

## APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.

S. SABAPATHY PILLAY (DIED) AND OTHERS (THE LEGAL REPRESENTATIVES OF THE DECEASED APPELLANT-PLAINTIFF),  
APPELLANTS,

v.

1913.  
February 20  
and  
1914.  
January  
15.

VANMAHALINGA PILLAY AND ANOTHER (DEFENDANTS NOS. 2 AND 3), RESPONDENTS.\*

*Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Compromise—Terms outside the scope of the suit, recorded in the decree—Decree so far as it relates to the suit, effect of—Terms forming consideration for those relating to the subject-matter of the suit—Decree, not ultra vires—Objection in execution, maintainability of—Contract Act (IX of 1872), ss. 38 and 54—Reciprocal promises—Non-performance by one party wrongfully—Consequent non-performance by the other, rightfully, effect of—Contract at an end—Compensation—Offer of performance, essentials of—Conditional offer—Offer to release without executing release deed, insufficient.*

The plaintiff sued to recover a sum of money on a simple money-bond executed by the first defendant and the father of the second and third defendants. The parties entered into a compromise by which the disputes between them, including the claim in the suit, were adjusted, and a decree was passed in the suit in accordance with the compromise, "so far as it related to the suit." Under the compromise the defendants agreed to get a release of certain properties which had fallen to the share of the plaintiff in a partition between the plaintiff and the first defendant and some other properties purchased by the former from the latter, from the claims of a mortgagee (decree-holder) of the same, on the plaintiff depositing in Court within a certain time a sum of money for payment to the mortgagee towards his decree. The plaintiff failed to deposit the amount. The defendants gave notice to the plaintiff, by a posted letter offering to get a release of the properties if the plaintiff paid the amount in one week, but the plaintiff did not pay the amount. The third defendant took an assignment of the mortgage-decree, brought the properties to sale in execution and purchased them in auction. The defendants applied in execution of the compromise-decree to recover a sum of money as due to them under the compromise, alleging that they had performed or offered to perform the conditions laid on them by the compromise. The plaintiff contended that the defendants could not recover the amount as the claim for it could not be deemed to have been included in the decree, and if it were included the decree was *ultra vires*; and further that the defendants, having failed to fulfil their part of the agreement, were not entitled to enforce the other terms of the compromise.

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*Held*, that all the terms recorded in the compromise-decree, which formed part of the consideration for the adjustment of the subject-matter of the suit, must be deemed to be part of the decree and can be enforced in execution proceedings.

A compromise-decree, even if it includes matters beyond the scope of the suit, is not *ultra vires*, and no objection can be taken to the enforcement of the same in execution proceedings.

When the parties to a contract fail to perform their reciprocal promises, the one wilfully and the other because he was not bound to fulfil his part unless the former had fulfilled his preliminary part, the contract itself comes to an end by the acts of both the parties except for the purpose of enabling the innocent party to claim compensation from the other.

An offer of performance must be unconditional, if it is to have the same effect as performance.

A mere offer by a posted letter that the party liable was ready to execute a release without having a document of release ready, is not a valid offer under section 38 of the Contract Act.

*Held* (on the facts of the case) that though the plaintiff failed to pay the money into Court, as the defendants failed to fulfil their part of the agreement or to make a valid unconditional offer to perform the same, and as the defendants disabled themselves from performing their part by reason of the purchase of the properties by the third defendant, the defendants were not entitled to enforce the other terms included in the compromise-decree.

APPEAL against the order of C. KRISHNASWAMI RAO, the Subordinate Judge of Māyavaram, in Execution Petition No. 193 of 1910 in Original Suit No. 29 of 1907.

This is an appeal against an order passed by the Sub-Court of Mayavaram in an application for execution of a razinamah decree passed in Original Suit No. 29 of 1907 in the said Court. The original suit on which the razinamah decree was passed, was instituted by the plaintiff to recover a sum of money on a simple bond executed by the first defendant (the uncle of the plaintiff), and the father of the second and the third defendants. There were certain disputes between the parties with reference to certain lands which fell to the share of the plaintiff in a partition said to have been made between the plaintiff and the first defendant and some other lands purchased by the former from the latter. The said disputes as well as the claim forming the subject-matter of the present suit were adjusted by a razinamah and a decree was passed in accordance therewith so far it related to the suit. The material terms of the razinamah decree were as follows :—

