

GAHC010040322021



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Review.Pet./39/2021

SMT. BANTI BHARALI
W/O- SRI KUMUD BHARALI, R/O- VILL.- MAZGAON, MOUZA-
BHAIRABPAD, P.S. TEZPUR, DIST.- SONITPUR, ASSAM, PIN- 784154.

VERSUS

RANJANA BEZBARUAH AND ANR.
W/O- SRI KAMAL BEZBARUAH, R/O- BORJULI TEA ESTATE, P.O. AND P.S.
RANGAPARA, MOUZA- BAHBARI, DIST.- SONITPUR, ASSAM., PRESENTLY
RESIDING AT VILL. AND P.O. DIPOTA, P.S. TEZPUR, DIST.- SONITPUR,
ASSAM, PIN- 784150.

2:KAMAL BEZBARUAH
S/O- LATE DANDI BEZBARUAH
R/O- BORJULI TEA ESTATE
P.O. AND P.S. RANGAPARA
MOUZA- BAHBARI
DIST.- SONITPUR
ASSAM.
PRESENTLY RESIDING AT VILL. AND P.O. DIPOTA
P.S. TEZPUR
DIST.- SONITPUR
ASSAM
PIN- 784150

Advocate for the Petitioner : MR G KAKOTI

Advocate for the Respondent : MR. S SAHU

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

ORDER

Date : 04.01.2024

Heard Mr. N. Nath, learned counsel for the petitioner and Mr. S. Sahu, learned counsel for the respondents.

2) By filing this application under section 114 read with Order XLVII, Rule 1 and section 151 of the CPC, the petitioner has prayed for review of the order dated 29.01.2021, passed by this Court in CRP No. 262/2017.

3) The petitioner was the sole respondent in CRP No. 262/2017. By the order dated 29.01.2017, which is under review, the said CRP No. 262/2017, filed under Article 227 of the Constitution of India was allowed.

4) The review petitioner was the plaintiff in the Trial Court in TS 22/2005. She was the appellant before the First Appellate Court and the respondent in CRP No. 262/2017. The respondents herein were the defendants in the suit and the respondents in TA 2/2008 and they were the petitioners in CRP 262/2017. For the sake of convenience, in this order, the parties are referred as per their status in this application.

5) It would be relevant to refer to the background facts on which the matter was decided, which are as follows:-

- a. The petitioner was the plaintiff in TS No. 22/2005, which was filed for specific performance of contract for sale of the suit property. The suit was partly decreed vide judgment and decree dated 30.06.2008, passed by the learned Civil Judge, Sonitpur, Tezpur, thereby allowing refund of the sale consideration money of Rs.1,75,000/- (Rupees One

lakh seventy five thousand only), but the specific performance of contract to obtain sale deed in respect of the suit land was refused.

- b. The review petitioner had preferred an appeal against the judgment and decree passed by the learned Trial Court. The learned District Judge, Sonitpur, Tezpur, by its first appellate judgment and decree dated 30.09.2011, allowed T.A. No. 2/2008, thereby setting aside the judgment and decree passed by the learned Trial Court. By holding that the petitioner was entitled to decree for specific performance of contract to get the sale deed registered in respect of the suit land and house standing thereon as prayed for. The respondents were directed to do the needful to execute the sale deed after receiving the balance sale consideration money of Rs.50,000/- (Rupees Fifty thousand only), preferably within 30 (thirty) days from the date of the decree. It was further ordered that if the respondents do not execute the sale deed and register it or do not receive the balance sale consideration amount of Rs.50,000/- (Rupees fifty thousand only), the review petitioner was given liberty to approach the Court to get the sale deed registered in her favour after depositing the balance amount.
- c. On the ground that the petitioner had not deposited balance sale consideration within the time allowed, but was deposited after a lapse of a year, the respondents had raised their objection to the executability of the decree under Section 47 CPC, which was rejected by order dated 21.07.2017, passed by the learned Civil Judge, Sonitpur, Tezpur i.e. Trial Court in TS No. 22/2005.
- d. Thus, the aggrieved respondents had assailed the said order dated 21.07.2017, passed by the learned Trial Court, before this Court by

filing an application under Article 227 of the Constitution of India.

- e. The said application was contested by the petitioners. However, the said CRP No. 262/2017 was allowed by the order dated 29.01.2021. The said order is now under review.

6) The operative part of the said order dated 29.01.2021, passed by this Court in CRP No. 262/2017 is extracted below:-

“17. Therefore, in light of the discussions above, and considering the ratio laid down in the case of Rina Bora (supra) and Chanda (supra), the Court is constrained to hold that the non- deposit of balance consideration money within thirty days from 30.09.2011, the date of judgment passed by the learned trial Court is hit by the provisions of section 28(1) of the Specific Relief Act. The typed copy of order dated 17.08.2017 (Annexure-1 of the affidavit- in- opposition) leaves no room for doubt that the respondent had deposited a sum of Rs.50,000/- on 17.06.2018, long after the time allowed by first appellate judgment had expired and also long after extended time as granted by impugned order dated 21.07.2017 had expired. Thus, the learned trial Court is found to have committed jurisdictional error in passing the order dated 21.07.2017, impugned herein. Accordingly, the Court has no hesitation to set aside the order dated 21.07.2017 impugned herein.

