

## Ramankutty Gupta vs Avara on 3 February, 1994

**Equivalent citations: 1994 AIR 1699, 1994 SCR (1) 542**

**Author: K. Ramaswamy**

**Bench: K. Ramaswamy, B.L Hansaria**

PETITIONER:  
RAMANKUTTY GUPTA

Vs.

RESPONDENT:  
AVARA

DATE OF JUDGMENT 03/02/1994

BENCH:  
RAMASWAMY, K.  
BENCH:  
RAMASWAMY, K.  
HANSARIA B.L. (J)

CITATION:  
1994 AIR 1699                      1994 SCR (1) 542  
1994 SCC (2) 642                JT 1994 (1) 342  
1994 SCALE (1) 390

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by K. RAMASWAMY, J.- Leave granted.

2. 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 4351 within one month from January 27, 1982 made by the appellate decree in AS 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 CRP No. 593 of 1990 dismissed the petition by judgment dated

August 11, 1992 holding it not maintainable on the execution side.

3. The only question that arises for consideration is whether an application under Section 28 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 Section 28 of the Act. The original suit and the execution application is in the same court.

4. Section 28(1) of the Act reads thus:

"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 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)

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

6. There appears to be a difference of opinion among the High Courts in this behalf. The Bombay High Court in *Maruti Vishnu Kshirsagar v. Bapu Keshav Jadhav*<sup>1</sup> 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 Section 28 of the Act. The Andhra Pradesh High Court in *Ibrahim Shariff v. Masthan Shariff*<sup>2</sup> took the contra view that an application does not lie on the execution side and it should be filed on the original side.

7. Shri Nambiar, learned counsel appearing for the respondent, contended that the meaning of the word "same suit" in Section 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 on execution side. We find no force in the contention.

8. Section 37 CPC enumerates that:

"37. Definition of 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,-

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and \* \* \* 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 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. In *K. Kalpana Saraswathi v. P.S.S. Somasundaram Chettiar*<sup>3</sup> 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 1 AIR 1970 Bom 398: 72 Bom LR 615: 1970 Mah LJ 907 2 (1967) 2 AWR 60, 65 3 (1980) 1 SCC 630: (1980) 2 SCR 293 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 handmaid 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 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.

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

10. 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 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 midway. Under these circumstances, the command of Article 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 pay heed to and do accordingly, but without costs.