

Surinder Pal Soni vs Sohan Lal (D) Thru Lr on 23 July, 2019

Equivalent citations: AIRONLINE 2019 SC 2193, (2019) 137 ALL LR 779, (2019) 204 ALLINDCAS 162, (2019) 2 CLR 546 (SC), (2019) 2 WLC(SC)CVL 512, (2019) 3 ALL RENTCAS 22, (2019) 3 RECCIVR 883, (2019) 4 CIVILCOURTC 120, (2019) 4 ICC 355, (2019) 4 PAT LJR 56, (2019) 9 SCALE 564, (2020) 146 REVDEC 602

Author: D.Y. Chandrachud

Bench: Indira Banerjee, Dhananjaya Y Chandrachud

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No 5360 of 2019
@Special Leave Petition (C) No 26508 of 2018

Surinder Pal Soni

.... Ap

Versus

Sohan Lal (D) Thru LR & Ors

....Resp

JUDGMENT

Dr Dhananjaya Y Chandrachud, J A learned Single Judge of the High Court of Punjab and Haryana allowed a Civil Revision instituted by the respondents and in the process dismissed the application of the appellant for the execution of a decree in a suit for specific performance. Accepting the objections of the judgment debtor, the High Court directed a refund of earnest money in substitution of the decree for specific performance.

2 In 2006, the appellant instituted a suit for specific performance of an agreement to sell dated 8 December 2003. The appellant sought to enforce an agreement for the sale of land bearing 12 kanals and 9 marlas, representing a half share out of the land bearing Khewat Khatauni No. 565/525, Khasra No. 94/18 (7-8), 19(8-0), 20/1 (6-3), 21/1 (1-7) and 94/21/3 (2-0) situated in village Billa, Tehsil and District Panchkula. On 20 March 2012, the Civil Judge (Senior Division), Panchkula

decreed the suit except for land bearing 2 kanals mentioned in the sale deed in exhibit-D3. Insofar as is material, the decree provided thus :

"Resultantly, a decree for possession by way of specific performance of the agreement to sell Ex. P1 dated 08.12.2003 is passed in favour of the plaintiff in respect of remaining suit land, i.e., except the land of 2 kanals mentioned in sale deed Ex. D3, on making balance sale consideration amount to the L.Rs. of defendant No.1, after deducting the consideration of aforesaid 2 kanals land. The L.Rs of the defendant No.1 are directed to execute the sale deed in respect of the remaining suit land within a period of two months from today in receipt of remaining balance sale consideration after deduction of consideration of 2 kanals land and in case of failure of the L.Rs. of defendant No.1 to do so, the plaintiff is entitled to get the sale deed executed and registered quo the aforesaid land through the Court agency."

3 Both the appellant and the respondent filed appeals against the judgment of the Trial Court. On 23 April 2012, the Additional District Judge, Panchkula issued notice in the appeal and on the application for stay filed by the respondent. 4 On 15 June 2012, the appellant filed proceedings before the Civil Judge (Senior Division), Panchkula for seeking the execution of the decree passed in his favour, pending the first appeal.

5 On 19 May 2014, the respondent filed objections to the execution petition. 6 On 17 January 2015, the Additional District Judge upheld the judgment and order of the Trial Court while dismissing both sets of appeals filed respectively by the appellant and the respondent.

7 On 23 February 2015, the executing court rejected the objections of the respondents to the execution of the decree and allowed the appellant's execution petition. The respondent then filed a civil revision before the High Court which resulted in the judgment of the learned Single Judge dated 1 June 2018 by which the order of the executing court was set aside. The High Court held that there was a failure on the part of the appellant to deposit the balance of the sale consideration within a period of two months from the date of the decree and as a consequence the decree had been rendered inexecutable by virtue of the provisions of Section 28 1 of 1 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 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. the Specific Relief Act 19632. The High Court noted that of the total sale consideration of Rs. 8,35,000/- under the terms of the agreement to sell, the appellant in 2004 had paid an amount of Rs. 5,85,000/- while the balance of Rs. 1,15,864/-, consequent upon the partial decree in the suit had been deposited on 19 February 2015 after the dismissal of the first appeals on 17 January 2015. The High Court opined thus:

“A perusal of the operative portion of the decree under execution shows that though the lower court has not specifically fixed any time for deposit of the amount of balance sale consideration but it has been provided in unambiguous terms that the sale deed is to be executed within two months from the date of judgment upon deposit of balance sale consideration.”⁸ According to the High Court, the time frame for the deposit of the balance sale consideration was implicit in the decision of the Trial Court which had ordered the execution of the sale deed within two months from the date of the judgment upon deposit of the remaining sale consideration. The High Court held that the judgment and decree had not been stayed during the pendency of the first appeals and the mere filing of an appeal did not amount to a stay under Order 41 Rule 5 of the Code (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 (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.