- (a) That within 16 months from this date (i) the defendants herein should get the properties which fell to

the plaintiff's share at the partition, and which are concerned in the decree in Original Suit No. 69 of 1902, on the file of the Kumbakonam Sub-Court, free from the liability of the said decree, (ii) that they should get a registered voucher showing the discharge of the hypothecation bond executed for Rs. 8,000 on 20th November 1896 by the first defendant to Ramachendrayar, late Sarishtadar of the Negapatam Sub-Court, from the said Ramachendrayar's heirs, (iii) and that if upon plaintiff depositing into Court within four months from this date the sum of Rs. 13,000 which the plaintiff has in the sale-deed executed for Rs. 13,000 to the plaintiff by the first defendant on 19th January 1903 in respect of the properties which fell to the plaintiff's share at the partition and which are concerned in Original Suit No. 66 of 1905 on the file of the Kumbakonam Sub-Court, undertaken to pay to the plaintiff in the said Original Suit No. 66 together with interest due from the date of the said sale-deed according to the terms of the plaint-bond in the said suit No. 66, the defendants get the properties which fell to the plaintiff's share at the partition as aforesaid and the properties mentioned in the said sale-deed, free from the liability of the said decree and even subsequent thereto, this suit shall be dismissed ;

- (b) that after the defendants have got things done as required in paragraph (a) hereof the plaintiff shall deduct from the sum of Rs. 16,000 shown above as payable by the plaintiff to the defendant, the amount which has accrued till 22nd May 1899, on account of the items specified in the bond in this suit and on account of the hypothecation-bond executed to the plaintiff by the first defendant for Rs. 3,343-2-0 on 16th October 1897, and pay to the second and third defendants the sum of Rs. 2,200, the balance found to be due, with interest at 11 annas per cent per mensem from 22nd May 1899 till the date of payment of the amount ;

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- (c) That in case the defendants have failed to fulfil according to the conditions stated in paragraph (a) above and within the time mentioned therein, the plaintiff shall recover the sum of Rs. 20,000 that has been settled in satisfaction of the plaint amount herein and of subsequent interest and costs of suit, etc., together with interest from this date at 11 annas per cent per mensem by proceeding in execution against the first defendant and the second and third defendant's family properties.

The defendants alleging that they had performed or offered to perform the condition laid on them under the decree, applied in execution of the decree to recover a sum of Rs. 2,200 as due to them under the decree. The lower Court passed an order for execution in favour of the defendants, overruling the objections of the plaintiff to the effect that the defendants had not fulfilled the conditions in the decree and that the present claim was not a part of the decree. The plaintiff appealed to the High Court. The case was originally heard by their Lordships BENSON and SUNDARA AYYAR, JJ., and findings were called for on certain issues. The lower Court returned findings to the effect that the assignment to the third defendant of the mortgage-decree in Original Suit No. 66 of 1905 was not contrary to the obligations laid on the defendants by the razinamah and that the defendants were ready to fulfil their obligations. The case came on for final disposal before their Lordships AYLING and SADASIVA AYYAR, JJ.

*K. Ramachandra Ayyar* for the appellant.

*K. Srinivasa Ayyangar* for the respondent.

This appeal came on for hearing before BENSON and SUNDARA AYYAR, JJ., who delivered the following

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JUDGMENT.—We see no reason to differ from the finding of the Subordinate Judge with regard to the first and second conditions to be fulfilled by the first defendant before the second and third defendants could claim to take out execution for the amount in question. But the finding with regard to the third condition is unsatisfactory. It is admitted that the plaintiff did not deposit in Court the amount that he was bound to deposit, but the plaintiff alleged in his objection petition that the third defendant had taken an assignment of the decree in Original

Suit No. 66 of 1905 and brought to sale the properties allotted to the plaintiff contrary to the obligation undertaken by the first defendant to obtain a release of those properties from liability for the decree. If this allegation be true, they certainly cannot take out execution for the amount in question. We request the Subordinate Judge to take evidence on the above question and submit his finding thereon; and also on the question whether the defendants were ready to fulfil their obligations under paragraph A (3) of the razinamah. We reserve the questions whether clause B of the razinamah can be treated as a part of the decree, and, if so, whether it is executable or should be regarded as declaratory. The findings will be submitted within two months after the receipt of this order and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the Subordinate Judge of Mayavaram submitted findings to the effect that the assignment to the third defendant of the mortgage decree in Original Suit No. 66 of 1905, was not contrary to the obligation laid by the razinamah and that the defendants were ready to fulfil their obligations.

This appeal again coming on for hearing the Court delivered the following judgments.

