

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**NAGPUR BENCH : NAGPUR**

**WRIT PETITION NO.3868 OF 2018**  
(SAKHUBAI LAXMAN NASLE..VS.. GANGUBAI PRAKASH PILLEY)

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Office Notes, Office Memoranda of Coram,  
appearances, Court's orders of directions  
and Registrar's orders  
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Court's or Judge's orders

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Shri Y.J.Chandurkar, Adv. h/f. Shri J.J.Chandurkar, Adv. for Petitioner.  
Shri S.A.Mohta, Advocate for Respondent.  
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**CORAM : ANIL S. KILOR, J.**  
**DATED : JUNE 14, 2023.**

1. Heard.

2. The Order dated 03/01/2018, passed below Exh.18 rejecting the application for rescission of contract under Section 28 of the Specific Relief Act and order below Exh.33, dated 03/01/2018 rejecting the application for dropping the execution proceedings, passed by Joint Civil Judge Junior Division, Murtizapur, in Regular Darkhast No.19 of 2003, are under challenge in the present writ petition.

3. The Joint Civil Judge Senior Division, Akola passed the decree in favour of the plaintiff in Special Civil Suit No.149 of 1992 on 17/06/1998, decreeing the suit for specific performance, which was carried in appeal bearing Regular Civil Appeal No.178 of 1998, which came to be dismissed on 08/01/2002. The petitioners are the legal representatives of the Judgment Debtor, whereas, the respondent is a Decree Holder.

4. The Decree Holder, accordingly, filed execution proceedings bearing Regular Darkhast No.19 of 2003. In the said proceedings the petitioners moved an application Exh.18 for rescission of contract under Section 28 of the Specific Relief Act, 1963 read with Sections 148, 151 and Order XXI of the Code of Civil Procedure on the ground that the decree holder has neither paid balance consideration amount nor filed execution proceedings within two months. It is submitted that there is no application for extension of time under Section 148 of the Code of Civil Procedure.

5. The petitioners have moved another application Exh.33 for dropping of the execution proceedings and dismissing the same on the point of limitation. It is the case of the petitioner that in the execution proceedings a prayer for possession has been made and therefore, execution ought to have been filed within 12 years. Whereas, the same has been filed beyond the period of 12 years and accordingly, the execution proceeding itself is not tenable.

6. The application Exh.18 was rejected by the learned executing Court by recording following reasons :

*“7. Read application and say. I have gone through citation filed by the D.H. the facts are not in dispute under the contract of sale the D.H. was not in possession and on failure of vendor/J.D. to execute the sale deed. The D.H. has filed suit for the specific performance. The trial Court partly decreed the suit. On appeal the decree is confirmed. As per decree direction to defendant / J.D. were given to execute registered sale-deed of suit property in favour of plaintiff/ D.H. by accepting balance consideration of*

*Rs.25,000/- within the period of two months. Record shows that D.H. has deposited Rs.25,000/- on 18.12.2003 i.e. at the time of filing of execution application but before the second appeal.*

*08. The J.D. has without perusal of record made contentions about not making payment of balance consideration amount by D.H. to J.D. and made these types of applications. While the decree was in execution J.D. has filed this application u/s. 28 of Specific Relief Act. Therefore, the very application filed u/s. 28 it is not maintainable before the execution court especially when this court is only to executed the decree and not empowered to annul and rescind the same. It is well established that the executing court cannot go beyond the decree. When that being is settled position of law, I fail to understand as to how the application u/s. 28 of the said act be entertained by this court. Moreover when the executing court cannot go beyond the decree and can only decided the issued between parties in accordance or consonance with the decree. Therefore the application filed by J.D. u/s. 28 of Specific Relief Act is not maintainable before the execution court i.e. before this court.*

*9. Considering aforesaid reasons, discussion and ratio laid down by Hon'ble Supreme Court, I do not find any substance in application. Application deserves to be rejected. As now the execution proceeding is 14 years old. J.D. has time to time made objection, applications and prolonged the execution of decree passed in Special Case No.149/1992 which is confirmed on 08.01.2002 and intentionally killed precious time of the court. Therefore application deserves to be rejected with cost. ...."*

