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KUMAR DHIRENDRA MULLICK AND ORS.

v.

TIVOLI PARK APARTMENTS (P) LTD.

NOVEMBER 1, 2004

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[ASHOK BHAN AND S.H. KAPADIA, JJ.]

Specific Relief Act, 1963; Section 28:

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Trust Estate—Transfer to Lessee for a certain period and transfer by lessee to assignee for remaining period in terms of lease deed—Oral agreement for renewal of the deed between Trustee and assignee on payment of increased rent and premium—Part payment—Trustee failed to execute the transfer deed, instead entered into an agreement to transfer the property with another party—Title Suit—Decreed by Trial Court on ground of default -Application for Specific Relief filed by Trustees on ground that the assignee not ready and

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willing to pay the balance consideration—Trial Court rescinded the agreement and recalled the decree—Correctness of—Held: Increase in the value of immovable property is no ground to rescind the lease agreement—Trustees could not enter into an agreement with another party to lease out the same property—In the absence of default clause in the order of the trial Court, the

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agreement cannot be rescinded on account of non-payment of balance premium before the specific date—Trial Court erred in directing rescission of the agreement since decree holder/assignee was ready and willing to perform his part of obligation—Trustees also prevented him from filing execution application in the guise of settlement—Hence, Trustees directed to

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execute the lease in favour of the respondent/assignee—Directions issued—Civil Procedure Code, 1908—O. IX R. 13—Section 151—Constitution of India, 1950; Article 142.

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Appellants-Trustees transferred certain premises of a Trust Estate in favour of lessee for a period of 21 years in terms of a lease deed executed by them. Subsequently, the Lessee assigned the suit premises in favour of respondent-assignee by executing an assignment deed for the remaining period of the lease subject to the same terms and conditions as contained in the lease deed. Trustees had entered into an oral agreement with the assignee before expiry of the lease to renew/extend the period of lease in his favour on

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payment of increased rent and premium. Assignee made part payment of premium and agreed to pay the balance at the time of execution of the transfer deed. Since Trustees failed to execute the deed, assignee filed a title suit which was decreed by the Trial Court. In the meantime, Suit was filed by the trustee which was dismissed by the Court for non-prosecution. Trustees filed an application under Section 28(1) of the Specific Relief Act r/w Section 151 CPC. Trial Court rescinded the agreement and recalled the decree on the ground that the respondent had failed to pay the balance amount within the stipulated period, thus he was not ready and willing to perform his part of the obligation under the decree. As such he was not entitled to renewal of the lease. Appeal preferred by the aggrieved assignee was allowed by the High Court by setting aside the order of the Trial Court. Hence the present appeal.

It was contended by the appellants that if the suit premises was allowed to be leased out to the respondent on the agreed monthly rent and premium in terms of the agreement, they would lose substantially as market value of the property would fetch them higher premium and rent; that the agreement for renewal of lease stood vitiated on account of collusion between the constituted attorney appointed by the Trustees and the respondent; and that the respondent was not willing to perform his part of the obligation under the decree.

Dismissing the appeal, the Court

HELD: 1.1. In the circumstances of the case, increase in the value of the immovable property, on account of inflation, is no ground to rescind the lease agreement. [808-A-G]

1.2. The Trustees had consented to the Assignment in favour of the respondent by the lessee. Pursuant to the said Assignment, the respondent/ assignee was put in possession of the suit property. The assignment was followed by an oral agreement to renew the lease. In the circumstances, one fails to appreciate the authority of the Trustees to enter into an agreement to lease out the said property in favour of another party. When title suit came for hearing, no evidence was led on behalf of the Trustees explaining the circumstances under which the Trust entered into the said agreement. In the circumstances, it is not open to the appellants to go behind the said decree. Since the trial Court has rescinded the agreement basically on the ground of alleged breaches thereof, it is not open to the appellants to submit that the decree was collusive and not binding on the Trust estate. [808-D-F]

A 2.1. Order of the Trial Court indicates that the respondent was directed not to put the decree in execution for 90 days from the date of the decree. The order did not specify the period within which the balance premium amount was to be paid by the decree holder. There is no default clause in the said order. It only directs the appellants to execute the lease on or before a certain date. In the circumstances, there is no merit in the argument of the appellants
B that, impliedly, the balance premium had to be tendered on or before the fixed date, failing which the agreement was liable to be rescinded. [811-C-D]

