

HIGH COURT OF MADHYA PRADESH : JABALPUR**CIVIL REVISION No.21/2013**

Murlidhar Pinjani & another

Vs.

Satyakam Tandon & another

Shri Jaideep Gupta, learned senior Counsel assisted by Shri Avinash Zargar, learned Counsel for the applicants.

Shri V.S. Shrotri, learned senior Counsel assisted by Shri Siddharth Seth, learned Counsel for respondent No.1.

Present : Hon'ble Shri Justice K.K. Trivedi

Heard finally on 30.03.2015

Reheard on 08.05.2015

O R D E R**(17/06/2015)**

1. This Civil Revision under Section 115 of the Code of Civil Procedure by the judgment-debtors take exception to the order dated 13.12.2012 passed in Misc. Judicial Case No.241/2007 and 6/2008 by the I Additional District Judge, Bhopal.

2. Facts giving rise to filing of the present revision in brief are that non-applicant/plaintiff/decreed-holder (herein after referred to as 'decreed-holder' for short) filed a suit along with his wife for specific performance of contract of sale of the land in suit against the applicants alleging that an agreement was executed on 18.10.1988 to sell 2.47 acres of land on a consideration of Rs.2,61,820/- and an amount of 10% of the sale consideration being Rs.26,182/- was paid as earnest money. Even after making the demand, the applicants failed to fulfill their part of agreement and,

therefore, two suits, one in the name of the wife of decree-holder and one in the name of the decree-holder, were required to be filed seeking grant of decree of specific performance under the Specific Relief Act, 1963 (herein after referred to as 'Act'). The suit was contested by the applicants on numerous grounds. However, the Trial Court ultimately reached to the conclusion that the claim for grant of decree was made out and passed judgment and decree on 3rd August, 1995. The Regular Civil Suit No.45-A/1992 was thus decreed in the following manner :

“(17)In view of the aforesaid decisions, I come to the conclusion that plaintiff has succeeded in establishing his case. Therefore, the decree be passed against the defendant No.1 and 2 and in favour of plaintiff that defendant No.1 and 2 to execute sale deed of suit land, Survey No.428/1/3/1, measuring area 2.47 acres, situated at village Badwai, Tahsil and District Bhopal in favour of the plaintiff after receiving remaining consideration of Rs.2,35,638/- from the plaintiff before the Sub-Registrar within one month of this judgment i.e. from today. The defendants should also pay plaintiff the cost of present suit and Counsel's fee as per schedule. In case of default to execute sale deed by the defendants it should be executed by the Court in favour of the plaintiff.”

3. Though the decree was passed, it appears that since the direction, as issued, was not fulfilled, no sale-deed could be executed in favour of the decree-holder. An appeal against the said judgment and decree was preferred before this Court being First Appeal No.288/1995. The said appeal was admitted and by order dated 02.11.1995 the Division Bench of this Court stayed the execution of the impugned judgment and decree. There were certain conditions imposed while passing the said interim order relating to payment of process. The appeal remained pending before this Court. While passing further orders on interim prayer

on 22.01.1998, a direction was given to the applicants to return the total amount of consideration already received under the agreement to the decree-holder with a specific condition that such return shall not be allowed to be urged as a ground against claim for specific performance. In addition, it was also directed that the applicants shall also furnish surety for three years mesne profits for the land in dispute.

4. The said appeal remained pending before this Court and since judgment and decree granted in the case of the wife of the decree-holder was affirmed by this Court in First Appeal No.287/1995, the appeal filed by the applicants also stand dismissed vide judgment dated 06.02.2007. It appears that an application for execution was thereafter filed on 21.03.2007 by the decree-holder. An application under Section 28 of the Act was filed by the applicants on 26.06.2007, which was registered as M.J.C. No.241/2007. In the execution proceedings, direction was sought to execute the sale-deed on behalf of the applicants conferring title on the decree-holder of the land in suit because of non-compliance of the mandate issued by the decree to the applicants/judgment-debtors.