18. Having noticed that the present litigation is continuing for about 16 years from the year 2005, as such, if the matter is remanded for a fresh hearing, there will be further delay, as such, it is deemed appropriate that this Court passes orders as envisaged under section 28 of the Specific Relief Act, 1963. Consequently, the unilateral agreement for sale dated 11.10.2002, executed by the petitioner no.1 in favour of the respondent hereby stands rescinded.

19. Consequent to the rescinding of the said agreement for sale dated 11.10.2002, the petitioners are jointly and severally directed to deposit before the learned trial Court, the part sale consideration amount of Rs.1,75,000/- received by the petitioner no.1 with interest thereon @ 6% (six percent) on and from the date of filing of the suit till the date of actual deposit. Such deposit shall be made within a period of one month from the date of this order. In the event there is any delay in making such deposit, the petitioners defendants shall be liable to pay interest @ 9% on the defaulted amount on and from the date of this order till such sum is deposited in full. The respondent shall be at liberty to withdraw such deposit from the learned trial Court.

20. In terms of the mandate of section 28(2)(a) of the Specific Relief Act,

1963, the Court is inclined to direct the respondent, if she has obtained possession of the suit property under the agreement for sale dated 11.10.2002, to restore such possession to the petitioners within the outer period of six months on and from the date when the petitioners deposit the part sale consideration amount of Rs.1,75,000/- in favour of the respondent with intimation to her counsel on record. Under the facts and circumstances of the case, there shall be no order against the respondent for payment of rent or profits as envisaged in section 28(2)(b) of the said Act or for cost as envisaged under section 28(5) of the said Act.

21. To the extent as indicated herein above, this application stands allowed. The appellate decree so drawn up by the learned first appellate Court would stand modified to the extent as indicated herein before.

7) The learned counsel for the petitioner had submitted that the review has been preferred because (a) certain factual error has crept in the impugned order; (b) as order which was in challenge in CRP 262/2017, was passed by the learned Trial Court in exercise of original jurisdiction under section 28 of the Specific Relief Act, 1963, in view of alternative appellate remedy available, a revision under Article 227 of the Constitution of India ought not to have been entertained; (c) the application on which the learned Trial Court had passed the order dated 21.07.2017 in TS 22/2005, was a time barred application and therefore, ought not to have been entertained.

8) The learned counsel for the petitioner had contended that section 28 of the Specific Relief Act, 1963 empowers the Trial Court to pass an order for rescission of the contract. Therefore, decree for specific performance of contract is like a preliminary decree and the suit is deemed to be pending even after grant of the decree and thus, the Trial Court retains control over the subject matter of the decree.

9) On the point of limitation, it was submitted that the learned appellate Court had passed the decree for specific performance of agreement for sale on 30.09.2011. Hence, it was submitted that the cause of action to

invoke the provisions of section 28 of the Specific Relief Act, 1963 had accrued on 31.10.2011 and therefore, the respondent ought to have approached the learned Trial Court for rescission of contract before expiry of three years, i.e. on or before 31.10.2014. However, the respondent had approached the learned Trial Court in the month of April, 2016, which was after 4 years 6 months, for which the application was barred by limitation.

10) It was submitted that section 28 of the Specific Relief Act, 1963 does not prescribe any period of limitation for preferring any application as contemplated therein and therefore, the provision of Article 137 of the Schedule to the Limitation Act, 1963 would be attracted, prescribing 3 (three) years as the period of limitation which begins to run from the date when the right to apply accrues.

Description of application	Period of limitation	Time from which period begins to run
137. Any other application for which no period of limitation is provided elsewhere in this division.	Three years	When the right to apply accrues.

11) It has been submitted that by the order under review, in exercise of power under section 115 CPC read with Article 227 of the Constitution of India, this Court had allowed rescinding of the agreement for sale and had also issued incidental directions as contemplated under section 28(2) of the Specific Contract Act, 1963, which was impressible, as those orders could have been passed in suit or in appeal.

12) In support of his submissions, the learned counsel for the petitioner has cited the following two cases of (i) *Kumar Dhirendra Mullick v.*

Trivoli Park Apartment (P) Ltd., (2005) 9 SCC 262, and (ii) Surinder Pal Soni v. Sohan Lal, dead, through LRs., (2020) 15 SCC 771.

13) Apart from making oral submissions, a written synopsis of argument is also submitted by the learned counsel for the petitioner, which is kept as a part of record.