C 2.2. The decree in question is not a self operative final decree. It is a preliminary decree. It merely directs the Trust to execute the lease on or before certain date. It does not prescribe any consequence of non-deposit of premium. It does not prescribe any consequence of non-tender of rent on or before the date. Since the decree holder has already paid the premium of Rs.30 lacs and Rs. 96 lacs as rent, it cannot be said that the decree holder intended to abandon the contract. There is no positive refusal on the part of the respondent to complete the lease. There is no explanation given by the Trust
D for not moving the application for rescission of the contract for nine years. [814-H; 815-A-B]

Hungerford Investment Trust Limited v. Haridas Mundhra and Ors., [1972] 3 SCC 684; *K. Kalpana Saraswathi v. P.S.S. Somasundaram Chettiar*, AIR (1980) SC 512; *Sardar Mohar Singh v. Mangilal*, [1997] 9 SCC 217;
E *V.S. Palanichamy Chettiar Firm v. C. Alagappan and Anr.*, AIR (1999) SC 918; *Abdul Shaker Sahib v. Abdul Rahiman Sahib and Anr.*, AIR (1923) Madras 284; *M. Sakuntala Devi v. V. Sakuntala and Ors.*, AIR (1978) A.P. 337; *Vaiyapuri Reddy and Anr. v. Sivalinga Reddiar*, (1970) 1 Madras L.J. 92 and *Ouseph and Anr. v. Devassy*, AIR (2001) Kerala 104, referred to.

F 3. The correspondence between the parties indicate that during this period of nine years in the guise of negotiations, the decree holder was prevented from filing execution application. The decree holder was repeatedly assured of settlement and that lease would be executed in its favour. Attempt was also made by the Trustees during the interregnum to lease the property
G to other lessee; that the decree holder was put in possession under the deed of assignment; and that he was not put in possession under the agreement. In the circumstances, the trial Court erred in directing rescission of the agreement. [815-D-F]

H 4. It is observed that the decree holder has already deposited Rs. 96 lacs including premium of Rs. 39 lacs and he undertakes to deposit the balance

amount. He also undertook to deposit the balance amount of Rs. 19,20,000 and to pay Rs. 10,00,000 by way of compensation for loss, if any. In the circumstances, the decree holder is directed to tender a sum of Rs. 29,20,000 within the stipulated time from the date of this order to the Trustees. On receipt, the Trustees should execute the lease in favour of the respondent for 70 years commencing from 1.5.1981 to 30.4.2051. In case the Trustees refuse to accept the said amount, the respondent should deposit the amount of Rs. 29,20,000/- in the Trial Court. On such deposit, the Officer nominated by the trial Court shall execute the lease in favour of the respondent in terms of the agreement and as directed by the Trial Court vide its order in the title suit. In case of default, on the part of the respondent, in tendering/depositing the aforesaid amount within the stipulated period, the agreement shall stand rescinded and the title suit shall stand dismissed. [8015-G; 816-A-C]

5. The Statement of Accounts as furnished by the appellant is for recovery of occupation charges and interest. The items mentioned in the Statement do not fall within the purview of the oral lease agreement. In the circumstances, it is not possible for this Court to grant relief under Article 142 of the Constitution, as prayed. [816-H; 817-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7234 of 1999.

From the Judgment and Order dated 10.6.1999 of the Calcutta High Court in F.M. A. No. 37 of 1997.

Bijan Kumar Ghosh, G.V.R. Choudhary and Brotindra Mullick for the Appellant.

Sanjiv Sen, Sameer Parekh, Rajeev Mishra, for the M/s. P.H. Parekh for the Respondents.

The Judgment of the Court was delivered by

KAPADIA, J. 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").

A Briefly, the facts are as follows. Appellants herein are the Trustees of the Trust Estate of Raja Rajendra Mullick Bahadur owning suit premises bearing nos. 225B and 225C, Lower Circular Road, Calcutta with eight cottages and a main building, more particularly described in the schedule annexed to the lease dated 25.11.1960 executed by the Trustees in favour of Mohd. Ismail for 21 years commencing from 1.5.1960.