5. On 24.10.2007 the applicants filed an application under Order 21 Rule 26 read with Section 151 of the Code of Civil Procedure for stay of the execution proceedings in the M.J.C., which application was rejected on 08.01.2008, therefore, a writ petition was filed before this Court being W.P. No.1011/2008 by the applicants and an interim stay was granted on 05.02.2008. In the execution proceedings since the fact was brought to the notice that application was already filed for annulling the decree, which is to be heard by the Trial Court, it appears that the writ petition was

dismissed as infructuous. During pendency of these proceedings, an application for extension of time was filed by the decree-holder, which was registered as M.J.C. No.6/2008. Both the MJCs were heard by the lower Court and since by the impugned common order both the MJCs have been dismissed, this revision is required to be filed.

6. It is the contention of learned senior Counsel for the applicants that in view of the law well settled since the decree-holder has failed to comply with his part of making payment of the sale consideration, the decree had become inexecutable in terms of Section 28 of the Act and, thus, a right was available to the applicants/judgment-debtors to rescind with contract of sale of immoveable property. Ample evidence was produced to show that the decree-holder was not vigilant about the fulfillment of the decree as he has not made any attempt to pay the sale consideration to the applicants and to get the sale-deed executed, therefore, even on the date when the decree was granted, the decree-holder was not ready and willing to fulfill his part of contract. This being so, the decree granted in his favour became inexecutable and no specific performance of contract could be ordered even in execution of the decree.

7. It is further contended by the learned senior Counsel for the applicants that since the decree-holder was not in a position to fulfill his part of the contract, he even applied for extension of time for payment of sale consideration. This being so, looking to the malafide of the decree-holder, his failure on the part of fulfilling his obligation and discharge of his liability, the applicants have every right to rescind with the agreement. In fact in terms of the law the decree had become inexecutable. Though such aspects have been considered by the Court below but erroneously making

application of law laid-down by the Division Bench of this Court, which specifically is not applicable in the facts and circumstances of the present case, prayer made by the applicants has been erroneously rejected. The fact that application filed by the decree-holder for extension of time is treated to be rejected and the said order is not called in question anywhere, it is enough to show that the decree-holder/non-applicant has not come with clean hands before the Court and as such the order impugned is not sustainable in law and is liable to be set aside.

8. Describing the decree granted in the present suit for specific performance and distinguishing it from the decree granted in the case, which has been made applicable, more particularly in the case of ***Khoobiram vs. Urmila Chouhan and others, [2010 (3) MPLJ 522]***, learned senior Counsel for the applicants has submitted that since the decree granted in the present case was partly a final decree and partly a preliminary decree, unless the part which was required to be fulfilled by the decree-holder was complied with, no execution application of the decree was maintainable. That being so, it is contended that the objection raised in that respect was also not considered and wrongly applying the law laid-down by the Division Bench of this Court in the case of *Khoobiram* (supra), though not applicable in terms of the law laid-down by the Apex Court in several cases, the application made under Section 28 of the Act by the applicants has been rejected, therefore, the order impugned is bad in law and the same is liable to be set aside. It is contended that in fact applicants would be entitled to rescind with the agreement and as such decree would not be executable against them.

9. Per contra, it is contended by learned senior Counsel appearing for the decree-holder that there is no distinction between the decree granted by the Court in the present case and the decree granted in the case of *Khoobiram* (supra). In fact it is the responsibility of the judgment-debtors to receive the sale consideration and to execute the sale-deed of the property agreed to be sold for which the specific performance is ordered by the decree. Despite the best attempt made by the decree-holder since the applicants have not come forward to fulfill their part in terms of the mandate of the decree, ultimately the decree-holder was left with no option but to file the execution application. Though there was no delay whatsoever attributable to the conduct of the decree-holder and for that in fact no application for extension of time was required to be made, yet in abandoned caution the application was made by the decree-holder. It is contended that the suit was filed on 19.10.1988. The decree was granted on 03.08.1995. The stay was granted by this Court in appeal of the applicants. Ultimately the appeal was dismissed on 06.02.2007. The decree was prepared by the High Court on 19.03.2007 and application for execution was filed on 21.03.2007. This being so, since there was no delay on the part of the decree-holder in seeking the execution of the decree, it was rightly treated by the Court below that the application filed by the applicants under Section 28 of the Act was not maintainable. Whether the extension of time was necessary or not was irrelevant in view of the aforesaid facts and circumstances and as such the Trial Court did not commit any error of law in dismissing the application of the applicants filed under Section 28 of the Act. Even if the application for extension of time filed by the decree-holder was also dismissed and the said order is not called in question, that would not *ipso facto* make the applicants

