disputes and a petition for recording the compromise was filed in the trial Court under Order 23, Rule 3, C. P. C. It may here be mentioned that by this time defendant No. 3 Anantlal had died and his sons Kalyandas and Daudas had been brought on record as defendants 3(a) and 3(b).

The relevant terms of this compromise were as follows:

In view of the fact that a private partition had been effected between the defendants Nos. 1 to 3 inter se whereby the interest of the joint Hindu family consisting of defendants Nos. 1 to 3 in the partnership property had fallen to the share of the deceased-defendant Anantlal alone, it was agreed that the decree in the suit shall be against defendants Nos. 3(a) and 3(b) alone (hereinafter called the judgment-debtors).

As plaintiffs Nos. 5 to 7 had purchased the right, title and interest of plaintiffs Nos. 1 to 4 in the partnership property, the decree was agreed to be in favour of the plaintiffs Nos. 5 to 7 alone (hereinafter called the decree-holders).

The judgment-debtors agreed to pay to the decree-holders Rs. 10,000/- by way of profits of the partnership property up to the date of the final decree.

The judgment-debtors also agreed to pay Rs. 2500/- to the decree-holders for the entire costs of the suit of the original Court as well as of the first appellate Court. It was further agreed that the judgment-debtors were to bear their own costs in both the Courts.

As regards the share of the decree-holders in the assets of the partnership property, it was agreed that the decree-holders shall assign their interest in favour of the judgment-debtors for a consideration of Rs. 20,588/- while the

judgment-debtors would also be liable to pay in addition, additional court-fee to the extent of Rs. 1500/- or as the Court may otherwise call upon the plaintiffs to pay.

The total amount due on the aforesaid settlement viz., Rs. 34,588/- was to carry interest from 15-9-1950 till realisation at 6 per cent per annum. The amount was also agreed to be paid in instalments as detailed in the compromise petition.

In default of payment of any two instalments amounting to Rs. 8,000/- and interest thereon on due dates as fixed in the compromise petition, the remaining amount together with interest was to become exigible at once.

The whole of the decretal amount was charged on the subject-matter of the suit, the partnership property, viz., the Ginning and Pressing Factory at Khirkia as described in Schedule A to the plaint. It was also agreed that the decree-holders shall get this decree registered. There were also clauses in respect of warranty of title to the factory by the judgment-debtors so that the decree-holders' security may not be in any way jeopardised.

The trial Court, viz., the Court of the Civil Judge, Class II, being satisfied that the suit had been wholly adjusted by the aforesaid compromise ordered that the compromise be recorded and be also passed a decree in accordance therewith presumably because in his opinion the whole of the compromise related to the suit.

As the instalments payable under the decree were defaulted, the decree-holders sought to execute their decree for the full decretal amount and filed an application for execution of the said decree on 17-4-1953. Thereon, the judgment-debtor Kalyandas (defendant No. 3(a)) filed an objection contending that the decree passed by the Court of the Civil Judge, Class II, was beyond its pecuniary jurisdiction and was therefore a nullity. It was further contended that the charge created by the compromise decree was on property which was not the subject-matter of the suit.

It was also contended that the whole amount had not become eligible in terms of the default clause contained in the decree. The executing Court by its order dated 29-4-1954 held that the decree was not a nullity and that the creation of a charge was not a matter unrelated to the suit. As regards the objection regarding eligibility clause and other objections, issues were framed and the case was fixed for evidence. Against the aforesaid order an appeal was filed by the judgment-debtor Kalyandas (defendant No. 3 (a)) to the Court of the District Judge. The learned District Judge by his order dated 13-8-1954 held that:

The lower Court had jurisdiction to entertain the suit as framed and consequently the mere fact that the compromise decree was for a sum which was in excess of the pecuniary jurisdiction of the Court would not make the decree a nullity; and

2 The objector-judgment-debtor had not specifically stated as to what was the matter extraneous to the suit. The decree as it stood did not make any distinction regarding its operative or inoperative part. So far as the charge created by the

decree was concerned, though it was not claimed as a relief in the suit it could not be said to be unrelated to the suit because it formed the consideration for the time allowed for the payment of the Sum decreed by instalments and was thus an integral and necessary part of the adjustment.