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Some of the relevant terms and conditions of the said lease are as follows:

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“(i) The lessee, i.e. Mohammad Ismail, would pay monthly rent at the rate mentioned in the said lease;

(ii) The lessee would pay the entire occupiers’ share of Corporation rates and taxes;

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(iii) The lessee would be entitled to sublet all or any portion of the demised premises. The lessee would, however, be liable for regular payment of rents and for due observance and performance of the terms and conditions of the lease agreement;

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(iv) Upon the expiration or sooner determination of the lease, the lessee would be obliged to deliver quietly and peaceful possession of the property to the lessors;

(v) The lessee would not do or suffer to be done anything in or upon the said property or any part thereof that may cause nuisance or annoyance to the lessors or the other tenants of the adjoining premises;

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(vi) The lease would take effect retrospectively from 1st May, 1960 and would be for a period of 21 years i.e. up to 1st May, 1981.

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(vii) The lease would come to an end in the event of the rents being in arrear for two months after the due date or in case of breach of any of the covenants of the lease agreement.”

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Subsequent to the grant of the above lease, the said Mohd. Ismail executed a deed of assignment dated 20.8.1970 and assigned the suit premises to the respondent-decree holder for the unexpired period and was subject to the terms and conditions contained in the lease. In the premises, the respondent herein was entitled to remain in possession of the said premises up to 1.5.1981

when the said lease was due to expire.

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Before expiry of the lease, on 16.8.1980, an agreement was entered into by the then Trustees and the respondent-decree holder to the effect that terms and conditions of the said lease would be extended/renewed in favour of the said respondent for a further period of 70 years from 1.5.1981 on payment of increased rent of Rs. 30,000 per month plus premium of Rs.30 lacs. Respondent herein paid Rs.4 lacs being part of the total premium of Rs.30 lacs agreed to be paid at the time of the execution of the Transfer Deed.

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Since the Trustees failed to execute the deed, respondent herein filed Title Suit No.176 of 1981 in the Court of Assistant District Judge, Alipore, Calcutta (hereinafter referred to as "the trial Court") for specific performance of the agreement dated 16.8.1980. On 25.7.1985, the said suit was decreed.

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In the said suit, the defendant-Trustees, made an application under Order IX Rule 13 CPC for recall of the decree. This application was not pursued, hence, it got dismissed. An appeal was also filed, however, the same was dismissed.

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To complete the chronology of events, it may be mentioned, that, the Trustees had instituted suit no.87/81 which got dismissed for non-prosecution.

On 3.10.1994, the Trustees - appellants herein, moved an application under section 28(1) of the 1963 Act read with section 151 CPC. It was alleged that there was a collusion between the two trustees and respondent; that the said two Trustees had alone agreed to renew the lease dated 25.11.1960 for a further period of 70 years; that these two Trustees received Rs.4 lacs from the respondent; that they did not account for it; that on 23.12.1980 they approved draft deed; that the said draft was in connection with renewal of lease for 70 years on payment of premium of Rs.30 lacs and increased monthly rent of Rs.30,000 on and from 1.5.1981; that the said Trustees had no authority to act on behalf of the said Trust; and, therefore, the agreement for renewal was null and void and not binding on the estate. It was further alleged that title suit No.176/81 was a counterblast to suit no.87/81; that even after passing of the decree dated 25.7.1985 in the title suit no.176/81, the respondent did not tender the deed to be executed by the Trustees nor did it tender the rent for nine years; that the respondent even failed to pay the balance premium of Rs.26 lacs as agreed. That the respondent was earning income by letting out premises for marriages etc. In the circumstances, it was alleged that the

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A respondent herein was not ready and willing to discharge its obligations under the decree dated 25.7.1985. Hence, it was submitted that contract dated 16.8.1980 be rescinded and the decree dated 25.7.1985 in suit no.176/81 be recalled.

B By reply dated 21.2.1995, the respondent herein alleged that the Trustees were avoiding the decree under various pretexts. In this connection, it was pointed out that the decree for specific performance was passed on 25.7.1985 in title suit no.176/81; that the said decree was an *ex-parte* decree and, therefore, the said Trustees moved an application under Order IX Rule 13 CPC which was also dismissed. That, being aggrieved, the Trustees carried the matter in appeal, which was also dismissed. In the circumstances, it was alleged that the trustees had repeatedly tried to avoid the decree. Having failed to have the decree set aside, the trustees now opted for its rescission.