entitled to claim rescission of the agreement, specially when the decree was already granted for specific performance of the said agreement. In view of the aforesaid, it is contended that the revision petition sans merit and deserves to be dismissed summarily. Full reliance is placed in the case of *Khoobiram* (supra) and dismissal of the revision with costs is prayed for.

10. The revision was heard finally on 31st March, 2015. However, while preparing the order, submissions made by learned senior Counsel for the applicants were noted down that in fact learned senior Counsel was insisting for final disposal of the revision, virtually granting the relief which was claimed by the applicants before the Trial Court. It was noted down that the order of the Trial Court was based on the decision rendered in the case of *Khoobiram* (supra) and no other evidence was looked into. As was submitted by learned Counsel for the parties, the record of the Trial Court was requisitioned and the matter was heard finally again on 8th May, 2015. The aspect whether this Court would require to grant the relief as was claimed by the applicants before the Trial Court is also to be considered. The submissions were made by learned senior Counsel for the applicants that this Court while exercising the power under Section 115 of the Code of Civil Procedure would still be competent to grant such a relief to the applicants in case it is found that sufficient evidence was available on record of the Trial Court warranting grant of such relief. Such submissions are to be dealt with in appropriate manner herein after.

11. Heard learned Counsel for the parties at length and perused the record.

12. To appreciate the rival submissions made by learned Counsel for the parties and to test the applicability of the provisions, it would be necessary to examine the applicability of Section 28 of the Act. This has to be done keeping in mind the fact that the reliefs under the Act are equitable reliefs and the principles of equity are to be applied squarely even after the grant of decree under the Act to either of the parties in equal proportion and with equal force of law. The specific performance of contract is a relief specifically prescribed under Chapter-II of the Act. Section 9 of the Act prescribes the defence in respect of suits for relief based on contract. Section 10 of the Act deals with the cases in which specific performance of contract is enforceable. The circumstances, primarily prescribe under this provision, are when there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done or when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief. It is though provided that unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money.

13. Keeping in view the aforesaid provisions if the provisions of Section 28 of the Act are examined, specific circumstances are shown where a judgment-debtor is still entitled to rescind with the contract even when the decree for specific performance of contract of sale is granted by the Court. For better appreciation, the provisions of Section 28 of the Act is quoted 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 lessee as earnest money or deposit in connection with the contract.

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

(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.”

14. Now the law laid-down by the Apex Court with respect to the applicability of the said provisions of Section 28 of the Act and the circumstances in which the judgment-debtor may be allowed to rescind with the contract is to be examined. In the case of **V.S. Palanichamy Chettiar Firm vs. C. Alagappan and another, (1999) 4 SCC 702**, while dealing with the power of the Executing Court in the matter of extension of time, the Apex Court has looked into the law laid-down in that respect in the case of **Sardar Mohar Singh vs. Mangilal, (1997) 9 SCC 217**, and has further held in consonance to the law earlier laid-down that even specific performance is an equitable relief and he who seeks equity can be put in terms to ensure that equity is done to the opposite party even while granting the relief. Taking into consideration all these aspects, the Apex Court in paragraphs 16 and 17 of the report has held thus :

“16. In view of the decision of this Court in Ramankutty Guptans case 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-debtor 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 the 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.

17. The agreement of sale was entered into as far back on February 16, 1980, about 19 years ago. No explanation is forthcoming as to why the balance amount of consideration could not be deposited within time granted by the court and why no application was made under Section 28 of the Act seeking extension of time of this period. Under Article 54 of the Limitation Act, 3 years period is prescribed for filing the suit for specific performance of contract of sale from the date of the agreement or when the cause of action arises. Merely because a suit is filed within the prescribed period of limitation does not absolve the vendee-plaintiff from showing as to whether he was ready and willing to perform his part of agreement and if there was non-performance was that on account of any obstacle put by the vendor or otherwise. Provisions to grant specific performance of an agreement are quite stringent. Equitable considerations come into play. 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 holder 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 decree-holder- respondents 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 decree holder-respondents and no extension of time be granted to them to comply with the decree.