In consequence, he dismissed the appeal summarily, though the objector-judgment-debtor was given a further opportunity to amend his objection petition so as to plead that the compromise decree included matters extraneous to the subject-matter of the suit. It was further directed that if and when this was done, the executing Court may decide this objection also. A second appeal was taken to the High Court against this order but that was also dismissed.

Thereafter, the judgment-debtor amended his objection petition to indicate in what manner the decree embraced matters extraneous to the suit and so was beyond the jurisdiction of the Court which passed the decree. The executing Court then recorded evidence, and by its order dated 3-4-1956 negated all the objections raised by the judgment-debtor except that it held that the whole of the decree had not become eligible as there was no default of two full instalments amounting to Rs. 8,000/- plus interest. It, therefore, dismissed the application for execution.

Against the aforesaid order dated 3-4-1956 the decree-holders (plaintiffs Nos. 5 to 7) filed an appeal (Civil Appeal No. 6-A of 1956) in the Court of the District Judge, Hoshangabad, contending that the executing Court was in error in holding that the whole amount had not become exigible and in any case in dismissing the execution application totally and in not allowing them to continue it at least for the balance of the first two instalments which admittedly were not paid. There was also an appeal by the judgment-debtor-defendant No. 3(a) Kalyandas (Civil Appeal No. 11-A of 1956) whereby he attacked some of the adverse findings given by the executing Court against him.

It was contended that the decree was a nullity as it was beyond the pecuniary jurisdiction of the Court and also for the reason that it embraced matters extraneous to the suit. It was also contended that it was beyond the jurisdiction of the Court in the suit as framed to create a charge for the decretal amount over the partnership property in favour of the decree-holders and that it was also beyond its pecuniary jurisdiction to order transfer of the share of the decree-holders to the assets of the partnership in favour of the judgment-debtors for a consideration of Rs. 20,588/-.

The lower appellate Court allowed the decree-holders' appeal (Civil Appeal No. 6-A of 1956) holding inter alia that as the instalments had not been fully paid, the exigibility clause came into operation and consequently the decree-holders were well within their rights in applying for the execution of the whole amount then due. As regards the appeal of the judgment-debtor it held that:

(a) the decree was not a nullity in so far as it was for an amount of Rs. 34,588/- which was beyond the pecuniary jurisdiction of the Court, because the instant case being a suit for accounts, the trial Court could validly pass a decree for a sum which was beyond its pecuniary jurisdiction;

(b) that it did not embrace matters extraneous to the suit in so far as the amount of Rs. 10,000/-, the estimated profits up to the date of the final decree, was concerned as it related to the suit and was thus rightly incorporated in the decree;

(c) the judgment-debtor's objection that the payment of Rs. 20,588/- as a consideration for the transfer of the share of the decree-holders in the assets of the partnership in favour of the defendants 3(a) and 3(b) was extraneous to the subject-matter of the suit was negated on the ground that the dissolution and winding up of partnership and taking of accounts in effect meant division of the surplus profits among the partners or their representatives; and consequently, instead of selling the assets by public auction and then dividing the sale proceeds according to their shares, the parties could well agree that all the assets be retained by the judgment-debtors and the decree holders be paid the price of their shares in the assets. The District Judge held that the ultimate effect of these terms in the compromise decree was to secure the winding up of the assets of the firm and their distribution according to the shares of the parties.

(d) In so far as the decree also incorporated an agreement to pay Rs. 2500/- as costs of the original suit and of the first appellate Court, it was held by the District Judge that it could be beyond the jurisdiction of the trial Court because the amount of Rs. 2500/- could not possibly be costs of the two proceedings on the ground that the awarded costs of the original suit and the first appeal did not add up to that amount.

Misc. (Second) Appeal No. 40 of 1958 is by the judgment-debtor Kalyandas, defendant No. 3(a), against the decision in Civil Appeal No. 6-A of 1956 wherein the lower appellate Court held that default had occurred in two consecutive instalments and that the whole amount had become exigible. Misc. (Second) Appeal No. 38 of 1958 is also by him. This appeal is against the decision in Civil Appeal no. 11-A of 1956 wherein his contention that the compromise decree was a nullity had been negated.