7. Similarly the application Exh.33 was rejected on the following grounds :

*“10. Considering the ratio laid down by the Hon’ble High Court it is to be noticed that order dated 17/06/1998 was appealed against the plaintiff before the appellate court and thereafter civil appeal was decided and the order was passed by the Hon’ble District Court Akola stand merged in the order passed by C.J.S.D. Akola in Special Civil Suit No.149/1992. Moreover against the order passed by the Hon’ble District Court, Akola J.D. has not preferred any second appeal before Hon’ble High Court. Therefore the order passed by the C.J.S.D. has attained finality after decision of Civil Appeal preferred by the J.D./Defendant. In this view of the matter the execution proceeding cannot be said to be barred by limitation.*

*11. The order dated 17/06/1998 having attained finality on 08.01.2002. Therefore the J.D. cannot question the validity thereof all over again before this court and therefore the contention raised by the J.D. questioning the validity of order passed by the Hon’ble District Court which is sought to be executed cannot be entertained and therefore not required to be dealt with. Therefore enforceability order dated 17.06.1998 was finally pronounced in the civil appeal order dated 08.01.2002. The application for execution filed on 08.12.2003 cannot be considered barred by limitation.”*

8. The Hon’ble Supreme Court of India in the case of *Ramankutty Guptan ..vs.. Avara*, reported in **AIR 1994 SC 1699** has held thus:

*“6. Sri Nambiar, learned Counsel appearing for the respondent, contended that the meaning of the word "same suit" in Section 28(1) of the Act should not be construed to be the original court in which the decree was made. Therefore, the application would lie for extension of time, or for rescinding the contract, only in the appellate court and not in the trial Court, that too on execution side. We find no force in the contention.*

*Section 37, C.P.C. enumerates that:*

*37. Definition of the court which passed a decree-The expression "Court passed a decree", or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include-*

*(a) Where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and xxx xxx xxx Therefore, it is clear that the decree of the appellate court would be construed to be the decree passed by the Court of first instance. It is settled law that an appeal is a continuation of the suit. Therefore, where a decree for specific performance has been dismissed by the trial court, but decreed by the appellate court, it should be construed to be in the same suit. When the decree specifies the time for performance of the conditions of the decree, on its failure to deposit the money, Section 28(1) itself gives power to the court to extend the time on such terms as the court may allow to pay the purchase money or other sum which the court has ordered him to pay. In K. Kalpana Saraswathi v. P.S.S Somasundaram Chettiar (1980) 2 SCR 293; (AIR 1980 SC 512) this Court held that on an oral prayer made by the counsel for the plaintiff for permission to deposit the entire amount as directed by the trial Court this Court directed the appellant to deposit the amount within six months from that date together with interest and other conditions mentioned therein. An application for extension of time for payment of balance consideration may be filed even in the court of first instance or in the appellate court in the same suit as the decree of the trial Court stands merged with that of the appellate court which decree is under execution. It is to be seen that the procedure is the handmaid for justice; and unless the procedure touches upon jurisdictional issue, it should be moulded to subserve substantial justice. Therefore, technicalities would not stand in the way to subserve substantive justice. Take a case where the decree is transferred for execution to a transferee executing court, then certainly*

*the transferee court is not the original court and execution it is not the "same court" within the meaning of Section 28 of the Act. But when an application has been made in the court in which the original suit was filed and the execution is being proceeded with, then certainly an application under Section 28 is maintainable in the same court."*

9. Thus, from the above referred observations made by the Hon'ble Supreme Court of India, it is clear that the Court of first instance means the Court which has entertained the suit and passed decree by exercising original jurisdiction. The power under Section 28 of the Specific Relief Act, 1963 can be exercised by the Court of first instance which has exercised original jurisdiction.

10. In the present matter, admittedly, the application Exh.28 filed under Section 28 of the Specific Relief Act, 1963, was not filed before the Court of first instance which passed the decree i.e. the Joint Civil Judge Senior Division, Akola. In this case, the execution proceeding was filed before Joint Civil Judge Junior Division, Murtizapur within whose jurisdiction the property in question is situated.

11. Admittedly, thus, the application was filed in the execution proceeding at Murtizapur. Hence, I do not find any error committed by the learned executing Court in rejecting the application Exh.18.

12. As far as order below Exh.33 is concerned, there is no dispute that the execution proceeding was filed within limitation after

attaining finality of the decree as held by the executing Court in paragraph Nos. 10 and 11 of the impugned order. Hence, I do not find any infirmity in the same, accordingly, the Writ Petition is **dismissed**. No order as to costs.

**JUDGE**

*RRaut..*