15. On yet another occasion while considering these aspects, taking into account the long and continuous delay in performance of the part by the decree-holder, the Apex Court in the case of ***Rattan Lal (since deceased) through his Legal Representatives vs. S.N. Bhalla & anr., 2012 AIR SCW 4543***, has held that in such circumstances the judgment-debtor can be allowed to rescind with the contract. The finding in that respect in paragraph 29 of the report reads thus :

“29. This, however, brings us face to face with a rather difficult situation having regard to the fact that the Agreement to Sell was executed 34 years ago on 8th September, 1978, in respect of the suit property. We cannot shut our eyes to the fact that during this period the price of real estate has escalated sharply. In addition to the above, the Appellant has not suffered any material loss, since only the earnest money of Rs.50,000/- had been paid by him to the Respondents and the balance consideration was yet to be paid when the agreement came to be terminated. Even the said sum of Rs.50,000/- was returned to the Appellant immediately upon

termination of the Agreement and the said amount was duly accepted by the Appellant, though by recording his objections subsequently. The Appellant, therefore, has not suffered any monetary loss, and, on the other hand, the value of the property must have skyrocketed during the period between the execution of the Agreement till date. In fact, that is why there is no prayer in the alternative for return of any sums advanced, which is one of the usual prayers in suits for specific performance.”

16. While relying on these decisions, it is the case of the applicants that since part of the contract as decreed by the Court was to pay the full sale consideration within a month to the applicants by the decree-holder and then to ask for execution of the sale-deed and since this part was not complied with, a ground for rescission of the contract had made out in favour of the applicants. The said submissions are considered in view of the law aforesaid. No doubt in the decree a specific command was issued to the decree-holder on first part to pay the full sale consideration to the judgment-debtors. In the agreement, of which the specific performance was ordered by the aforesaid decree, it was agreed in between the parties that the applicants will apply for grant of permission before the competent authority of Urban Land Ceiling for grant of sanction to execute the sale-deed and on grant of such permission, the names of transferee would be intimated to the transferor. Even after grant of such permission if the execution of the registry is not got done by the decree-holder, the agreement itself will come to an end. It was not the condition mentioned in the decree that any such sanction was to be obtained by the judgment-debtors and then only the payment of sale consideration was to be made by the decree-holder. Therefore, it was necessary on the part of the decree-holder to demonstrate that he was willing to perform his part of the

command of decree by offering the amount of sale consideration to the applicants within the given time but the later part of the command of the decree was not complied with by the applicants. It is submitted by learned senior Counsel for the applicants that though the evidence to this effect was produced by the applicants but the same was neither examined nor appreciated by the Trial Court and relying on a decision which is not applicable in the facts and circumstances, the application made by the applicants was rejected. Such an order, according to the applicants, is not sustainable.

17. While replying to such submissions, learned senior Counsel for the respondent No.1 has not only placed reliance in the case of ***Kuobiram (supra)*** but has also placed his reliance in the case of ***Kumar Dharendra Mullick and others vs. Tivoli Park Apartments (P) Ltd., (2005) 9 SCC 262*** and has contended that since the circumstances were not such, merely because there was hike in the price of the immoveable property, the applicants would not be entitled to grant of permission to rescind with the agreement, as has been held by the Apex Court in para 18 of the report. Further placing reliance in the case of ***Yeshoda and another vs. K. Nagarajan, (1996) 11 SCC 228***, it is contended that even when the amount is not deposited, the Court has power to extend the period and enlarge the time for such deposit. Further placing reliance in the case of ***MD. Alimuddin vs. Waizuddin and another, (1998) 9 SCC 108***, it is contended that deposit itself is nothing but an order of extension of time and, therefore, on these counts the applicants would not be entitled to grant of opportunity to rescind with the contract. Strongly the law laid-down by the Division Bench of this Court in the case of ***Khoobiram (supra)*** has been relied

and it is contended that taking into account the nature of the decree as compared to the decree granted in the case of *Khoobiram* (supra), the same relief would be available to the respondent/ decree-holder and the applicants would be liable to execute the sale-deed in favour of the decree-holder. They would not be entitled to rescind with the contract and for that reason rightly their application has been rejected.