C It was further alleged that the respondent was repeatedly assured of the execution of the lease. In this connection, there were negotiations between the parties. At the insistence of the Trustees the respondent did not put the decree in execution. In the circumstances, it was submitted that the respondent was always ready and willing to perform its obligations under the agreement dated 16.8.1980 and that there was no intention on the part of the respondent to abandon the contract. In the written statement, the respondent further alleged that on 1.12.1994, the Trustees attempted to lease out the suit premises

D to one Dilip Kankaria and Smt. Sudha Kankaria. In this connection, the Trustees moved the High Court and obtained permission to transfer the suit premises without notice to the respondent herein. Being aggrieved, the respondent herein applied for setting aside the leave. By order dated 16.12.1994, the Division Bench of the High Court stayed the above permission on the condition of deposit of Rs.50 lacs. In the circumstances, the respondent

E submitted that it was ready and willing to perform its obligations under the decree. In the circumstances, the respondent herein submitted that the application filed by the Trustees for rescission of the contract dated 16.8.1980 be dismissed.

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G By order dated 31.7.1996, the trial Court rescinded the agreement dated 16.8.1980 and also recalled the decree dated 25.7.1985.

By order dated 31.7.1996, the trial Court held that under the terms and conditions of the agreement dated 16.8.1980, the respondent had to pay Rs.30 lacs to the Trust at the time of renewal of the lease i.e. by 24.10.1985 and since

H the respondent had failed to pay the said amount within the stipulated period,

the respondent herein was not entitled to the said renewal. Further, the said respondent had failed to pay the arrears of rent amounting to Rs.39 lacs towards rent. In the circumstances, according to the trial Court, the respondent herein was not ready and willing to perform its obligations under the decree. The trial Court observed that under section 28(1) of the 1963 Act, the Court had unlimited and unfettered power to grant extension but has no power to condone the delay, if the period for complying with the terms and conditions stood expired. According to the trial Court, the date of payment of the premium of Rs.30 lacs expired on 24.10.1985 and consequently, the respondent herein was not entitled to renewal of the lease. The trial Court further observed that at no point of time, the respondent had approached the Court, prior to 24.10.1985, for execution of the lease through the Court. Nothing prevented the respondent from approaching the Court, prior to 24.10.1985, seeking permission to deposit Rs.30 lacs on account of premium and arrears of rent in Court and in the circumstances, the trial Court allowed the petition filed by the Trustees-appellants and recalled the decree dated 25.7.1985 after rescinding the agreement dated 16.8.1980.

Being aggrieved by the order dated 31.7.1996, the respondent herein carried the matter in appeal to the High Court, being appeal from original order no.3652 of 1996.

During the pendency of the appeal, vide order dated 18.12.1996, the High Court directed the respondent to deposit Rs.1 crore with the appellants-Trustees on account of arrears of rent. By the said order, the High Court also directed the respondent herein to deposit Rs.40 lacs with the Registrar, High Court on account of arrears of corporation tax.

Being aggrieved by the order dated 18.12.1996, the respondent herein preferred SLP to this Court. By order dated 10.3.1997, this Court directed the respondent herein to deposit in all Rs.83 lacs comprising of Rs.57 lacs towards arrears of rent up to 31.3.1997 plus Rs.26 lacs towards the balance premium which the respondent herein has paid. In addition, respondent herein was asked to deposit Rs.40 lacs towards corporation tax subject to final accounting, which has also been paid.

By impugned judgment dated 10.6.1999, the High Court held that the order passed by the trial Court dated 31.7.1996 was contrary to section 28(1) of the 1963 Act, as there was no default clause in the decree dated 25.7.1985. According to the High Court, section 28(1) was not applicable as the decree

A dated 25.7.1985 did not direct the respondent herein to deposit the amounts within specific time frame. According to the High Court, under section 28, there was no power vested in the trial Court to set aside the decree. Section 28 contemplated rescission of the agreement. The only power which the Court has under section 28 is to rescind the agreement if it finds that the decree holder was a defaulter. The High Court further held that in the present case, the decree holder was put in possession under the deed of assignment dated 20.8.1970. The decree holder was never put in possession under the agreement dated 16.8.1980 for which the decree for specific performance was granted. In the circumstances, the High Court held that the trial Court had erred in directing the decree holder to restore possession to the Trustees. In the circumstances, the appeal preferred by the respondent was allowed and the order of the trial Court rescinding the agreement dated 16.8.1980 was set aside. Hence, this appeal.

