

A CHANDA (DEAD) THROUGH LRS.

v.

RATTNI AND ANR.

MARCH 23, 2007

B [DR. ARIJIT PASAYAT AND LOKESHWAR SINGH PANTA, JJ.]

*Specific Relief Act, 1963:*

C S.28—Power under—Held, is discretionary—On facts, decree of specific performance of contract passed—In execution proceedings, plaintiff's failure to deposit the balance sale consideration—No prayer made by plaintiff before trial Court and High Court for deposit or extension of time—Order of rescission of contract rightly passed on application filed by defendant—Specific Relief Act, 1877—s.35(c).

D The defendant-respondent entered into an agreement to sell land to plaintiff-appellant and received earnest money. The sale deed was to be executed on payment of balance sale consideration. Appellant filed suit for specific performance of agreement to sell on the promise that respondent did not execute the sale deed. Trial Court decreed the suit and directed respondent  
E to execute sale deed on receipt of balance sale price and also to get it registered within 2 months from the date of decree.

Appellant did not deposit the balance sale price within the time allowed by Court. The respondents did not execute the sale deed.

F Appellant moved an application for execution of decree pleading that since the respondents had failed to execute sale deed the same was to be executed through Court. Respondents moved an application u/s.28 of the Specific Relief Act, 1963 praying for rescission of the agreement to sell as appellant had failed to deposit the balance sale consideration. The trial Court allowed the application and rescinded the contract. Accordingly, the execution  
G application by appellant was dismissed. High Court dismissed the revision petition. Hence the present appeal.

Dismissing the appeal, the Court

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**HELD:** 1. Section 28 of the Specific Relief Act, 1963 corresponds to s. 35 (c) of the Specific Relief Act, 1877 (the 'repealed Act') under which it was open to the Vendor or lessor in the circumstances mentioned in that Section to bring a separate suit for rescission; but this Section goes further and gives to the Vendor or lessor the right to seek rescission in the same suit, when after the suit for specific performance is decreed the plaintiff fails to pay the purchase money within the period fixed. The present section, therefore, seeks to provide complete relief to both the parties in terms of a decree for specific performance in the same suit without requiring one of the parties to initiate separate proceedings. The object is to avoid multiplicity of suits. Likewise under the present provision where the purchaser or lessee has paid the money, he is entitled in the suit for specific performance to the reliefs as indicated in sub-section (3) like, partition, possession etc. A suit for specific performance does not come to an end on passing of a decree and the Court which as passed the decree for specific performance retains the control over the decree even after the decree has been passed. [Para 9] [407-E-G; 408-A]

2. The decree for specific performance has been described as a preliminary decree. The power under s. 28 of the Act is discretionary and the Court cannot ordinarily annul the decree once passed by it. Although the power to annul the decree exists yet s.28 of the Act provides for complete relief to both the parties in terms of the decree. The Court does not cease to have the power to extent the time even though the trial Court had earlier directed in the decree that payment of balance price to be made by certain date and on failure suit would stand dismissed. The power exercisable under this Section is discretionary. [Para 10] [408-A-B]

3. The stand now taken by appellant that there was no direction to pay within a particular time was not pleaded before the trial Court and High Court and is clearly unsustainable. [Para 11] [408-D]

*Kumar Dharendra Mullick and Ors. v. Tivoli Park Apartments (P) Ltd.*, [2005] 9 SCC 262, distinguished.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5494 of 2000.

From the Final Judgment Order dated 21.5.1999 of the High Court of Punjab and Haryana at Chandigarh in C.R.No. 4509 of 1998.

Neeraj Kr. Jain, Sanjay Singh, Sandeep Chaturvedi and Ugra Shankar Prasad for the Appellants.

A Naresh Kaushik, B.S. Methaila, Amita Kalkal, and Lalita Kaushik for the Respondent.

The Judgment of the Court was delivered by

B **DR. ARIJIT PASAYAT, J. 1.** Challenge in this appeal is to the judgment of a learned Single Judge of the Punjab and Haryana High Court dismissing the revision petition filed under Section 115 of the Code of Civil Procedure, 1908 (in short the 'Code').

2. Background facts as projected by the plaintiff in a nutshell are as follows:

C 3. Defendants-respondents entered into an agreement dated 25.3.1989 to sell land measuring 54 Kanals 3 Marlas to the original plaintiff-Chandu and received Rs.56,000/- as earnest money. The sale deed was to be executed on or before 15.6.1989 on payment of the balance sale consideration of Rs.1,39,000/-.

D Since the defendants did not execute the sale deed within the time specified in the agreement, the plaintiff-appellant instituted a suit on 24.1.1990 for specific performance of the agreement to sell. The suit was decreed ex parte on 1.5.1992 and it is common case of the parties that the decree has become final between them. Para 6 of the judgment of the trial court decreeing the suit reads as under:-

E "For the reasons discussed above, the suit succeeds. A decree for possession of the suit land by way of specific performance is hereby passed in favour of the plaintiff and against the defendants with costs. Defendants are directed to execute the proposed sale deed on payment of the balance sale price of Rs.1,39,000/- and get it registered within a period of two months from the date of this decree failing which the plaintiff shall be at liberty to get the sale deed executed and registered under Order 21 Rule 12 Code. Decree be drawn up accordingly and file be consigned to the record room."

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G 4. The plaintiff did not deposit the balance sale price within two months from the date of the decree, and the defendants did not execute the sale deed. Plaintiff then moved an application on 10.10.1992 for the execution of the decree pleading therein that since the judgment debtors-respondents had failed to execute the sale deed the same was to be executed through court and that he (plaintiff) be allowed to deposit the balance sale price in court.