14) Per contra, the learned counsel for the respondent has opposed this review application. It was submitted that this review is an appeal in disguise. It was also submitted that the power of revision under section 115(1) of the CPC empowered this Court to pass such order as "it may think fit" and therefore, the order of this Court did not suffer from any error whatsoever.

15) It was submitted that an order passed under section 28 of the Specific Relief Act, 1963 was only an order and not a decree. Hence, it was submitted that the Trial Court order dated 21.07.2017 was not amenable to appeal and therefore, this Court had rightly entertained a revision which was filed under section 115 CPC read with Article 227 of the Constitution of India.

16) It was also submitted that to test whether a particular order is a decree or not, one is required to read that particular provision of law vis-à-vis the provision of Order XX, Rule 9 of the CPC. In this regard, the following provisions were referred to, viz., (i) sections 5 and 6 of the Specific Relief Act, 1963 read with Order XX, Rule 9 CPC; (ii) section 10 of Specific Relief Act read with Order XX, Rule 12A CPC; (iii) section 22 of Hindu Succession Act, 1956 read with Order XX, Rule 14 CPC; (iv) section 231 of Mulla's Principle of Mohammedan Law read with section 9 and Order XX, Rule 14 CPC; (v) sections 13 and 44 of Partnership Act, 1932 read with Order XX, Rule 15 CPC; (vi) section 2 of the Partition Act, 1893 read with Order XX, Rule 18 CPC; (vii)

section 5 of the Assam Urban Areas Rent Control Act, 1972 read with Order XX, Rule 9 CPC.

17) It was further submitted that another way of determining whether an order is a decree or not is that the particular provision itself specifically specifies the word "decree". In the said context, reference was made to the provisions of (i) section 5 of the Assam Urban Areas Rent Control Act, 1972 ; (ii) Chapter 9 of the Assam (Temporarily Settled Areas) Tenancy Act, 1971; (iii) sections 9 to 13, 13A, 13B, and 23 of the Hindu Marriage Act, 1955.

18) It was also submitted that there was yet another way of determining as to whether an order is appealable or not is that the very provision itself specifies either the order is a "deemed decree", or it is provided that appeal would lie against an "order". In this regard, reference has been made to the provisions of (i) section 104 CPC; (ii) Order XXI, Rule 58(4) and Rule 103 CPC; (iii) Order XLIII, Rule 1 CPC; (iv) section 54 of the Land Acquisition Act, 1894; (iv) sections 299 and 384 of the Succession Act, 1925; and (v) section 173(1) of the Motor Vehicles Act, 1988.

19) Accordingly, it was submitted that under section 28 of the Specific Relief Act, 1963, the only question that is decided by the Court is whether the contract or agreement for sale was liable to be rescinded on account of non-compliance of conditions of the decree. In other words, it was submitted that an order passed under section 28 was whether the decree was liable to be extinguished. Accordingly, it was submitted that the order contemplated under section 28 of the Specific Relief Act, 1963 was not a decree.

20) Thus, it was submitted that the revision under section 115 CPC read with Article 227 of the Constitution of India was maintainable against the

order dated 21.07.2017 passed by the learned Trial Court in TS No. 22/2005.

21) The learned counsel for the respondent had also submitted a written note of submissions, which is retained as a part of the record.

Discussions and decision:

22) Considered the rival submissions made at the Bar as well as the respective written note of submissions. Also considered the two cases cited by the learned counsel for the petitioner.

Points of determination which arise for determination in this case:

23) As per the submissions made by the learned counsel for both sides, the following points of determination arise for decision in this case:-

- i. *Whether any factual error had crept in the order dated 29.01.2021, passed by this Court in CRP No. 262/2017?*
- ii. *Under the facts of this case, whether the Court had committed an error apparent in the face of record by entertaining a revision against the order dated 21.07.2017, in T.S. No. 22/2005, passed by the learned Civil Judge, Sonitpur, Tezpur that was passed by the learned Trial Court in exercise of power under section 28 of the Specific Relief Act, 1963?*
- iii. *Whether the order dated 21.07.2017, passed by the learned Civil Judge, Sonitpur, Tezpur in T.S. No. 22/2005 was on a time barred application?*

Provisions of Section 28 of the Specific Relief Act, 1963:

24) At the outset, we would refer to the provisions of section 28 of the Specific Relief Act, 1963, which is extracted herein below:-

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.

(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."

(emphasis supplied)

Background events referred by the parties in CRP No. 262/2017:

25) In this case in hand, the petitioner had filed an execution petition to execute and/or enforce the appellate decree. The said proceeding was

registered as T.Ex. Case No. 1/2012. In connection with the said execution case, the respondents herein had filed an objection under section 47 read with section 151 CPC, praying for dismissal of the execution petition as the petitioner had not performed her part of the agreement. The said objection was registered as Misc.(J) Case No. 28/2016. Against the said Misc.(J) Case, an objection was filed by the petitioner, praying therein for a direction to the respondents to register the sale deed by accepting balance sale consideration. By order dated 28.02.2017, passed in Misc.(J) Case No. 28/2016, the learned Executing Court had forwarded the matter to be considered in the original side as an interlocutory application and accordingly, the said Misc.(J) Case No. 28/2016 was disposed of.