D It has been submitted on behalf of the appellants herein that at the time of the agreement dated 16.8.1980, the value of the property in question was about Rs.30 crores. On the basis of the said value, the market rate ought to have been Rs.30 lacs. It was urged that if the Trust property is allowed to be leased out to the respondent herein on monthly rent of Rs.30,000/- and a premium of Rs.30 lacs, the appellant-Trust will loose substantially. In this connection, reliance has been placed on the valuation report dated 26.4.2000.

E We do not find any merit in the aforestated arguments. As far back as 20.8.1970, the Trustees allowed the lessee, Mohd. Ismail, to assign the leasehold rights in favour of the respondent herein. Further, the assignee was allowed to be put in possession. On 16.8.1980, the Trustees entered into oral agreement to renew the above lease for 70 years w.e.f. 1.5.1981 at increased rent of Rs.30,000/- per month plus premium of Rs.30 lacs as found by the trial Court in title suit no.176/81 decided on 25.7.1985. In the circumstances, increase in the value of the immovable property, on account of inflation, is no ground to rescind the agreement dated 16.8.1980. We have to see the circumstances prevalent as on 16.8.1980 when the parties entered into the oral agreement to lease.

G It is next contended on behalf of the appellants that the oral agreement dated 16.8.1980 for renewal of lease stood vitiated on account of collusion between Tivoli Court Pvt. Ltd., the constituted attorney appointed by the Trustees, and the respondent herein. In this connection, it has been alleged that the Trust had entered into an agreement dated 29.4.1981 to lease out the

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property to one Tivoli Court Pvt. Ltd., in whose favour a power of attorney was also executed. Under that power of attorney, Tivoli Court Pvt. Ltd. was authorized to adopt all legal proceedings against the respondent herein for eviction. It is further alleged that the respondent herein perpetrated fraud on the Trust by colluding with the Tivoli Court Pvt. Ltd., so that no effective legal steps could be taken against the respondent herein. It is further alleged that the Director of Tivoli Court Pvt. Ltd. was also a Director of the respondent company. Consequently, the suit for eviction bearing no.87/81 was allowed to be dismissed for default while suit for specific performance was allowed to be decreed *ex-parte*. That even the subsequent application under Order IX Rule 13 CPC was allowed to be dismissed for default. In the circumstances, it is submitted that the trial Court was right in rescinding the agreement dated 16.8.1980.

We do not find any merit in the above arguments. As stated above, prior to the purported agreement dated 29.4.1981 in favour of Tivoli Court Pvt. Ltd., the Trustees had consented to the Assignment dated 20.8.1970 by their lessee, Mohd. Ismail, in favour of the respondent herein. Pursuant to the said Assignment, the said respondent was put in possession. This assignment was followed by oral agreement dated 16.8.1980 to renew the lease. In the circumstances, one fails to appreciate the authority of the Trustees to enter into an agreement dated 29.4.1981 to lease out the said property in favour of Tivoli Court Pvt. Ltd. On 25.7.1985, when title suit no.176/81 came for hearing, no evidence was led on behalf of the Trustees explaining circumstances under which the Trust entered into the agreement dated 29.4.1981 with Tivoli Court Pvt. Ltd. In the circumstances, it is not open to the appellants herein to go behind the said decree dated 25.7.1985. Lastly, it may be mentioned that the trial Court has rescinded the agreement dated 16.8.1980 basically on the ground of alleged breaches thereof. In the circumstances, it is not open to the appellants now to submit that the decree dated 25.7.1985 was collusive and not binding on the Trust estate.

On behalf of the appellants, it was next submitted that the respondent herein was not serious about performing its obligations under the decree. In this connection, it was submitted that nothing prevented the respondent from applying to the Court for execution of the lease. That, nothing prevented the respondent from seeking extension of time to deposit the premium/rent. It was urged that the very fact that the respondent chose to make no such application and slept on its rights for nine years conclusively proves that it was not ready and willing to perform its part of the contract and also its obligations under