Misc. (Second) Appeal No. 69 of 1958 is by the decree-holders arising out of the judgment in Civil Appeal No. 11-A of 1956 aforesaid. It is against the order of remand passed by the lower appellate Court for the purpose of determining whether the amount of costs Rs. 2500/- agreed to between the parties and incorporated in the compromise decree included any sum which did not relate to the suit.

Misc. (Second) Appeal No. 40 of 1958 was not pressed before me as no amount towards the instalments had since been paid and consequently there could be no

dispute now that the whole amount had become exigible. The appeal is, therefore, dismissed with costs.

I shall now take up for consideration the two remaining appeals, one by the judgment-debtor (Misc. (Second) Appeal No. 38 of 1959) contending that the decree was a nullity and the other by the decree-holders (Misc. (Second) Appeal No. 69 of 1958) contending that the order of remand was in the circumstances improper and unwarranted,

The contention of the learned counsel for the appellant-judgment-debtors is that the decree is a nullity for the reason that:

(i) it was for a sum of Rs. 34,588/- whereas the pecuniary jurisdiction of the Court of Civil Judge, Class II, was Rs. 2,000/- only; and

(ii) that the compromise decree was in contravention of the provisions of Order 23, Rule 3, C. P. C., as it incorporated matters which were extraneous to the subject-matter of the suit and, therefore, the decree sought to be executed was without jurisdiction and consequently a nullity.

As regards the first contention, apart from the fact that the objection could not be permitted to be raised again as it had been negatived once before by the District Judge in Civil Appeal no. 4-B of 1954 decided on 13-8-1954 which dismissal was confirmed by the High Court in Misc. (Second) Appeal No. 168 of 1954 decided on 18-1-1955, I am of opinion that there is no merit in this contention.

It has been the consistent view of this Court that when in a suit for accounts the plaintiff tentatively fixed a sum for the purpose of valuation of the suit for court-fees or jurisdiction, the pecuniary jurisdiction is governed by the value stated by the plaintiff in the plaint and such jurisdiction is not ousted by the Court finding that a decree for a sum exceeding the limit of its ordinary pecuniary jurisdiction should be given to the plaintiff. (See *Kalooram v. Ramkishen* 8 CP LR 86, *Olpherts v. Arjundas* 9 Nag LR 112 and *Mithoolal v. Jai-narayan* 1941 Nag LJ 508 : (AIR 1941 Nag 346). In the last mentioned case it was observed that in a suit for dissolution of partnership and accounts wherein the plaintiff had placed a tentative valuation of Rs. 500/- only, reserving to himself the right to receive more than Rs. 500/-, if more were found due to him, subject only to the payment by him of additional court-fees, the Court could have in that suit given him a decree even for Rs. 2 lakhs.

The learned counsel for the appellants relied on the decisions in *Ijyatulla Bhuyan v. Chandra Mohan Banerjee* ILR 34 Cal 954, *Bhupendra Kumar v. Puma Chandra* 15 Cal WN 506 and *Sarat Charan Chose v. Shyam Chand Singh* ILR 39 Cal 663, in support of his contention but in *Olphert's* case 9 Nag LR 112 (supra), a Division Bench of the Court of the Judicial Commissioner had expressly dissented from the judgment of the Calcutta High Court in ILR 34 Cal 954 (supra) and 15 Cal WN 506 (supra) and observed:

"After considering the arguments of the learned counsel on both sides we are of opinion that the previous ruling of this Court, which has the support of the Madras and Allahabad High Courts, should be followed. Very great dislocation of business would occur if a suit had to be transferred to a higher Court after accounts were taken, and if the plaintiff's relief were limited to the pecuniary jurisdiction of the Court in which the suit is filed injustice might often occur where the plaintiff through no fault of his own has underestimated the amount due to him on accounts".

In my opinion, in view of the aforesaid rulings of this Court, with which I am in respectful agree- I ment, the contention has no force.