26) The learned Trial Court, which was also the Executing Court, took up the matter on the original side. Accordingly, by order dated 21.07.2017, passed in T.S. No. 22/2005, the objection of the respondents was rejected and the petitioner- plaintiff was directed to deposit the balance sale consideration within 1 (one) month of the order and get the sale deed executed as per the decree.

27) It may be mentioned that in paragraph 8 of the affidavit-in-opposition filed in CRP No. 262/2017, the respondent herein had mentioned that she had deposited a cheque amounting to Rs.50,000/- (Rupees Fifty thousand only) by cheque no. 072947 dated 17.08.2017, which has been reflected in the order dated 17.08.2017, passed by the learned Civil Judge [now renamed as Civil Judge (Senior Division), Sonitpur, Tezpur in T.Ex. Case No. 1/2012. As per the order dated 17.08.2017, the said cheque has been kept in safe custody of the Court.

On point of determination no. (i) as to whether any factual error had crept in

the order dated 29.01.2021, in CRP 262/2017:

28) This Court, in paragraph 17 of the order dated 29.01.2021, passed in CRP No. 262/2017 had observed as follows:-

17. ... The typed copy of the order dated 17.08.2017 (Annexure-1 of the affidavit-in- opposition) leaves no room for doubt that the respondent had deposited a sum of Rs.50,000/- on 17.06.2018 long after the time allowed by first appellate judgment had expired. Thus, the learned trial Court is found to have committed jurisdictional error in passing the order dated 21.07.2017 impugned herein. Accordingly, the Court has no hesitation to set aside the order dated 21.07.2017, impugned herein."

29) Thus, from the sequence of events as narrated in paragraph 26 above, and also on the perusal of the Annexure-1 to the affidavit-in-opposition filed by the review petitioner in CRP 262/2017, it is seen that the date on which cheque for a sum of Rs.50,000/- was deposited by the petitioner herein before the learned Executing Court in the proceedings of T.Ex. No. 1/2012 was on 17.08.2017, and not on 17.06.2018, as reflected in paragraph 17 of the order dated 29.01.2021, passed in CRP No. 262/2017.

30) Therefore, a typographical error is found to have crept in paragraph 17 of the order dated 29.01.2021, passed in CRP No. 262/2017. Moreover, in paragraph 3 of the said order, the suit year is wrongly recorded as 2015. Therefore, the said suit number should be read as TS No. 22/2005 instead of TS No. 22/2015. Thus, consequential orders would be passed in the later part of this order.

31) It is seen that except for the incorrect reference to the date, the said error is not found to have adversely impacted the decision of this Court.

On point of determination no. (ii) as to whether the Court had committed an error apparent in the face of record by entertaining a revision against the order

dated 21.07.2017, in T.S. No. 22/2005, passed by the learned Civil Judge, Sonitpur, Tezpur that was passed by the learned Trial Court in exercise of power under section 28 of the Specific Relief Act, 1963?

32) In the case of *Kumar Dharendra Mullick (supra)*, decided by the Supreme Court of India, paragraph 1 thereof is as follows:-

“This civil appeal, by grant of special leave, arises out of judgment and order dated 10-6-1999 of the High Court of Calcutta in FMA No. 37 of 1997 allowing the appeal of the respondent herein and setting aside the order of 2nd Assistant District Judge, Alipore, Calcutta, rescinding the agreement dated 16.8.1980 under section 28 of the Specific Relief Act, 1963 (hereinafter referred to as "the 1963 Act").”

33) It would also be relevant to extract herein below paragraphs 4 to 8 of the case of *Kishor Ghanshyamsa Paralikar (Dead) through LRs. v. Balaji Mandir Sansthan Mangrul (Nath) & Anr., (2022) 0 Supreme(SC) 1287*, which is as follows:-

“4. On 12.03.2007, the appellant herein filed a suit for specific performance of an agreement dated 20.09.2002 executed by the first respondent in his favour for the sale of agricultural land bearing Survey No.3, admeasuring 10 H (Hectare), 50 R (Are) situated at Village Murtizapur, Mangrulpur Taluk, District Washim, State of Maharashtra.

5. During the pendency of the suit, a compromise was arrived at between the parties and accordingly the Trial Court vide Order dated 06.12.2010 decreed the suit in terms of the compromise. As per the compromise decree, the respondent agreed to sell the suit land for a total consideration of Rs.8,78,500/-. The appellant paid a sum of Rs. Rs.7,31,000/- immediately to the first respondent. He was required to pay the remaining amount of Rs.1,47,500/- within a period of one month from the date of the compromise decree.