18. On due consideration, this Court is of the opinion that Trial Court has completely failed to exercise jurisdiction vested in it. Had it been a case that the decree-holder has deposited the sale consideration in the Court beyond the period of one month, the application of the decree-holder could have been considered. The analysis of the statement made by the decree-holder in the Court proceedings on oath indicates that he had no vision or even a thought to deposit the said amount of sale consideration in the Trial Court. His eagerness to get the decree executed expeditiously was not shown on the date when the decree was granted or even thereafter as he had not taken any step to offer the amount of balance sale consideration to the applicants. The two folds of the command of decree was that the decree-holder was required to pay the amount of balance sale consideration to the applicants in a way where atleast some evidence of such an attempt could have been created or obtained. If he was of the view that amount of sale consideration was to be paid before the Sub-Registrar of Documents, atleast he could have issued a registered letter to the applicants indicating the date and time on which he was intending to remain present before the Sub-Registrar with the amount of balance sale consideration and, ask them to remain present there on that time so as to accept or receive the amount from the decree-holder. He did

nothing in that respect. Further he had not approached the Court on expiry of period of one month from the date of decree after obtaining certified copy of judgment and decree, for extension of time, even when he came to know about the fact that amount was to be paid within one month from the date of decree. He waited till an interim stay was obtained by the applicants in their appeal from this Court. In fact it appears that the decree-holder was never interested in getting the sale-deed executed, or for that he had no funds to pay the balance sale consideration in terms of the decree. Keeping in view the aforesaid circumstances, it has to be considered whether the revisional power to be exercised by this Court includes the power of an Appellate Court and whether if the evidence is not properly appreciated by the Trial Court, this Court would be competent to assess and evaluate the evidence and to pass appropriate orders.

19. The Apex Court in some what similar circumstances, in the case of ***Bhupinder Kumar Vs. Angrej Singh (2009) 9 SCC 766***, while considering the law laid down in the case of ***Kumar Dharendra Mullick*** (supra) has held that a decree of specific performance is a preliminary decree and Court granting decree does not lose jurisdiction till a final decree is passed nor it becomes *functus officio*. In case the command of decree is not complied with or sufficient cause is shown for not complying with such terms of decree, even when application for extension of time is made by the decree holder, the Court has jurisdiction to refuse the extension of time and further grant relief of rescission of contract. The relevant parts of judgment are extracted below, for ready reference :-

“20. In **Kumar Dharendra Mullick** (supra), this Court, after analysing earlier decisions, has concluded that : (SCC p.264a-c)

“When the Court passes the decree for specific performance, the contract between the parties is not extinguished. The court does not lose its jurisdiction after the grant of the decree for specific performance nor does it become *functus officio*. The decree for specific performance is in the nature of a preliminary decree and the suit is deemed to be pending even after the grant of such decree. Hence, the court retains control over the entire matter even after the decree. Section 28 gives power to grant order of rescission of the agreement which itself indicates that till the sale deed is executed, the trial Court retains its power and jurisdiction to deal with the decree of specific performance. Therefore, the court has the power to enlarge the time in favour of the decree-holder to pay the amount or to perform the conditions mentioned in the decree for specific performance.”

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/ decree. 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.

23. If we apply the above principles to the facts of the present case, the order of the executing court and the High Court cannot be faulted with. The suit for specific performance is in the nature of a discretionary remedy and on equity, the appellant was not entitled to get the decree executed since he failed to place relevant materials about his inability to tender or deposit the decreed amount.”