The second question shall have to be considered in its two aspects: first, whether the compromise decree in fact "related to the suit" and secondly, whether, even if it did not relate to the suit, the question could be enquired into by an executing Court.

It is not disputed that under Order 23, Rule 3, C. P. C., where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, the Court shall order such agreement or compromise to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit. In *Ana Pakiri Sha v. Somasundaram Servai* AIR 1922 L B 22 , it was held that the words "so far as it relates to the suit" meant "so far as it relates to the adjustment or settlement of the matters litigated in the suit" and consequently there was nothing to prevent that settlement taking any form which is lawful and fair and which satisfies the parties.

In [Nanalal Bhogilal Choksi Vs. Ambalal Somnath](#), : [Nanalal Bhogilal Choksi Vs. Ambalal Somnath](#), it was held that 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. In *GO-dhumal v. Mt. Bhambo* AIR 1943 Sind 11, a Division Bench held that the proceedings must be looked at as a whole, the frame of the suit, the plaint, the written statement, the consideration for the compromise etc. In [Byomkesh Mukherjee Vs. Bhupendra Narayan Sinha Bahadur and Another](#), , referring to the observations of Mitra, J., in *Gobinda Chandra Pal v. Dwarka Nath Pal* ILR 35 Cal 837, it was pointed out that:

"the question whether any particular term in a compromise relates to the suit must be decided from the frame of the suit, the relief claimed, and the relief allowed by lawful agreement. No hard and fast rule can be laid down. Each case is governed by its own facts. This view was adopted later by Rankin, C. J., in [Shashi Bhusan Shaw Vs. Hari Narain Shaw](#), . It may be stated that " as a general rule all the terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject-matter of the suit or not, become related to the suit, and can be embodied in the decree". Thus, where A sues B on a promissory note, and a compromise is arrived at between the parties whereby B agrees to pay the amount of the note by instalments and the amount is also made a charge on certain

immovable property of B, it could not be said the Court was not entitled to make the amount a charge on this property, because the relief claimed was for a money decree only. The charge, though not claimed as a relief, would still be a matter relating to the suit."

(Underlining (here in single quotation marks -- Ed.) is mine).

In AIR 1927 204 (Privy Council) , the facts were that in a suit for a declaration a compromise was arrived at, the terms of which, were such "as to be susceptible in every detail to an effective order in the nature of specific, performance against any party to the compromise who seeks to escape from his obligations thereunder", but were extraneous to the subject-matter of the suit.

The question was whether such a compromise could be given effect to in a decree under Order 2.3, R. 3, C. P. C., and the Judicial Committee of the Privy Council ruled that it could be given effect to. This case was followed in AIR 1928 173 (Nagpur) : AIR 1928 173 (Nagpur) , where a Division Bench of the Court of Judicial Commissioner held that in a declaratory suit a compromise decree directing the defendant to pay a sum of money to the plaintiff may be passed. The relevant part of the headnote which correctly reproduces the ratio decidendi of the case says:

"If the terms..... of the adjustment are such as to be susceptible in every detail to an effective order in the nature of specific performance, against any party to the compromise who seeks to escape from his obligations thereunder, it is competent to the Court not only to record the entire compromise but to pass a decree in accordance therewith by even including in its operative parts the operative directions thereof, in spite of the suit being merely declaratory in its nature."

In AIR 1929 164 (Nagpur) , the ratio decidendi of the Mehdi Ali Khan's case 53 Mad LJ 345: (AIR 1927 PC 204). (supra), was stated to be that;

"where a compromise completely disposes of a suit and the terms agreed to are such as to be susceptible of specific performance being granted no party to such a compromise can refuse to be bound by its terms and to escape from his obligation thereunder,"

and it was held that the phrase "so far as it relates to the suit" does not exclude the possibility of all matters which are not subject-matter of the suit being related to the suit provided they form the consideration for the adjustment of the matter in dispute.

Mulla's CPC (12th Edn.) also states the proposition thus:

"Where..... suits are not for the recovery of property but to establish particular rights,it may be stated that as a general rule all terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject-matter of the suit Or not become related to the suit, and can be embodied in

the decree." (See p. 989).