- A** the decree and in the circumstances, the trial Court had rightly rescinded the oral lease agreement dated 16.8.1980. It was further submitted that the trial Court while passing the decree had stated that within 90 days of the decree dated 25.7.1985, the lease shall be executed i.e. all payments were required to be made within that period. That without such payments, a lease could not be directed to be executed. No steps were taken by the respondent herein to renew the lease and pay the premium in accordance with the agreement dated 16.8.1980. No rent was offered during the period 25.7.1985 to 3.10.1994 when the appellants filed their application for rescission of the oral lease agreement dated 16.8.1980. In the circumstances, it was submitted, that, by implication, the respondent herein was obliged to pay or tender the amount of premium of Rs.30 lacs within 90 days from the date of the decree dated 25.7.1985. It was urged that when the decree fixed 90 days for execution of the lease, it was implicit in the said direction that the respondent herein shall pay or tender Rs.30 lacs on or before 24.10.1985. That, since the respondent failed to pay or tender Rs.30 lacs on or before 24.10.1985, the appellants were entitled to seek rescission of the agreement dated 16.8.1980. That, when the agreement for renewal of the lease dated 16.8.1980 provided for payment of monthly rent of Rs. 30,000, it was implicit in the decree dated 25.7.1985 for the respondent to pay the monthly rent in terms of the agreement dated 16.8.1980 and since the decree holder failed to pay, in the aforesaid terms, the appellants were entitled to seek rescission of the decree dated 25.7.1985 under section 28(1) of the 1963 Act. In the circumstances, it was urged, that the respondent herein was never ready and willing to abide by the terms and conditions of the agreement and consequently, the trial Court was right in rescinding the oral lease agreement dated 16.8.1980.

- F** We do not find merit in the above arguments. The short question which arises for determination in this case is-whether the oral lease agreement dated 16.8.1980 was liable to be rescinded for alleged breaches. Mr. L.N. Rao, learned senior counsel appearing on behalf of the appellants, at the very threshold, submitted that he would like to confine his arguments to the question of rescission only. According to the learned counsel, the power of the Court under section 28(1) to order cancellation of the decree and order restoration of possession to the vendor was a very wide question which need not to be gone into in the present case.

G In the light of the above, we may now examine the above arguments advanced on behalf of the appellants.

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In the present case, the decree for specific performance is dated 25.7.1985 in suit no.176/81. On behalf of the plaintiff (respondent herein) PW1 was examined. He tendered evidence indicating that the respondent herein was in possession. No evidence was led on behalf of the Trustees. In the circumstances, the trial Court decreed the suit on 25.7.1985 and passed an order in following terms:

“... Defendants do execute register and deliver the lease in favour of the plaintiff (respondent herein) in terms of the agreement dated 16.8.1980 within 90 days from the date of the decree, failing which the decree holder (respondent herein) will be at liberty to get the lease executed through the Court.”

A bare reading of the order indicates that the respondent herein was directed not to put the decree in execution for 90 days from the date of the decree i.e. 25.7.1985. The said order did not specify the period within which the balance premium amount of Rs.26 lacs was to be paid by the decree holder. There is no default clause in the said order. It only directs the appellants to execute the lease on or before 24.10.1985. In the circumstances, there is no merit in the argument advanced on behalf of the appellants, that, impliedly, the balance premium had to be tendered on or before 24.10.1985, failing which the agreement dated 16.8.1980 was liable to be rescinded.

In the case of *Abdul Shaker Sahib v. Abdul Rahiman Sahib and Anr.*, reported in AIR (1923) Madras 284 while construing section 35 of the 1877 Act (similar to section 28 of the 1963 Act) it has been held as follows:

“After the original judgment for specific performance it is the definite practice in England that all consequential relief by reason of any party failing to comply with the terms of the judgment must be sought by application to the Court by which the judgment was passed. Such applications are made by motion in the action showing that in England, after the original judgment the action is by no means ended but remains under the control of the same Court. If the default is made by the purchaser in paying the purchase-money there are several remedies open to the vendor. (1) He may on motion in the action obtain an order fixing a definite time and place for payment and delivery over of the conveyance and title-deed and can, after the expiration of that time, levy execution for the amount, if not paid. (2) He may apply by motion in the action for an order rescinding, not the

A judgment but the contract, and in order to succeed in such a motion he has to satisfy the Court that there has been a positive refusal to complete, which it may be observed in the present case, the respondent has certainly not proved. A similar right is given by Section 35 of the Specific Relief Act of 1877. (3) He can enforce his unpaid vendor's lien for the purchase-money and costs. (4) He can by motion in the action obtain an order for sale by the Court of the property when he will be at liberty to bid. The proceeds of the sale are paid into Court and the vendor gets his contract price, interest and costs and the purchaser the balance, if any. Where the vendor is in default, the remedies are even more varied.