6. The appellant moved an application on 11.01.2011 seeking permission of the court to deposit the balance of Rs.1,47,500/- as per the decree. The said application was allowed by the Trial Court, and accordingly, the said amount was deposited by the appellant in the court on the same day. On 12.01.2011, the first respondent executed the sale deed in respect of the suit property in favour of the appellant. On 15.01.2011, the appellant filed an application for extension of time for payment of balance of the sale consideration which was allowed by the Trial

Court vide Order dated 02.12.2015.

7. *After a passage of about three years from the date of execution of the sale deed, the first respondent filed an application for cancellation of the aforesaid sale deed and for a direction to recover possession of the suit property from the appellant. The Trial Court vide Order dated 13.01.2016 dismissed the said application.*

8. *Being aggrieved, the first respondent filed a writ petition before the High Court. As noticed above, the High Court has allowed the writ petition and cancelled the sale deed dated 12.01.2011."*

34) In a very recent judgment of the Supreme Court of India in the case of *P. Shyamala v. Gundlur Masthan*, AIR 2023 SC 1224, the Supreme Court of India had entertained a challenge to the common judgment and order dated 17.01.2022, passed by the High Court of Telengana in CRP 2374/2019 and CRP 2304/2019, by which the High Court had dismissed the said revision petitions preferred by the appellants before the Supreme Court of India. The relevant paragraphs 5 and 9 of the judgment of the Supreme Court of India are quoted below:-

"5. We have heard learned counsel for the respective parties at length.

At the outset, it is required to be noted that by an ex-parte judgment and decree dated 12.10.2013, the trial Court passed a decree for specific performance of the agreement to sell dated 9.5.2012. In the agreement to sell dated 9.5.2012, the total sale consideration was Rs.23,00,000/-, against which Rs.8,00,000/-was paid as advance. The balance sale consideration of Rs. 15,00,000/- was directed to be deposited/paid by the plaintiff under the ex-parte judgment and decree dated 12.10.2013, within two weeks from the said date, which expired on 21.10.2013. Nothing is on record that any steps were taken by the plaintiff either to deposit/pay the balance sale consideration of Rs.15,00,000/-or even calling upon the defendant to execute the sale deed as per the judgment and decree passed by the trial Court dated 12.10.2013 till the present application under Section 148 CPC and Section 28 of the Specific Relief Act was filed on 7.6.2017/19.06.2017 with a huge delay of 853 days, seeking extension of time to deposit the balance sale consideration. The reasons for delay are set out hereinabove. The explanation which was given by the plaintiff, narrated hereinabove, can hardly be said to be a sufficient explanation as to why the plaintiff did not pay the balance sale consideration as per the judgment and decree or even did not make an application within a reasonable time under

Section 148 CPC and Section 28 of the Specific Relief Act seeking extension of time for making payment. If the plaintiff was ready with the money payable towards the balance sale consideration, he could have got the sale deed executed through power of attorney after effecting deposit/payment. In absence of any sufficient explanation, such a huge delay of 853 days ought not to have been condoned by the trial Court.

* * *

9. *In view of the above and for the reasons stated above, both these appeals succeed. The impugned common judgment and order dated 17.01.2022 passed by the High Court dismissing the revision applications and the common order passed by the trial Court dated 29.06.2019 allowing I.A. No. 732/2016 filed by the plaintiff seeking extension of time with a huge delay of 853 days and dismissing I.A. No. 914/2017 filed by the defendant to rescind the agreement to sell dated 09.05.2012 are hereby quashed and set aside. I.A. No. 732/2016 filed by the plaintiff under Section 148 CPC and Section 28 of the Specific Relief Act seeking extension of time with a huge delay of 853 days to deposit the balance sale consideration stands dismissed. I.A. No. 914/2017 filed by the appellant – defendant under Section 28 of the Specific Relief Act to rescind the agreement to sell dated 09.05.2012 on non-payment of/deposit of the balance sale consideration by the plaintiff, which the plaintiff was required to deposit/ pay within a period of two weeks from the date of ex-parte judgment and decree dated 12.10.2013, stands allowed. Agreement to sell dated 09.05.2012 stands rescinded in exercise of powers under Section 28 of the Specific Relief Act. However, the appellant herein is directed to refund the amount of Rs. 8,00,000/-to the plaintiff with 12% interest from 09.05.2012 till the actual payment, within a period of six weeks from today, failing which it shall carry interest @ 18% per annum."*

35) Thus, it is seen that in the case of *Kumar Dhirendra Mullick (supra)*, an appeal was entertained against the order passed under section 28 of the Specific Relief Act, 1963. However, in the case of *Kishor Ghanshyamsa Paralikar (Dead) through LRs. (supra)*, writ petition was entertained to assail the order passed under the said provision. Moreover, in the case of *P. Shyamala (supra)*, the Supreme Court of India did not find fault in entertaining the civil revision petition to challenge the orders passed by the learned Trial Court in exercise of power under section 28 of the Specific Relief Act, 1963.