(3) If the purchase 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:— (a) the execution of a proper conveyance or lease by the vendor or lessor; (b) the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease. (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. 2 Specific Relief Act of Civil Procedure 1908³. Hence, it was not open to the appellant to seek the execution of the decree on account of the lapse of the period stipulated in the decree for its execution. The High Court has relied upon the provisions of Section 28 of the Specific Relief Act. It also observed that no application for the enlargement of time had been filed by the appellant. The correctness of this view falls for determination in the present appeal.

9 Mr A Tewari, learned Counsel appearing on behalf of the appellant urged the following submissions :

(i) The judgment and decree of the Trial Court dated 20 March 2012 has merged with the decree of the First Appellate Court 4 dated 17 January 2015. The doctrine of merger applies whether the judgment of a subordinate court is reversed, modified or upheld by a court superior to it (Chandi Prasad v Jagdish Prasad⁵);

(ii) The decree for specific performance is in the nature of a preliminary decree and the court passing it does not become functus officio (Sardar Mohar Singh v Mangilal⁶). Since the decree of the appellate court dated 17 January 2015 makes no mention of the transaction becoming time barred, limitation would commence from 17 January 2015;

3 CPC 4 “Appellate Court” 5 (2004) 8 SCC 724 6 (1997) 9 SCC 217

(iii) The appellate court did not impose a time limit and, in consequence, the decree dated 17 January 2015 became enforceable from the date on which it was issued;

(iv) The power which is entrusted to the court under Section 28 of the Specific Relief Act is equitable in nature and it is open to the court to grant additional time for the performance of any condition laid down in the decree (Sardar Mohar Singh) (supra). What is of prime importance is to gauge the readiness and the willingness of the decree holder. The judgment debtor did not seek the rescission of the contract under the provisions of Section 28 of the Specific Relief Act;

(v) The balance of equities lies in favour of the appellant who has paid Rs.

5,85,000/- out of the total sale consideration in 2004 and only an amount of Rs. 1,15,864/- remained to be paid after the judgment of the Trial Court; and

(vi) The provisions of Order 41 Rule 5 do not detract from the doctrine of merger. 10 On the other hand, Mr Gopal Jha, learned Counsel appearing on behalf of the respondents submitted that :

(i) The doctrine of merger applies to a situation when the limitation for the filing of an execution application is to be computed;

(ii) The decree of the Trial Court was conditional since it contained a direction for the execution of the sale deed of the suit land except 2 kanals within a period of 2 months on receipt of the balance sale consideration. The decree contained three conditions, each of which had to be fulfilled;

(iii) In the present case, the decree of the Trial Court was not modified by the appellate court;

(iv) No application was filed by the appellant for the extension of time to effect deposit nor was any amount deposited while filing the execution application.

The High Court while dismissing the appeal of the judgment debtor did not grant an extension of time to the decree holder for the deposit of the balance;

(v) The decree holder has not shown reasonable grounds for extension of time and the filing of an appeal does not constitute a valid ground particularly in the absence of a stay under Order 41 Rule 5;

and

(vi) The respondent deposited the balance of the sale consideration on 19 February 2015 without an application under Section 148 of the CPC for the extension of time.

For the above, it was submitted that the appellant having failed to comply with the conditions specified in the decree dated 20 March 2012, the High Court was justified in allowing the respondent's civil revision and holding that the decree had been rendered inexecutable.

11 The rival submissions fall for our consideration.

12 By its judgment dated 20 March 2012, the Trial Court decreed the suit for specific performance filed by the appellant save and except for the land admeasuring 2 kanals. The decree of the Trial Court envisaged performance of the agreement to sell dated 8 December 2003 in respect of the land which formed the subject matter of the suit, except for 2 kanals. The judgment debtor was directed to execute the sale deed in respect of the remaining portion of the suit land

(i) within a period of 2 months;

(ii) on receipt of the balance sale consideration; and

(iii) upon deducting the consideration for 2 kanals of land. The decision of the Trial Court was carried in appeal both by the decree holder and by the judgment debtor. The Appellate Court issued notice on the appeal and the application for stay filed by the judgment debtor, while the decree holder moved for execution of the decree. The judgment debtor had filed objections to the execution of the decree. The Appellate Court dismissed both sets of appeals by confirming the judgment and decree of the Trial Court.

