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RAMANKUTTY GUPTAN

v.

AVARA

FEBRUARY 3, 1994

B

[K. RAMASWAMY AND B.L. HANSARIA, JJ.]

C *Specific Relief Act, 1963: Section 28—Suit filed for recovery of balance of consideration in a contract for sale—Decree passed by the Appellate Court—Application filed to rescind the contract of sale—Whether maintainable on the execution.*

Words & Phrases: "Same Court"—Meaning of in the context of S. 28(1) of the Specific Relief Act, 1963.

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Under a contract of sale the respondent was put in possession and on failure of the vendor to execute the sale deed, the respondent filed a suit for specific performance. The trial court dismissed the suit. On appeal the appellate court granted the decree for specific performance. It also granted one month's time to the respondent to deposit the balance consideration. The appellant preferred a second appeal to the High Court.

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Respondent deposited the amount after the time fixed by the appellate court but before the second appeal was dismissed.

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While the decree was in execution the appellant filed a petition under Section 28 of the Specific Relief Act, 1963 to rescind the contract of sale on the plea that the respondent had committed default in depositing the balance consideration of Rs.4,351 within the time allowed by the appellate court. The executing Court dismissed the application. The Revision petition preferred to the High Court was also dismissed. The High Court held that the application was not maintainable on the execution side. Hence this appeal.

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The Respondent contended that the meaning of the word "same suit" in s. 28(1) of the Act should not be construed to be the original court in which the decree was made and so the application would lie for extension of time, or for rescinding the contract, only in the appellate court and not in the trial court, that too on execution side.

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Dismissing the appeal, this Court

HELD: 1.1. It is clear that the decree of the appellate court would be construed to be the decree passed by the Court of first instance. It is settled law that an appeal is a continuation of the suit. Therefore, when a decree for specific performance has been dismissed by the trial court, but decreed by the appellate court, it should be construed to be in the same suit. When the decree specifies the time for performance of the conditions of the decree, on its failure to deposit the money, section 28(1) of the Specific Relief Act, 1963 itself gives power to the court to extend the time on such terms as the court may allow, to pay the purchase money or other sum which the court has ordered him to pay. An application for extension of time for payment of balance consideration may be filed even in the court of first instance or in the appellate court in the same suit as the decree of the trial court stands merged with that of the appellate court which decree is under execution. It is to be seen that the procedure is the hand-maid for justice; and unless the procedure touches upon jurisdictional issue, it should be moulded to subserve substantial justice. Therefore technicalities would not stand in the way to subserve substantive justice. Where the decree is transferred for execution to a transferee executing court, then certainly the transferee court is not the original court and execution Court is not the "same court" within the meaning of s. 28 of the Act. But when an application has been made in the court in which the original suit was filed and the execution is being proceeded with, then certainly an application under section 28 is maintainable in the same court. [546-G-H, 547-A-E]

1.2. It is equally settled law that after passing the decree for specific performance, the court does not cease to have any jurisdiction. The court retains control over the decree even after the decree has been passed. It was open to the court to exercise the power under s. 28(1) of the Act either for extension of time or for rescinding the contract as claimed for. Since the execution application has been filed in the same court in which the original suit was filed, namely, the court of first instance, instead of treating the application on the execution side, it could have as well been numbered as an interlocutory application on the original side and disposed of according to law. [547-F-G]

K. Kalpana Saraswathi v. P.S.S. Somasundaram Chettiar, [1980] 2 S.C.R. 293, relied on.

A *Maruti Vishnu Kshirsagar v. Bapu Keshav Jadhav*, (1970) A.I.R. Bombay 398, approved.

Ibrahim Shariff v. Masthan Shariff, (1967) 2 Andhra Weekly Reporter 60, at p.65, overruled.

B 2. In the instant case, the decree for specific performance became final. While the second appeal was pending the balance consideration was deposited and no steps have been taken to bring it to the notice of the High Court that the respondent had committed default in compliance of the appellate decree of depositing the balance consideration within the given time. Moreover, the respondent has been in possession of the land for along time. The execution is on mid-way. Under these circumstances, no interference called for, in exercise of power under Article 136, which in the present case requires drawing of curtain. [548-B, C]

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D CIVIL APPELLATE JURISDICTION : Civil Appeal No. 556 of 1994.

From the Judgment and Order dated 11.8.1992 of the Kerala High Court in C.R.P. No. 593 of 1990.

E G. Viswanatha Iyer and M.P. Vinod for the Appellant.

K.R. Nambiar for the Respondent.

The Judgment of the Court was delivered by

F K. RAMASWAMY, J. Leave granted.

G 1. The appellant judgment-debtor filed a petition in the executing court to rescind the contract dated January 16, 1976 on the plea that the respondent-plaintiff had committed default in depositing the balance consideration of Rs.4,351 within one month from January 27, 1982 made by the appellate decree in A.S. No. 213 of 1979. The executing court dismissed the application on the ground that the deposit was made within the time though the application on the execution side was maintainable. On revision, the High Court in C.R.P. No. 593/90 dismissed the petition by judgment dated August 11, 1992 holding it not maintainable on the execution side.