36) It would now be relevant to extract herein below paragraphs 19 and 20 of the case of *Surinder Pal Soni (supra)*, wherein the Supreme Court of India had observed as follows:-

“19. Interpreting the provisions of Section 28 of the Specific Relief Act, a three judge Bench of this Court held in Sardar Mohar Singh Ahluwalia (Dead) by LRs v. Maitrai Park Housing Co-op. Society Ltd. & Anr., AIR 1989 SC 86:

“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, (2009) 8 SCC 766 this Court held thus:

“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*, (1999) 4 SCC 702. While advertng to the decision of this Court in *Ramankutty Guptan v. Avara*, (1994) 2 SCC 642, 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 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...”

37) Therefore, it appears from the decision of the Supreme Court of India in the case of *Surinder Pal Soni (supra)* that the decree passed by the learned Trial Court in a suit for specific performance of contract is a preliminary decree. Nonetheless, the suit remains pending and that the learned Trial Court is vested with power to pass appropriate orders in an application filed under section 28 of the Specific Relief Act, 1963.

38) In this case in hand, a unique factual situation had arisen. The suit was dismissed and the appellate Court had decreed the suit. The Trial Court was the executing Court and the petition filed under section 28 of the Specific Relief Act, 1963 was decided by the learned Trial Court. As per the doctrine of merger, upon the decision of the appellate Court, there is a merger of judgment of the trial Court with the decision which was rendered in appeal. We may extract herein below the paragraph nos. 13 to 17 of the case of *Surinder Pal Soni (supra)*, which is as follows:-

“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, (2000) 6 SCC 359 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...”

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., (2019) 4 SCC 376.

14. The decision in Kunhayammed (supra) was followed by a three judge Bench decision of this Court in Chandi Prasad v. Jagdish Prasad, (2004) 8 SCC 724, 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, Civil Appeal No. 10442 of 2011, 2018 SCC OnLine SC 2196, 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 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."

39) Thus, in light of the unique facts of this case, can it be said that while the District Judge, Sonitpur, Tezpur (i.e. the appellate Court) had passed a preliminary decree in exercise of appellate jurisdiction, the Court of Civil Judge, Sonitpur, Tezpur (i.e. the Trial Court), which is lower in rank than the District Judge had passed a final decree. We are unable to agree to the said legal proposition.

40) Therefore, in this present case in hand, the only way to reconcile the power of the learned Trial Court under section 28 of the Specific Relief Act, 1963 to order recession of contract while suit for specific performance has been decreed is to hold that in this case, the learned Trial Court, i.e. the Civil Judge, Sonitpur, Tezpur had passed an order to extend the time to the review petitioner to make payment of the balance sum payable to the respondents. The decree would exist, but the said decree would not be executable in light of the orders passed by the learned Trial Court.

41) In this regard, the Court finds support from the observations made by the Supreme Court of India in the case of *Kishor Ghanshyamsa Paralikar (Dead) through LRs. (supra)*, notwithstanding that a writ petition was entertained by the High Court against the order passed under section 28 of the Specific Relief Act, 1963. The observations are extracted below:

11. *This section gives to the vendor or the lessor the right to rescission of the contract for the sale or lease of the immovable property in the same suit, when after a suit for specific performance is decreed, if the vendor or the lessor fails to pay the purchase money within the period fixed. This section seeks to provide complete relief to both the parties in terms of a decree of specific performance in the said suit without having resort to a separate*

proceeding. Therefore, a suit for specific performance does not come to an end on the passing of a decree and the court which has passed the decree for specific performance retains control over the decree even after the decree has been passed. Section 28 not only permits the judgment-debtors to seek rescission of the contract but also permits extension of time by the court to pay the amount. The power under this section is discretionary and the court has to pass an order as the justice of the case may require. It is also settled that time for payment of sale consideration may be extended even in a consent decree. This Court in Smt. Periyakkal & Ors. v. Smt. Dakshyani, (1983) 2 SCC 127, speaking through Chinnappa Reddy, J. observed that even in a compromise decree, the court may enlarge the time in order to prevent manifest injustice, and to give relief to the aggrieved party against a forfeiture clause. The Court observed the following:

“4. ...The parties, however, entered into a compromise and invited the court to make an order in terms of the compromise, which the court did. The time for deposit stipulated by the parties became the time allowed by the court and this gave the court the jurisdiction to extend time in appropriate cases. Of course, time would not be extended ordinarily, nor for the mere asking. It would be granted in rare cases to prevent manifest injustice. True the court would not rewrite a contract between the parties but the court would relieve against a forfeiture clause; And, where the contract of the parties has merged in the order of the court, the court's freedom to act to further the ends of justice would surely not stand curtailed.”