20. Now it has become necessary to examine whether the law laid-down by the Division Bench of this Court in the case of ***Khoobiram*** (supra) would be squarely applicable in the present case or not. It is trite that the law laid-down by the Courts are made applicable keeping in mind the facts and circumstances in each and every case. Though it is vehemently contended by learned Counsel appearing for respondent-decree holder that the decree granted in the case of present decree-holder and in the case of *Khoobiram* (supra) is identical and virtually the same but a distinction has been tried to be made by learned senior Counsel for the applicants. It is suggested by learned Counsel for the applicants that the decree contains a command to the decree-holder as well to pay the amount of balance sale consideration to the applicants/judgment-debtors and only after the said payment and the receipt of the same, the sale-deed was to be executed by the applicants. It is the contention of learned senior Counsel for the applicants that there was no obligation on the part of the applicants to ask for the payment of balance sale consideration.

21. Such submissions appear to be justified in view of the fact that the decree passed in the present suit was to the effect that the defendants, applicants herein, after receipt of the amount of balance sale consideration from the plaintiff before the Sub-Registrar within one month from the

date of judgment would execute the sale-deed. Since the time though was prescribed, the date for such payment was not fixed, it was in fact necessary on the part of the respondent/decreed-holder to intimate a date on which he was to remain present before the Sub-Registrar with the amount of balance sale consideration to pay the same to the applicants/defendants. As has been mentioned herein above, not a single statement was made in that respect nor any notice was ever issued to the applicants by the decreed-holder intimating such a date. It was not the case of the decreed-holder that on a notified date he continuously remained present before the Sub-Registrar for making payment of the balance sale consideration to the applicants but since the applicants failed to appear deliberately or otherwise to receive the said amount, that part of the decree could not be complied with. On the other hand, his plea was that he was not aware of such condition mentioned in the decree till he received the certified copy of the said decree and, therefore, could not comply with the said condition. If he received the certified copy at a later date, after the expiry of the period prescribed by the Trial Court in decree for such a purpose, it was the duty on the part of the respondent/decreed-holder to make an application for extension of that time on such plea but again nothing has been done in that respect by the decreed-holder. More discussion regarding such conduct of the decreed-holder have been done herein above, repetition of which is not necessary.

22. Yet another aspect is that the decree in the case of ***Khoobiram*** (supra) was granted with specific direction to the judgment-debtor to receive the amount of sale consideration and to execute the sale-deed. The facts and circumstances in the case of *Khoobiram* (supra) were

glaringly distinguishable in view of the fact that the agreement between the plaintiff and the defendant in the said case was entered into on 28.11.1990 for sale of the land on a consideration of Rs.55,250/- out of which an amount of Rs.37,000/- was paid as advance. Less than half of the sale consideration remained to be paid on the date of execution of the sale-deed. Not only this, during the pendency of the suit, the suit land was sold to the other defendants in the said suit on 25.06.1996 and this fact was also noted down by the Court. After the grant of decree when the direction was given to handover vacant possession, and the execution proceedings were pending, it appears that the decree-holder No.2 was murdered by the judgment-debtor No.3 and his brother. All these facts were taken note of and the Division Bench of this Court reached to the conclusion that in such a case, power under Article 227 of the Constitution of India was not required to be exercised and dismissed the writ petition filed by the judgment-debtors seeking rescission of contract.

23. These are not the facts and circumstances available in the present case. On the other hand, if properly scrutinized, it would be clear that the decree-holder/respondent was not very much keen in getting the sale-deed executed as he had not taken any step immediately for payment of the balance sale-consideration, which was 90% of the sale-consideration as only 10% advance was paid by him at the time of execution of the agreement. Keeping in mind these distinguishable features, it can be safely said that though the law may be correctly appreciated by the Division Bench of this Court in the case of *Khoobiram* (supra) but looking to the facts and circumstances available in the present case, the said decision would not be applicable in the case of present applicants, who have not only challenged the action

of grant of decree within time but have honoured all the orders of the Court while stay was granted to them.