Examining the facts of this case in the light of the principles enunciated above, I am of opinion that no objection could be taken to the inclusion of Rs. 10,000 by way of profits up to the date of the decree, nor could any objection be taken with regard to the assessment of costs of the original Court as well as of the first appellate Court, by the parties at Rs. 2500/-. I do not agree that in assessing the costs the parties were limited to the taxed costs only. It is well known that besides the taxed costs parties have to incur many more expenses which are not ordinarily provided for in the decree for costs.

In any case, in so far as it provided for costs of the original Court as well as of the first appellate Court at a figure agreed to between the parties which figure does not at all appear to be so disproportionate as to be fictitious and fraudulent, it would not be open to a Court to disallow it or a part of it because it was much more than the taxed costs. I therefore do not agree with the lower appellate Court that the matter required further enquiry by permitting parties to lead evidence to show whether the agreed costs included any amount extraneous to the suit.

The third matter provided for in the compromise decree was with respect to the transfer of the share of the decree-holders in the assets of the partnership property. I agree with the lower appellate Court that it was not absolutely necessary in the suit as framed that the assets of the dissolved partnership should first be sold to the third parties and then the amount so realised should be distributed between the parties to the suit.

It was competent for the parties to the suit to agree between themselves that instead of selling the assets of the dissolved partnership to the third parties the judgment-debtors themselves should purchase the interest of the decree-holders, and in consequence undertake the liability to pay to the decree-holders a sum agreed to between them as the price of the assets so transferred. In my opinion, in so providing they were only doing what the suit envisaged, viz., realising the assets of the partnership and distributing it between the partners according to their shares.

AS this term related to the subject-matter of the suit, it could well be incorporated in the decree. It was also faintly contended that the creation of a charge for the decretal amount on the partnership property detailed in the compromise application was beyond the scope of the suit, but as pointed out in [Byomkesh Mukherjee Vs. Bhupendra Narayan Sinha Bahadur and Another](#), the creation of a charge on the property of the judgment-debtor to secure the payment of the decretal debt may well be a matter relating to the suit.

In *Mst. Sarjabai v. Dhanraj*, F. A. No. 62 of 1923 dated 6th November 1924 (noted in 8 Nag LJ 9): (AIR 1925 Nag 239), and cited with approval in AIR 1929 164 (Nagpur) at p. 167), it was held that "where a decree was passed in terms of a compromise which directed that in case of failure in payment up to a certain date, by the

judgment-debtor, of the decretal amount, the amount was to be a charge on certain properties of the judgment-debtor, this Court held that the charge was enforceable in execution of that decree and no separate suit was necessary".

In AIR 1930 17 (Nagpur) , also a contention was negated viz., that a compromise decree, which created a charge upon property that was not the subject of the suit, was incapable of execution. I am, therefore, of opinion that the compromise decree did not incorporate anything that was extraneous to the suit and the decree could not for that reason be held to be a nullity.

This brings me to the second aspect of the question, namely, whether even supposing that matters which were extraneous to the suit were erroneously incorporated in the operative part of the decree by the trial Court, could it for that reason be held to be a nullity? Order 23, Rule 3 of the CPC provides that the trial Court shall pass a decree in accordance with the compromise arrived at between the parties so far as it relates to the suit.

Consequently, if in the opinion of the Court passing the decree there are matters which are extraneous to the subject-matter of the suit, the proper course for the court is to recite the compromise as a whole in the form of a schedule to the decree for purposes of reference but to restrict the operative part of the decree to those terms of the compromise which relate to the suit. In such a case the decree would be executable only in respect of the matters that relate to the suit, (*Hemanta Kumari Debi v. Midnapur Zamindari Co.* 46 Ind App 240; (AIR 1919 PC 79)).

But what is to happen if this course is not followed by the trial Court and the error is not got corrected by the party aggrieved by an appeal or review? It may be that the Court in its opinion considers that all the terms of the compromise relate to the suit and for that reason incorporates them in the operative part of the decree. Can the matter be agitated in the executing Court? It is trite that civil Courts which are Courts of plenary jurisdiction have jurisdiction to decide rightly as well as wrongly: *Malkarjun v. Narhari* ILR 25 Bom 337 .