13 Upon the decision of the Appellate Court, there was a merger of the judgment of the Trial Court with the decision which was rendered in appeal. Consequent upon the passing of the decree of an Appellate Court, the decree of the Trial Court merges with that of the Appellate Court. The doctrine of merger is founded on the rationale that there cannot be more than one operative decree at a given point in time. The doctrine of merger applies irrespective of whether the Appellate Court has affirmed, modified or reversed the decree of the Trial Court. In *Kunhayammed v State of Kerala*⁷, while explaining the doctrine of merger, this Court held thus:

“12. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way — whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal

or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view.” Further, while explaining the position that emerges on the grant of special leave to appeal by this Court, it was observed:

“41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one...” 7 (2000) 6 SCC 359 This position of law has been recently affirmed and reiterated by a three judge Bench decision of this Court in *Khoday Distilleries Ltd v Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd*⁸.

14 The decision in *Kunhayammed* (supra) was followed by a three judge Bench decision of this Court in *Chandi Prasad* (supra), which held thus:

“23. The doctrine of merger is based on the principles of propriety in the hierarchy of justice delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject matter at a given point of time.

24. It is trite that when an Appellate Court passes a decree, the decree of the trial court merges with the decree of the Appellate Court and even if and subject to any modification that may be made in the appellate decree, the decree of the Appellate Court supersedes the decree of the trial court. In other words, merger of a decree takes place irrespective of the fact as to whether the Appellate Court affirms, modifies or reverses the decree passed by the trial court...”

15 More recently, the decision in *Chandi Prasad* (supra) was followed by a two judge Bench of this Court in *Shanthi v T D Vishwanathan*⁹ rendered on 24 October 2018 in the following terms :

“7. ...When an appeal is prescribed under a statute and the appellate forum is invoked and entertained, for all intents and purposes, the suit continues. When a higher forum entertains an appeal and passes an order on merit, the doctrine of merger would apply. The doctrine of merger is based on the principles of the propriety in the hierarchy of the justice delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an 8 (2019) 4 SCC 376 9

Civil Appeal No. 10442 of 2011, 2018 SCC OnLine SC 2196 order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject matter at a given point of time.”

16 Learned Counsel appearing on behalf of the respondents submitted that under Order 41 Rule 5 of the CPC, an appeal does not operate as a stay of the proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of the decree be stayed only by reason of an appeal having been preferred from the decree. The Appellate Court is however vested with the authority to stay the execution of the decree for sufficient cause. The submission is that since the decree was not stayed pending the disposal of the appeal, there was no impediment in its execution and, upon the failure of the appellant to deposit the balance in the execution proceedings, the decree becomes inexecutable. Learned Counsel submitted that in such a situation, application of the doctrine of merger stands obviated.

17 We are unable to accept the submission. The doctrine of merger operates as a principle upon a judgment being rendered by the Appellate Court. In the present case, once the Appellate Court confirmed the judgment and decree of the Trial Court, there was evidently a merger of the judgment of the Trial Court with the decision of the Appellate Court. Once the Appellate Court renders its judgment, it is the decree of the Appellate Court which becomes executable. Hence, the entitlement of the decree holder to execute the decree of the Appellate Court cannot be defeated.

18 The issue can be looked at from another perspective in terms of the provisions of Section 28 of the Specific Relief Act. Section 28 provides :

“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 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.”

19 Interpreting the provisions of Section 28 of the Specific Relief Act, a three judge Bench of this Court held in Sardar Mohar Singh (supra):

“4. From the language of sub-section (1) of Section 28, it could be seen that the court does not lose its jurisdiction after the grant of the decree for specific performance nor it becomes functus officio. The very fact that Section 28 itself gives power to grant order of rescission of the decree would indicate that till the sale deed is executed in execution of the decree, the trial court retains its power and jurisdiction to deal with

the decree of specific performance. It would also be clear that the court has power to enlarge the time in favour of the judgment-debtor to pay the amount or to perform the conditions mentioned in the decree for specific performance, in spite of an application for rescission of the decree having been filed by the judgment-debtor and rejected. In other words, the court has the discretion to extend time for compliance of the conditional decree as mentioned in the decree for specific performance...” In *Bhupinder Kumar v Angrej Singh*¹⁰, this Court held thus:

10 (2009) 8 SCC 766 “21. It is clear that Section 28 gives power to the court either to extend the time for compliance with the decree or grant an order of rescission of the agreement. These powers are available to the trial court which passes the decree of specific performance. In other words, when the court passes the decree for specific performance, the contract between the parties is not extinguished. To put it clearly the decree for specific performance is in the nature of a preliminary decree and the suit is deemed to be pending even after the decree.