24. Now coming to the equitable reliefs if tested in the anvil of the law laid-down by the Apex Court in the cases referred to herein above, in fact the decree-holder was not put to greater financial loss inasmuch as though he paid the amount of earnest money on 18.10.1988 but got it back under the orders of this Court on 22.01.1998. Though the Division Bench of this Court has categorically said that it would not amount to waiver of the right of specific performance by the decree-holder but still the fact remains that right from 22.01.1998, the decree-holder/respondent was not suffering any monetary loss whatsoever. In comparison to this, the applicants though could have utilized the land to the best of their requirement, could have fetched a better price looking to the hike in the prices of the land during such period, could not sale out the land because of the pendency of the litigation. At the best, while considering the rescission of the contract or agreement even after grant of decree, the Court could have passed an order compensating the respondent/decreed-holder in terms of money for the amount of earnest money, which was retained by the applicants from 18.10.1988 to 22.01.1998. However, making application of the case of ***Khoobiram*** (supra) only, the claim of rescission of contract, as set out by the applicants, was not required to be rejected outrightly.

25. On a deeper probe in the findings recorded by the Trial Court, it appears that while framing the issues on the application so made by the applicants as also the decree-holder/respondent under Section 28 of the Act, the Trial Court has reached to the conclusion that there was no proof of the fact that the decree-holder has failed to comply with

the command of the decree dated 03.08.1995 only because it was said that the Trial Court while trying the suit has reached to the conclusion that the plaintiff/ decree-holder was ever since willing to comply with his part of agreement dated 18.10.1988. A distinction is to be made in ascertaining the willingness to comply with the agreement and the willingness of the grant of decree as Section 28 of the Act prescribes rescission of contract on non-compliance of the condition of the decree. The findings in Issue No.1(A) and 1(B) though have been recorded negative but it appears that proper appreciation of evidence was not done by the Trial Court. Again the allegation of waiver of getting the specific performance executed on receipt of the amount of earnest money by the decree-holder was not to be pressed home because of the specific conditional order passed by the Division Bench of this Court in appeal of the applicants. To that extent, the findings of the Trial Court are correct. However, the findings on Issue No.3(A) and 3(B) are again contrary to the ultimate result of the application for extension of time filed by the decree-holder. If such an application was maintainable because of the exclusion of the time spent in litigation before this Court, where in appeal of the applicants interim stay of the execution of the decree was ordered, though on condition, and if there were sufficient reasons to make such an application for extension of time, why such a prayer of the decree-holder was rejected, has not been mentioned in the order impugned. Therefore, on these counts the order impugned cannot be sustained.

26. The findings recorded by the Trial Court are based only on the decision rendered by the Division Bench of this Court in ***Khoobiram*** (supra) which has been found to be distinguishable. The other evidence adduced by the parties

were not looked into, appreciated or considered by the Trial Court. It was contended by learned Counsel for the parties that since entire evidence was available on record of the Trial Court, the matter should have been decided even on merits but since this has not been done by the Trial Court, a jurisdictional error is committed by the Court below. However, as has been recorded herein above, it is contended by learned Counsel for the applicants that remitting back the matter to the Trial Court is not necessary as this Court has the power to appreciate the evidence and decide the issue by itself instead of sending back the matter to the Trial Court. It is contended by learned senior Counsel for the applicants that if the entire evidence, as adduced by the parties, is seen, it would be clear that a case for rescission of contract even after the grant of decree, was made out by the applicants and, therefore, the application was not to be rejected in the manner it has been rejected by the Trial Court.

27. Per contra it is contended by learned Counsel for the respondent that even when the evidence was adduced to explain that there was no delay in approaching the Court for execution of the decree duly affirmed by the Division Bench of this Court, yet the application filed by the decree-holder/respondent for extension of time to comply with the part of the decree was rejected by the Trial Court. According to learned Counsel for the respondent, this also vitiates the entire order and the matter is required to be considered on these aspects as well. However, it is not disputed by learned Counsel appearing for the respondent that the order passed on the application of the decree holder/respondent for extension of time was not called in question before this Court even by way of filing a counter revision against the impugned order.