When we speak that a decree is a nullity by reason of absence of jurisdiction in the Court which passed it, we mean thereby that there was initial want of jurisdiction in the Court to entertain the lis or that the Court was *coram non judice*. There is a distinction between an absolute want of jurisdiction and an error in the exercise of it. In the first case, when there is no jurisdiction with reference to the subject-matter, the parties or the particular lis before the Court, there is absence of initial jurisdiction in the Court.

Where, however, the Court has complete jurisdiction to adjudicate on the subject-matter before it but the complaint is that the Court which had jurisdiction over the subject-matter, over the parties and over the lis pending before it, has acted in disregard of some provision of law, as for instance against the provisions of Order 23, Rule 3, as in the instant case, it cannot be said that there was no

jurisdiction in the Court to pass the decree it did. All that can be said is that its exercise of the jurisdiction was in an irregular or illegal manner or was in violent disregard of the particular statute under which it purported to act.

In the latter case, it is settled law that the defect can be waived. In *Ex parte Pratt* (1884) 12 QBD 334, and *Ex parte May* (1884) 12 QBD 497, it was pointed out that where jurisdiction over the subject-matter exists, requiring only to be invoked in the right way, the party who has invited or allowed the Court to exercise it in a wrong, way cannot afterwards turn round and challenge the legality of the proceedings due to its own invitation or negligence. As stated by Mookerjee, J. in *Gurdeo Singh v. Chandrikah Singh* ILR 36 Gal 193 :

".....it is only when a Judge or Court has no jurisdiction over the subject-matter of the proceedings or action in which an order is made or a judgment rendered, that such order or judgment is. wholly void, and that the maxim applies that consent cannot give jurisdiction; in all other cases, this objection to the exercise of the jurisdiction may be waived, and is waived when not taken at the time the exercise of the jurisdiction is first claimed, (*Hobart v. Frost* (1856) 5 Duer NY 672) Black on Judgments, Section 217."

In the instant case it cannot be said that there was want of jurisdiction in the first sense explained above to make the decree a nullity. The trial Court had jurisdiction over the subject-matter of the suit. A compromise was filed before it. IE is not disputed that it was lawful and that it adjusted the suit wholly. The Court was also so satisfied and consequently was bound to record it. It had also to pass a decree in accordance therewith so far as it related to the suit.

The question, therefore, how much of it "related to the suit" was a matter within its jurisdiction to decide and even if in deciding that the whole the compromise related to the suit, it committed an error of law, all that can be said is that at worst it exercised its jurisdiction in an irregular or illegal manner, in so far as the decree was in violation of Order 23, Rule 3 of the C. P. C. It has also to be remembered that the compromise decree was passed per invitum. The appellant instead of protesting that the whole of it did not relate to the suit, asked the Court to incorporate the whole of it in the decree.

In my opinion, under the circumstances of the case, even if there was an irregular or illegal exercise of jurisdiction it was waived and the appellant cannot be heard to complain of it in the execution proceedings. If the appellant considered that the compromise decree incorporated matters which on a proper appreciation of the facts could not be said to relate to it, his remedy was to go up in appeal against it and to get the error corrected, because unless that is done, the decree would stand and would be executed as it stands. In *C. H. Kinch v. E. K. Walcott* AIR 1929 PC 289, the Judicial Committee observed that:

"A party bound by a consent order, as was "tersely observed by Byrne, J., in *Wilding v. Sanderson* (1897) 2 Ch. 534: "must when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose". In other words the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the Court; the second stands unless and until it is discharged on appeal."

In the light of the principles therein enunciated, it is not true to say that the decree embodying the compromise is a nullity. It may be that if the appellant's contentions were correct, it could have been modified or discharged on appeal if proper proceedings had been taken for that purpose unless and until it is set aside the decree must be executed as it is.