H 2. The only question that arises for consideration is whether an

application under s. 27 of the Specific Relief Act, 1963, for short 'the Act' is maintainable on the execution side in a decree passed in the same suit by the appellate court. The facts are not in dispute. Under the contract of sale the respondent was put in possession and on failure of the vendor to execute the sale deed the respondent filed the suit for specific performance. The trial court dismissed the suit. On appeal, while granting the decree for specific performance, the court granted one month time to deposit the balance consideration. The appellant carried the matter in Second Appeal to the High Court. The respondent deposited the amount after the time fixed by the appellate court but before the Second Appeal was dismissed. While the decree was in execution the appellant filed the petition under s. 28 of the Act. The original suit and the execution application is in the same court.

Section 28(1) of the Act reads thus:

28". Rescission in certain circumstances of contract for the sale of lease of immovable property, the specific performance of which has been decreed-

(1) Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and purchaser or lessee does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor or lessor may apply *in the same suit* in which the decree is made, to have the contract rescinded and on such application the court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require".

(Emphasis supplied)

3. A bare reading itself clearly mentions that in a suit a decree for specific performance of a contract for the sale of immovable property has been made and time has been prescribed for performance, it should be complied within time. On its default, power has been given to the court that passed the decree to further extend the time as the court may allow and the purchase money or any other sum be paid within the extended

A time. If the payment is not made even within the time originally fixed or extended time, what would be the consequences depends on the terms of the decree with which we are not concerned in this appeal.

4. There appears to be difference of opinion among the High Courts in this behalf. The Bombay High Court in *Maruti Vishnu Kshirsagar v. Bapu Keshav Jadhav*, (1970) A.I.R. (Bombay) 398, held that the application, though made on the execution side, may be transferred to the original side or may be treated as an application made on the original side and time may be extended under s. 28 of the Act. The Andhra Pradesh High Court in *Ibrahim Shariff v. Masthan Shariff*, (1967) 2 Andhra Weekly Reporter 60, at (p.65), took the contra view that an application does not lie on the execution side and it should be filed on the original side.

5. Sri Nambiar, learned counsel appearing for the respondent, contended that the meaning of the word "same suit" in s. 28(1) of the Act should not be construed to be the original court in which the decree was made. Therefore, the application would lie for extension of time, or for rescinding the contract, only in the appellate court and not in the trial court, that too an execution side. We find no force in the contention.

Section 37 C.P.C. enumerates that:

E "37. Definition of the court which passed a decree - The expression "Court which passed a decree", or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include-

F (a) Where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

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G Therefore, it is clear that the decree of the appellate court would be construed to be the decree passed by the Court of first instance. It is settled law that an appeal is a continuation of the suit. Therefore, when a decree for specific performance has been dismissed by the trial court, but decreed by the appellate court, it should be construed to be in the same suit. When H the decree specifies the time for performance of the conditions of the

decree, on its failure to deposit the money, s. 28(1) itself gives power to the court to extend the time on such terms as the court may allow to pay the purchase money or other sum which the court has ordered him to pay. In *K. Kalpana Saraswathi v. P.S.S. Somasundaram Chettiar*, (1980) 2 S.C.R. 293, this court held that on an oral prayer made by the counsel for the plaintiff for permission to deposit the entire amount as directed by the trial court this court directed the appellant to deposit the amount within six months from that date together with interest and other conditions mentioned therein. An application for extension of time for payment of balance consideration may be filed even in the court of first instance or in the appellate court in the same suit as the decree of the trial court stands merged with that of the appellate court which decree is under execution. It is to be seen that the procedure is the hand-maid for justice; and unless the procedure touches upon jurisdictional issue, it should be moulded to subserve substantial justice. Therefore, technicalities would not stand in the way to subserve substantive justice. Take a case where the decree is transferred for execution to a transferee executing court, then certainly the transferee court is not the original court and execution Court is not the "same court" within the meaning of s. 28 of the Act. But when an application has been made in the court in which the original suit was filed and the execution is being proceeded with, then certainly an application under s. 28 is maintainable in the same court.

6. The question then emerges is whether it should be on the original side or execution side. Section indicates that it should be "in the same suit". It would obviously mean in the suit itself and not in the execution proceedings. It is equally settled law that after passing the decree for specific performance, the Court does not cease to have any jurisdiction. The court retains control over the decree even after the decree has been passed. It was open to the court to exercise the power under s. 28(1) of the Act either for extension of time or for rescinding the contract as claimed for. Since the execution application has been filed in the same court in which the original suit was filed, namely, the court of first instance, instead of treating the application on the execution side, it should have as well been numbered as an interlocutory application on the original side and disposed of according to law. In this view, we feel that the judgment of the Bombay High Court laid down the law correctly and that of the Andhra Pradesh High Court is not correct. The High Court, therefore, is not right in dismissing the application treating it to be on execution side, instead of transferring

A it on the original side for dealing with it according to law.

7. The question then is whether it is a fit case for our interference. It is seen that the decree for specific performance became final. While the second appeal was pending, the balance consideration was deposited and no steps have been taken to bring it to the notice of the High Court that

B the respondent had committed default in compliance of the appellate decree of depositing within the given time the balance consideration. Moreover, the respondent has been in possession of the land for a long time. The execution is on mid-way. Under these circumstance, the command of Art. 136 of the Constitution is to draw the curtain and allow the application to lie in quietus where it was laid and dismiss the appeal. We

C pay need to and do accordingly, but without costs.

G.N.

Appeal dismissed.