28. After a due consideration of the submissions of learned Counsel for the parties and after going through the order impugned, it is clear that the Trial Court committed a grave error of jurisdiction as the trial Court was supposed to decide both the applications, one filed by the applicants under Section 28 of the Act and the other one filed by the decree-holder/respondent for extension of time, as if the suit was required to be decided. In fact the provision under Section 28 of the Act enables the Trial Court to try the issue afresh instead of driving the litigants to the fresh civil proceedings by way of filing fresh suit. In view of this, if the order passed by the Trial Court is examined, it would be clear that the Trial Court has not decided the application of the applicants in the manner it should have been, after appreciating the entire evidence available on record. True it is that this Court has power to examine the orders passed by the Trial Court in exercise of its revisional power under Section 115 of the Code of Civil Procedure. However, such a power is limited to certain extent. A revisional Court has to interfere in the order of the subordinate Court if it appears that the subordinate Court has exercised jurisdiction not vested in it by law or has failed to exercise the jurisdiction so vested or has acted in exercise of jurisdiction illegally or with material irregularity. The appellate powers of the Courts are different as are prescribed under Section 107 of the Code of Civil Procedure. While exercising the appellate power, the Court can determine a case finally, remand a case, frame issues and refer them for trial or take additional evidence or direct taking of such evidence by the subordinate Court. Akin to such appellate power, specific provisions are made under Order 41 Rule 24 of the Code of Civil Procedure, which prescribe that if the evidence available on record is sufficient to enable the Appellate

Court to pronounce judgment, the Appellate Court may after re-settling the issues if necessary finally determine the suit notwithstanding with the judgment of the Court from whose decree the appeal is preferred, has proceeded wholly upon some grounds other than that on which the appellate Court proceeds. Notably this power is not to be exercised by the Revisional Court.

29. Yet another aspect is that rescission of a contract even after grant of decree, in terms of provisions of Section 28 of the Act, invariably amounts to modification of decree granted by the Trial Court. It is the settled law that while exercising the power of revision, the Courts are not required to act beyond the scope of decree granted by the Trial Court. The very intention of the legislature is also to confer power on the Trial Court to modify the decree as is discerned from the language of Section 28 of the Act. Such power is not to be exercised by the Revisional Courts. Even when it is found that the Trial Court has acted beyond the jurisdiction, the Revisional Court is required to remit back the matter to the Trial court for passing the order afresh. The provisions of Section 28 of the Act are akin to the provisions of Section 47 of the Code of Civil Procedure. Any modification in the decree on an objection under Section 47 of the Code of Civil Procedure can be directed only and only by the Trial Court and not otherwise. This particular principle has been laid-down by the Apex Court in the case of ***Darshan Singh vs. State of Punjab, (2007) 14 SCC 262***. While dealing with such a situation, the Apex Court has deprecated the practice of modifying the decree by the Revisional Court. In view of this, if at all it is held by this Court that the Trial Court has committed jurisdictional error in deciding the application of the applicants, it has no option but to remit back the matter to the Trial Court to re-

appreciate the evidence and to decide the application of the applicants in appropriate manner. Of course as has been observed, this Court is competent to direct the Trial Court to decide such an application expeditiously, keeping in mind the principle of equitable relief enshrined under the Act.

30. For the aforesaid reason, the revision is partly allowed. The order impugned is set aside and the matter is remitted to the Trial Court to appreciate the evidence available on record in appropriate manner and to decide the application of the applicants afresh. The Trial Court is further directed to consider the aspect of granting compensation to the decree-holder/respondent in case the Trial Court reaches to the conclusion that the application for rescinding with the contract filed by the applicants is required to be allowed, as the amount of earnest money paid by the decree-holder/respondent to the applicants was kept in their possession right from 18.10.1988 to 22.01.1998 and same was returned to the decree-holder only after order passed by the Division Bench of this Court in the First Appeal of the applicants. The Trial Court would ascertain appropriate rate of interest on the said amount for the period it was in possession of the applicants. Nevertheless since the cost of the litigation was also allowed even by the first Appellate Court, the Trial Court would also be required to pass appropriate orders for payment of cost to the decree-holder/respondent in case ultimately the Trial Court reaches to the conclusion that contract has to be rescinded with because of non-compliance of mandate of the decree by the decree-holder. It be done within a period of four months from the date of receipt of copy of this order passed today. Registry is directed to send back the record of Trial Court immediately with a copy of this order.

31. The revision is allowed to the extent indicated herein above. There shall be no order as to costs.

(K.K. Trivedi)
Judge

Skc