H During the pendency of this application, one Sarup Singh through his general

attorney moved an application for being impleaded as a party in the execution proceedings on the plea that he was the owner in possession of the suit land on the basis of a decree dated 26.7.1991 which the defendants are alleged to have suffered in his favour. The executing court as per its order dated 14.8.1995 allowed the applicant to be impleaded in the execution proceedings. Sarup Singh then filed objections to the execution application which were dismissed as per order dated 10.9.1998 and it was held that he was not a bona fide purchaser of the suit land. On 8.9.1998, the judgment debtors-respondents moved an application under Section 28 of the Specific Relief Act, 1963 (for short the 'Act') with a prayer that the agreement to sell dated 25.3.1989 be rescinded since the plaintiff-appellant had failed to deposit the balance sale consideration within the time allowed by the court. This application was contested by the appellant-plaintiff and on a consideration of the contentions advanced by the counsel for the parties the trial court as per its order dated 15.9.1998 allowed the application and rescinded the original contract dated 25.3.1989 holding that the plaintiff had failed to deposit the balance sale consideration within the time allowed by the Court. The execution application filed by the plaintiff-appellant was consequently dismissed. The said order was assailed in the revision petition filed before the High Court.

5. Before the High Court the stand of the appellant was that the order of the Trial Court was not sustainable as the court while decreeing the suit for specific performance had directed the defendants-respondents to execute the sale deed within two months from the date of decree and since they failed to do so the plaintiff was entitled to have the sale deed executed through the court. According to him, there was no specific direction given to the plaintiff to deposit the balance share consideration within stipulated period and, therefore, the Trial Court was not justified in rescinding the contract on account of non-deposit of the balance sale price by the plaintiff. It was also contended that several imposters were set up which disentitled the applicant from any relief. The High Court found that para 6 of the judgment of the Trial Court as quoted above, clearly indicated that the defendants had been directed to execute the sale deed within two months from the date of the decree on payment of the balance sale price of Rs.1,30,000/-. The same was, therefore, a condition precedent for execution of the sale deed. It was implicit in the direction that the plaintiff was required to deposit the balance consideration within a period in the first instance and it was only then defendants were required to execute the sale deed. Since the plaintiff did not deposit the balance amount, the order of court below was perfectly in order. Revision petition was accordingly dismissed.

A 6. In support of the appeal, learned counsel for the appellant submitted that the scope and ambit of Section 28 of the Act has been examined in various decisions. There was scope for extension of time and mere non deposit did not deprive the appellant from getting any relief. There was no unreasonable delay in making the request for extension of time to make deposit. Strong reliance was placed on the decision in *Kumar Dhirendra Mullick and Ors. v. Tivoli Park Apartments (P) Ltd.*, [2005] 9 SCC 262.

B 7. In response, learned counsel for the respondents submitted that execution of sale deed was to be done only after the payment or deposit in court. The conduct of the decree-holder in not depositing is full of mala fides. C He has not deposited the amount for long 6 years i.e. between the disposal of the execution proceedings/rescission application. The court had interpreted the decree to mean that the deposit was condition precedent. There was no specific prayer for deposit or for extension of time. The factual position is entirely different from *Kumar Dhirendra's* case (supra). In that case there was repeated assurance of payment but in the present case there is no such D assurance.

8. Section 28 of the Act reads as follows:

E 28. *Rescission in certain circumstances of contracts for the sale or 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 the 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 F 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.

G (2) Where a contract is rescinded under sub-section (1), the court—

(a) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor; and

H (b) may direct payment to the vendor or lessor of all the rents and

profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and if the justice of the case so requires, the refund of any sum paid by the vendee or the lessee as earnest money or deposit in connection with the contract. A

(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely:— B

(a) the execution of a proper conveyance or lease by the vendor or lessor; C

(b) the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease. D

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

(5) The costs of any proceedings under this section shall be in the discretion of the court.” E

9. The present section corresponds to Section 35 (c) of the Specific Relief Act, 1877 (hereinafter referred to as the ‘repealed Act’) under which it was open to the Vendor or lessor in the circumstances mentioned in that Section to bring a separate suit for rescission; but this Section goes further and gives to the Vendor or lessor the right to seek rescission in the same suit, when after the suit for specific performance is decreed the plaintiff fails to pay the purchase money within the period fixed. The present section, therefore, seeks to provide complete relief to both the parties in terms of a decree for specific performance in the same suit without requiring one of the parties to initiate separate proceedings. The object is to avoid multiplicity of suits. Likewise under the present provision where the purchaser or lessee has paid the money, he is entitled in the suit for specific performance to the reliefs as indicated in sub-section (3) like, partition, possession etc. A suit for specific performance does not come to an end on passing of a decree and the Court which has passed the decree for specific performance retains the H

A control over the decree even after the decree has been passed.

10. The decree for specific performance has been described as a preliminary decree. The power under Section 28 of the Act is discretionary and the Court cannot ordinarily annul the decree once passed by it. Although the power to annul the decree exists yet Section 28 of the Act provides for complete relief to both the parties in terms of the decree. The Court does not cease to have the power to extend the time even though the trial Court had earlier directed in the decree that payment of balance price to be made by certain date and on failure suit to stand dismissed. The power exercisable under this Section is discretionary.

C 11. As rightly contended by learned counsel for the respondents the stand now taken was not pleaded before the trial Court and the High Court. The decision in *Kumar Dhirendra's* case (supra) is clearly distinguishable on facts. In fact, it has been noted in that case that the decree-holder was repeatedly assured of payment. The situation is not the same here. The only stand taken was that there was no direction to pay within a particular time. This plea is clearly unsustainable and untenable and has been rightly rejected.

D 12. Above being the position, there is no merit in this appeal which is dismissed without any order as to costs.

E D.G.

Appeal dismissed.