42) There is another viewpoint on this matter. Keeping in mind that the Supreme Court of India had interpreted that a decree passed in a suit for specific performance of contract to be a preliminary decree. Nonetheless, under the scheme of the CPC, ordinarily the Court that had passed the “preliminary decree” is the Court which would also pass a “final decree”. The provisions of section 28 of the Specific Relief Act, 1963 has been interpreted by the Supreme Court of India to mean that when the Executing Court and the Trial Court is same, an application for seeking extension of time to make payment can be made to the Executing Court. In this case, the decree was passed by the First Appellate Court. Therefore, it is legally inconceivable that while a preliminary decree is passed by the appellate Court, the final decree can be passed by a Court that is a rank lower than the Court passing the preliminary decree.

Therefore, the Court is of the considered opinion that for the intent and purpose of Section 28 of the Specific Relief Act, 1963 the decree in a suit for specific performance of contract is a *deemed* "preliminary decree". In order to understand the implication, the Court would refer to the observations made by the Supreme Court of India in paragraph 16 of the case of *V.S. Palanichamy Chettiar Firm v. C. Alagappan*, AIR 1999 SC 918, which is extracted below:-

16. *In view of the decision of this Court in Ramankutty Guptan's case (supra) when the trial Court and the executing Court are same, executing Court can entertain the application for extension of time though the application is to be treated as one filed in the main suit. On the same analogy, the vendor judgment-holder can also seek rescission of the contract of sale or take up this plea in defence to bar the execution of decree. One of the grounds on which the trial Court dismissed the execution application was that the decree holder did not pay the balance of consideration as per the sale agreement and also did not pay within the time stipulated by the Court in the decree. High Court could have certainly gone into this question when applications for extension of time was filed before it. However, on the objection by the judgment-debtor, it chose to send back the matter to the executing Court for decision on these applications, which was perhaps, in circumstances, was not correct procedure to adopt. But then, at the same time, the High Court put shackles on the discretion of the executing Court by observing that vendor might have felt that after the appeal filed by the vendor judgment-holder against the decree for specific performance was disposed of they can even then deposit the amount or at the time of seeking the execution of the sale deed."*

43) The Court is reminded of the fact that in the present case in hand, the decree was passed by the learned District Judge, Sonitpur, Tezpur, which is the First Appellate Court. Therefore, if by fiction the order passed in an application under section 28 of the Specific Relief Act, 1963 is interpreted to be a "final decree" that was passed by the Civil Judge, Sonitpur, Tezpur (i.e. Trial Court), then against a *deemed* "final decree", a first appeal would lie before the Court of District Judge, Sonitpur, Tezpur. Such a situation is inconceivable and

not envisaged in law.

44) Therefore, the point of determination no. (ii) is answered by holding that in this case, this Court had not committed any error apparent in the face of record by entertaining a revision against the order dated 21.07.2017, passed by the learned Civil Judge, Sonitpur, Tezpur in T.S. No. 22/2005, which was passed by the said learned Trial Court in exercise of power under section 28 of the Specific Relief Act, 1963.

On point of determination no. (iii) as to whether the order dated 21.07.2017, passed by the learned Civil Judge, Sonitpur, Tezpur in T.S. No. 22/2005 was on a time barred application?

45) The point that the application filed by the respondents under section 28 of the Specific Relief Act, 1963 was barred by limitation was not raised by the petitioner when CRP 262/2017 was heard.

46) In this review petition, the petitioner has taken 6 (six) grounds for review. In ground no. (I), the point of typographical error that had crept in the order with regard to the date of 17.06.2018 instead of 17.08.2017 was taken. In ground no. (II) point was taken to the effect that the order passed in Misc. (J) Case No. 28/2016 was appealable. In ground no. (III) point has been taken to the effect that the High Court in exercise of revision did not have power to modify the decree. In ground no. (IV) point was taken to the effect that the trial court was required to decide as to what remedies for further relief may be granted to each of the parties particularly when the review petitioner had constructed Assam Type House with the knowledge and consent of the respondents. In ground no. (V), it was stated to the effect that the respondents had invoked the jurisdiction of section 115 CPC, but this Court had passed the

order by invoking the provisions of Article 227 of the Constitution of India. In ground no. (VI), it was stated to the effect that in any view of the matter, the impugned order was liable to be reviewed by this Court.

47) Therefore, it is seen that the petitioner did not take such a plea before the learned Trial Court as well as before this Court in CRP No. 262/2017 and in this present review petition.