22. Sub-section (1) of Section 28 makes it clear that the court does not lose its jurisdiction after the grant of decree for specific performance nor it becomes functus officio. On the other hand, Section 28 gives power to the court to grant an order of rescission of the agreement and it has the power to extend the time to pay the amount or perform the conditions of decree for specific performance despite the application for rescission of the agreement/decreed. In deciding an application under Section 28(1) of the Act, the court has to see all the attending circumstances including the conduct of the parties.”

20 Learned Counsel appearing on behalf of the respondents placed reliance on the decision in *V S Palanichamy Chettiar Firm v C Alagappan*¹¹. While advertent to the decision of this Court in *Ramankutty Guptan v Avara*¹², the two judge Bench held:

“15. ...This Court observed that when the decree specifies the time for performance of the conditions of the decree, on its failure to deposit the money, Section 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. The Court held, after noticing the conflict of decisions by the Bombay High Court and the Andhra Pradesh High Court, that when the court which passed the decree and the executing court is the same, application under Section 28 can be filed in the executing court. However, where a decree is transferred for execution to a transferee executing court then certainly the transferee 11 (1999) 4 SCC 702 12 (1994) 2 SCC 642 court is not the original court and the executing court is not the “same court” within the meaning of Section 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...” 21 In the above case, the facts before this Court were that an agreement to sell had

been executed nineteen years earlier on 16 February 1980 and no explanation was forthcoming as to why the balance of the sale consideration was not deposited within the time granted by the court. No application for extension was made under Section 28 of the Specific Relief Act. This Court observed that merely because a suit was filed within a period of three years prescribed by Article 54 of the Limitation Act 1963, that did not absolve the vendee-plaintiff from demonstrating that he was ready and willing to perform the agreement and whether the non-performance was on account of obstacles placed by the vendor or otherwise. In that context, this Court held:

“17. ...The court has to see all the attendant circumstances including if the vendee has conducted himself in a reasonable manner under the contract of sale. That being the position of law for filing the suit for specific performance, can the court, as a matter of course, allow extension of time for making payment of balance amount of consideration in terms of a decree after 5 years of passing of the decree by the trial court and 3 years of its confirmation by the appellate court? It is not the case of the respondent decree-holders that on account of any fault on the part of the vendor judgment-debtor, the amount could not be deposited as per the decree. That being the position, if now time is granted, that would be going beyond the period of limitation prescribed for filing of the suit for specific performance of the agreement though this provision may not be strictly applicable. It is nevertheless an important circumstance to be considered by the Court. That apart, no explanation whatsoever is coming from the respondent decree-holders as to why they did not pay the balance amount of consideration as per the decree except what the High Court itself thought fit to comment which is certainly not borne out from the record. Equity demands that discretion be not exercised in favour of the respondent decree-holders and no extension of time be granted to them to comply with the decree.” The facts noted in the above extract from the judgment indicate a situation which is factually distinct. In that case, the balance of the sale consideration was sought to be deposited three years after the confirmation of the decree by the Appellate Court.

In the present case, the facts clearly are to the contrary. The appellant had deposited an amount of Rs. 5,85,000/- The partial decree of the Trial Court in the suit for specific performance was placed in issue before the Appellate Court. After the Appellate Court affirmed the decree on 17 January 2015, the decree of the Trial Court merged with that of the Appellate Court. Barely a month thereafter, on 19 February 2015 the appellant deposited the balance of the sale consideration. The appellant acted bona fide. The equities in a matter arising out of a decree in a suit for specific performance must weigh in his favour. The executing court was justified in rejecting the specious objections of the respondents. The High Court acted in excess of its revisional jurisdiction. The High Court impermissibly substituted the decree for specific performance with an order for refund of the sale consideration, beyond the earnest money of Rs. 2,00,000/- to the decree holder. The reasons which weighed with the High Court in doing so as well as its ultimate directions are unsustainable. In a Civil Revision arising out of an execution proceeding, the High Court has modified the decree. Such a course was not open in law.

22 We accordingly allow the appeal and set aside the impugned judgment and order dated 1 June 2018 of the learned Single Judge in CR No. 3372 of 2015 (O&M). In consequence, the order passed by the Executing Court on 23 February 2015, dismissing the objections of the respondent – judgment debtor in Execution Petition No. 2489 of 2013 shall accordingly stand restored. 23 The appeal is allowed in the above terms. There shall be no order as to costs.

.....J. [DR DHANANJAYA Y CHANDRACHUD]
.....J. [INDIRA BANERJEE] New Delhi;

July 23, 2019.