In [Ambalal Chunthabhai Patel Vs. Somabhai Bakorbhai Patel](#), , Lokur, J. while interpreting the dictum of their "Lordships in *Hemanta Kumari Debi v. Midnapur Zamindari Co.* 46 Ind App 240: AIR 1919 PC 79 said:

"The question whether the terms of a compromise decree go beyond the subject-matter of the suit is one which has to be determined on the "facts of each particular case with reference to what the claim in the suit was and what was the nature of the compromise. Their Lordships intended to point out that it was not proper for a Court to allow the operative part of a decree to go beyond the actual subject-matter of the existing litigation, and I do not think that their remark that a decree which infringed that rule might be incapable of being executed outside the lands in suit was intended to throw any doubt on the well established view that parties in execution proceedings cannot call in question the validity of the decree. Under Order 23, Rule 3, Civil P. C., 1908, the Court is bound to record a compromise in accordance with the terms "so far as it relates to the suit." But where the compromise is plainly outside the suit, it is open to the Court to refuse to incorporate it in the decree. But as observed by Madgavkar J. in *Bajirao v. Sakharam* 33 Bom LR 463: (AIR 1931 Bom 295), where, however, it is a 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 the compromise, as for instance, the consideration for the compromise even though this consideration may be entirely outside the scope of the suit and relate to property which was never in question in the suit itself. That case was cited with approval and followed by a Division Bench in [Shambhusing Sujansing Thakor Vs. Manual Vadilal Gandhi](#), .

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Whether the compromise relates to the suit or not is a question which the Court which tries the suit has jurisdiction to decide. "Even in cases where a part of the compromise does not. strictly speaking, relate to the suit and nevertheless the "Court decides that it does relate to the suit and incorporates it into the operative

portion and passed a decree in terms of it, the decree is not a nullity and not one passed without jurisdiction," but would be binding upon the parties to the decree, and its validity cannot be questioned in execution proceedings of that decree nor can any title derived under it be attacked".

(Underlining (in single quotation marks in this report -- Ed.) is mine).

In [\(Sahu\) Shyam Lal Vs. M. Shayamlal](#), at p. 650. the Full Bench observed:

"It is quite obvious that if the Court had no jurisdiction to incorporate any part of the compromise into the decree, the decree would be ultra vires and therefore void and a nullity and the auction purchase would fall with it. On the other hand if the court had jurisdiction to entertain the compromise, then even if it acted in an irregular manner or acted illegally or committed an error of law the decree when passed would be one passed with jurisdiction and binding on the parties unless set aside in appeal or by way of review of judgment.

It is possible to conceive of cases where a civil court would not have jurisdiction to pass a decree even if it is based on a compromise between the parties. For instance, a small cause court may not have jurisdiction to deal with rights to immovable properties, or a revenue court may not have jurisdiction to deal with immovable property, or even a Munsif's court may not have pecuniary jurisdiction to deal with properties of higher valuation, or again a civil court may not have jurisdiction to deal with matters which are exclusively within the jurisdiction of the revenue Courts. On the other hand, it appears to have been contemplated by the legislature that there may be matters which are irrelevant to the suit and should be ignored by the court and only such matters as relate to the suit be incorporated in the decree.

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In some cases it may be very easy to split up the compromise into two parts, -- the first which relates to the suit and the second which does not relate to the suit, and then it would be very easy for the court to incorporate into the operative portion of the order the part which relates to the suit, and to exclude the other which does not relate to the suit. On the other hand, there can be a compromise, which mixes up various matters in such a way as to make it impossible to separate the part which exclusively relates to the suit and another part which does not so relate to the suit. It will therefore be the duty of the court to decide which relates to the suit and which does not relate to it. Such a question obviously is a question of law to be decided by the court which is called upon to pass a decree on a perusal of the compromise. The Court in deciding this matter may err, but the court would have jurisdiction to decide a point of law wrongly. Except in cases where the court had no jurisdiction to entertain the matter at all, a wrong decision would make the decree valid and binding on the parties.