48) In this regard, we may refer to the observations of this Court in the case of *Dipak Chandra Ruhi Das v. Pradip Kumar Sarkar*, (2021) 3 GLR 71: 2021 (4) GLT 886: (2021) 0 Supreme(Gau) 100:-

“16. Fifthly, the petitioner has alleged that the SC certificate of Chandan Kumar Sarkar is fake and fraudulent. It is already indicated above that the election of the said Chandan Kumar Sarkar was challenged by the petitioner herein by filing election petition no.17/2001, inter alia, on the ground that SC certificate was obtained by fraud. The Court is inclined to take note of the provisions of Article 58 of the Schedule of the Limitation Act, which prescribes limitation of three years to obtain any other declaration from when the right to sue first accrues and under residuary provisions of Article 113 of the said Schedule where the limitation prescribed is three years from when the right to sue accrues to file any suit for which no period of limitation is provided elsewhere in the Schedule. Therefore, when election of Chandan Kumar Sarkar was assailed in the year 2001, in any view of the matter, it prima facie appears that the suit seeking declaration that SC certificates of Chandan Kumar Sarkar on 31.03.1990, and 11.06.1995 is illegal, null and void, appears to be filed beyond the mandate of Article 58 and/or Article 113 of the Schedule of the Limitation Act. But no final opinion is expressed and the issue is left to be decided by the learned trial Court. The issue of limitation has been taken up because in the case of State of Gujarat Vs. Kothari and Associates, (2016) 14 SCC 761: 2015 STPL 9107 SC, the Supreme Court of India had observed as follows:-

6. Section 3 of the Limitation Act explicitly states that "every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence." It is thus incumbent upon the Court to satisfy itself that the suit is not barred by limitation, regardless of whether such a plea has been raised by the parties. In Union of India v. British India Corporation Ltd, (2003) 9 SCC 505, it has

been opined that "the question of limitation is a mandate to the forum and, irrespective of the fact whether it was raised or not, the forum must consider and apply it, if there is no dispute on facts." It is thus irrelevant that the Appellant State had not raised the issue of limitation before the Trial Court. A duty was cast on the Court to consider this aspect of law, even on its own initiative, and since it failed to do so, the Appellant State was competent to raise this legal question in appeal or indeed even in any successive appeal. Close to a century ago, in Lachhmi Sewak Sahu v. Ram Rup Sahu, (1944) AIR PC 24, it has been held that the point of limitation is available to be urged even in the Court of last resort."

49) Thus, although it is well settled that the question of an application being barred by limitation can be raised at any stage, but the petitioner had not pleaded such a ground in this review petition. Therefore, the Court is of the considered opinion that this review petition cannot be heard and decided on the point of limitation due to lack of this point being urged in the "grounds of review". Therefore, as the petition filed under section 28 of the Specific Relief Act, 1963 was not raised before the learned Trial Court, not it was urged in the "grounds of review", this Court, while exercising power of review would not hear the parties on the issue which is not raised before the learned two Courts. The challenge in the connected CRP No. 262/2017 was by the respondents order dated 21.07.2017, passed by the learned Civil Judge, Sonitpur, Tezpur in TS No. 22/2005, rejected their objection under Section 47 CPC as to the executability of the decree.

50) When the point of limitation has not been urged in (i) TS 22/2005, (ii) CRP 262/2017, and in this review petition, this is not a case where there has been a discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the petitioner or could not be produced by her at the time when the order was passed in CRP 262/2017. This is also not a case where the Court had committed any mistake

or error apparent on the face of the record in respect of appreciating the point of limitation. Therefore, there is no other sufficient reason to review the order dated 29.01.2021 in CRP 262/2017.

51) It is too well settled that the power of review cannot be exercised as an appeal in disguise.

52) The petitioner may, if deemed fit, may avail advise for future steps that may be permitted by law in respect of the issue of limitation.

53) In light of the discussions above, and in view of the decision in respect of point of determination no. (i), which is answered in favour of the petitioner, and decision on point of determination nos. (ii) and (iii), which have been answered against the petitioner, as indicated herein before, this Court is inclined to pass the following orders:-

- a. In the decision on point of determination no. (i), wherein it has been held that a typographical error that had crept in paragraph 3 of the order dated 29.01.2017 passed in CRP No. 262/2017 and also in (ii) paragraph 17 of the order dated 29.01.2021, passed by this Court in CRP No. 262/2017. Accordingly, this Court is inclined to direct that the said part of the order which contains TS No. 22/2015 in paragraph 3 of the said order shall be read as TS No. 22/2005, and the date of "17.06.2018" in paragraph 17 of the said order shall now be read as "17.08.2017". For the said limited purpose, this order shall be read along with the order dated 29.01.2021, passed by this Court in CRP No. 262/2017.
- b. In view of the decision on point of determination nos. (ii) and (iii), which has been answered against the petitioners, fails on those two

points of determination.

- c. This review petition stands partly allowed to the extent as indicated above.
- d. Under the circumstances, there shall be no order as to cost.

54) As both sides in T.Ex. No. 1/2012, pending before the Court of Civil Judge, Sonitpur, Tezpur are duly represented before this Court, they are directed to appear before the said learned Court on 29.01.2024, and await further instructions or orders from the said learned Court.

JUDGE

Comparing Assistant