SADASIVA AYYAR, 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 defendants Nos. 2 and 3 as decree-holders.

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.

The plaintiff and the first 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 first defendant, the plaintiff obtaining for his share certain specific properties out of the 34 properties and the first defendant the remaining properties. In June 1899, the first defendant and the father of the defendants Nos. 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

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land, all the 34 items had been mortgaged by the first 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 first defendant; the plaintiff (without protest apparently from the first 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 first defendant was not a debt incurred by the first defendant for the benefit of both the plaintiff and the first 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 first 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.

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.

The present suit was brought by the plaintiff in 1906 as Original Suit No. 38 of 1906 (in the Kumbakonam Sub-Court) on the simple bond for Rs. 10,000 executed in June 1899 by the first defendant and the father of the defendants Nos. 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 Nos. 1 to 3 comprising 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.

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 No. 66 of 1905, the defendants Nos. 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 first defendant by the plaintiff and that the plaintiff should pay Rs. 2,200 to the defendants Nos. 2 and 3 (which sum would be the balance due to the defendants Nos. 2 and 3 after such set off) with interest

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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 plaint bond with interest from the date of the rāzinamah by execution against defendants Nos. 1 to 3. (There are certain other minor terms in the rāzinamah which need not be stated here.)

Now, the defendants Nos. 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 rāzinamah decree, the plaintiff ought to pay Rs. 2,200 to them and that the defendants Nos. 2 and 3 are entitled in execution of this same decree to recover this Rs. 2,200 and interest from the plaintiff. On these contentions, they filed the execution petition No. 198 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 Nos. 2 and 3. Two of these objections, namely, that the defendants Nos. 1 to 3 did not fulfil conditions A1 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 third 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 themselves from fulfilling that condition by certain acts of the third defendant.* The second objection was that even if the defendants had fulfilled all the three conditions, the term (B) of the rāzinamah petition, namely, that on the defendants fulfilling those conditions, the second and third 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 Nos. 2 and 3 should bring a separate suit on the promise recorded as term (B) in the razi-namah decree and cannot claim that an executable decree for that amount has been passed in this suit No. 29 of 1907.

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 razi-namah was intended to be one of the considerations which moved the defendants Nos. 1 to 3 in consenting to the term (C) of the razi-namah 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*(1) and *Purna Chandra Sarkar v. Nil Maadhub Nandi*(2) 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*(3), I shall quote certain passages therefrom :—

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“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. Bhuban Jelini*(4) BRETT and SHARFUDDIN, JJ., recognized 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.*

(1) (1907) I.L.R., 30 Mad., 478.

(2) (1901) 5 C.W.N., 485.

(3) (1908) I.L.R., 35 Calc., 837 at pp. 841 and 842.

(4) (1907) I.L.R., 34 Calc., 456.

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*Nil Madhub Nandi*(2). In the latter case, GHOSE and PRATT, JJ.,  
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 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."

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 v.*  
*Chandrikah Singh*(3), where MOOKERJEE, J., says that if a com-  
 promise decree "gives effect to the settlement touching pro-  
 perties 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*(4) 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.

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 Nos. 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 par-  
 ticular relief to the defendants Nos. 2 and 3 *only if a condition*

(1) (1897) 2 C.W.N., 663.

(2) (1901) 5 C.W.N., 485.

(3) (1909) I.L.R., 36 Calc., 193 at p. 223.

(4) (1907) I.L.R., 30 Mad., 421.

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 (b) 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 plaintiff's rights in those properties and the third defendant by his acts has rendered it impossible for the defendants Nos. 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 Nos. 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. Under section 38 of the Contract Act, an offer equivalent to

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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 the plaintiff's properties under the decree in suit No. 66 of 1905 only if the plaintiff *paid Rs. 13,000 and the interest within one week's time*. Further, an offer under section 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 third defendant is ready to execute a release and without having a document of release ready to be delivered, is not a proper offer. Again as said in *Haji Abdul Rohman v. Haji Noor Mahomed*(1) and *Behari Lal v. Ram Ghulam*(2) 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.

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 third

(1) (1889) I.L.R., 16 Bom., 141.

(2) (1902) I.L.R., 24 All., 461.

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 under section 54 of the Contract Act as having also himself avoided the contract. In the result, I hold that the defendants Nos. 2 and 3 cannot obtain any relief in pursuance of the term (B) of the razinamah decree as they have not fulfilled the condition (A3) 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 second and third 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 I would make no order as to costs in either Court.

AYLING, J.—I agree.

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