No doubt, there has been some conflict of opinion on this point. It was held in the case of *Mohibullah v. Imami* ILR 9 Ail 229 that a court had jurisdiction to award to the plaintiff a larger amount than was claimed if the amount is decreed on a compromise between the parties. In a later case in *Raghubans Mani Singh v. Mahabir Singh*, ILR 28 All 78 there was an observation at pages 80-81 which was in the nature of an obiter, dictum that the decree of a court will be enforceable as a decree only so far as it relates to the subject matter of the suit.

The learned Judges were not called upon to decide whether, if the court wrongly decided that a certain agreement related to the suit and passed a decree on it, the decree would be a nullity and would not be binding on the parties to it. The view which has prevailed in Madras and also in Oudh seems to be to the effect that even though it incorporates some part of it which did not, strictly speaking, relate to the suit, it would nevertheless not be ultra vires. On the other hand, the earlier Calcutta cases and some cases of the Punjab Chief Court seem to lay down that a court could not pass a decree in terms of the compromise which do not relate to the suit.

"We think that even in cases where a part of the compromise does not, strictly speaking, relate to the suit and nevertheless the court decides that it relates to the suit and incorporates it into the operative portion and passes a decree in terms of it, the decree is not a nullity and not one passed without jurisdiction, but would be binding upon the parties to the decree and its validity cannot be questioned in the execution department, nor can any title derived under it be attacked". (Underlining (herein single quotation marks-Ed.) is mine).

In [Seth Harak Chandas Vs. Hyderabad State Bank, Hyderabad](#), where" some of the cases cited above have been reviewed, the learned Judges came to the conclusion that a compromise decree which included matters extraneous to the suit was not for that reason one passed without jurisdiction or a nullity. Relying on [\(Sahu\) Shyam Lal Vs. M. Shayamlal](#), Lal Singh v. Mohan Singh AIR 1934 Lah 623 and [Muhammad Ismail Vs. Bibi Shaima](#), they also came to the conclusion that an objection to such a decree cannot be allowed to be raised in the executing Court, but must be taken by way of appeal to the compromise decree. They, however, pointed out that a contrary view had been taken in ILR 36 Cal 193 and [Vishnu Sitaram Achat Vs. Ramchandra Govind Joshi](#). But in my opinion both these cases do not lay down anything to the contrary on that aspect of the question which is under consideration in the instant case.

The learned counsel for the appellant-judgment-debtor strongly relied on the decision of the Allahabad High Court in [Nain Singh and Others Vs. Mahendra Singh](#), but that decision, in my opinion, is hardly relevant for the decision in this case. That was a case where the Court had exceeded its pecuniary jurisdiction and consequently had acted without initial jurisdiction in the matter. In that case the plaintiffs had brought a suit against the defendant for Rs. 2,000/- as damages resulting from cutting of trees and for injunction restraining the defendant from

cutting down any more trees.

During the pendency of the suit more trees were cut down and ultimately under a compromise the defendant agreed to pay Rs. 9650/- by way of damages and a decree in terms of the compromise was passed. On these facts, the learned Judges of the Division Bench held that under Order 23, Rule 3 of the CPC it was the duty of the Court to record the compromise and to pass a decree in accordance therewith so far as it related to the suit, and as the dispute before the Court was in respect of trees already felled on the date on which the suit had been brought, it ought not to have passed a decree for a sum exceeding its pecuniary jurisdiction by in-corporating in the decretal amount damages in respect of trees which had been felled later on.

The reason was obvious. The plaintiff in that case could not have brought the suit in that Court for a combined claim in respect of two separate claims for damages, as the suit for the combined claim would have been beyond the pecuniary jurisdiction of the Court. The instant case was not a case of that kind and the problem arising here has no relation to the principle enunciated therein.

I am therefore of opinion that the appeal of the judgment-debtor, defendant No. 3 (a), (Misc. (Second) Appeal No. 38 of 1958) must fail. It is accordingly dismissed with costs.

The appeal of the decree-holders (Misc. (Second) Appeal no. 69 of 1958) against the order remanding the case to the executing Court for the purpose of elucidating whether the amount of costs incorporated in the compromise decree related to matters outside the suit is allowed with costs. The whole decree as it stands shall now be executed.