C It would seem to be absurd to hold that the mere fact that a date of completion is fixed in the original decree puts an end to the action and that the control of the original Court expires on the expiration of that date and thus substitute in effect for all the known remedies stated above the simple expedient of treating the action and the decree as dead for all purposes and leaving the vendor in undisturbed possession of property which is not his.....”

E In the case of *Hungerford Investment Trust Limited v. Haridas Mundhra and Ors.*, reported in [1972] 3 SCC 684 it has been held that when the Court passes the decree for specific performance, the contract between the parties is not extinguished. That the decree for specific performance is in the nature of preliminary decree and the suit is deemed to be pending even after the decree. Hence, the Court retains control over the entire matter even after the decree. Since the Court retains control over the matter, despite the decree, it is open to the Court to order rescission of the agreement, when it is found that the decree holder is not ready and willing to abide by his obligations under the decree.

G In the case of *M. Sakuntala Devi v. V. Sakuntala and Ors.*, reported in AIR (1978) A.P. 337 it has been held that though section 28 does not confer power on the Court to extend time, it recognizes its power to do so in cases of default in payment.

In the case of *K. Kalpana Saraswathi v. P.S.S. Somasundaram Chettiar*, reported in [AIR 1980 SC 512] it has been held as follows:

H “It is perfectly open to the court in control of a suit for specific

performance to extend the time for deposit, and this court may do so even now to enable the plaintiff to get the advantage of the agreement to sell in her favour. The disentitling circumstances relied upon by the defendant-respondent are off-set by the false pleas raised in the course of the suit by him and rightly negated. Nor are we convinced that the application for consideration and extension of time cannot be read, as in substance it is, as a petition for more time to deposit. Even so, specific performance is an equitable relief and he who seeks equity can be put on terms to ensure that equity is done to the opposite party even while granting the relief. The final end of law is justice, and so the means to it too should be informed by equity. That is why he who seeks equity shall do equity. Here, the assignment of the mortgage is not a guileless discharge of the vendor's debt as implied in the agreement to sell but a disingenuous disguise to arm herself with a mortgage decree to swallow up the property in case the specific performance litigation misfires. To sterilize this decree is necessary equity to which the appellant must submit herself before she can enjoy the fruits of specific performance."

In the case of *Sardar Mohar Singh v. Mangilal* reported in [1997] 9 SCC 217 it has been held that section 28(1) postulates that the Court does not lose its jurisdiction after the grant of the decree for specific performance nor it becomes *functus officio*. 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 the specific performance. Therefore, the Court has the 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, despite the application for rescission of the agreement/decree.

In the case of *Vaiyapuri Reddy and Anr v. Sivalinga Reddiar*, reported in (1970) 1 Madras L. J. 92] it has been held that since the Court has, under section 28, the power to extend the period in cases where it has already fixed a period of deposit, it should be deemed to have the power to either fix a period or grant a fresh period to deposit, particularly in cases where no such period is fixed by the decree. In that case, the Court found that there were laches on the part of the plaintiff in depositing the amount and yet the Court gave thirty days time to the plaintiff to deposit the amount on the application made by the defendants for rescission of the contract.

A In the case of *Ouseph and Anr v. Devassy*, reported in AIR (2001) Kerala 104 the decree was silent as to the date by which the decree holder was to pay the balance of the price. Possession was with the decree holder. The purchaser deposited the balance before filing of the petition for rescission of the agreement but after expiry of the period fixed by the decree. The decree holder applied for condonation of the delay. The same was granted. In doing so, the Court observed that section 28 enables the Court to extend the time which by itself implies that mere failure to deposit the balance need not result in the rescission of the contract. On facts, it was found that the decree was silent as to the date by which the decree holder was to deposit the balance of the sale consideration. On facts, it was found that the decree holder was in possession for 18 years. On facts, it was found that the vendor did not take any steps to get the balance of the sale consideration. That the vendor failed to seek rescission for 18 years. In the circumstances, the Court allowed the decree-holder, condonation of delay in depositing the balance consideration.

D In the case of *V. S. Palanichamy Chettiar Firm v. C. Alagappan and Anr*, reported in AIR (1999) SC 918, cited on behalf of the appellants, the vendee-decree holder filed application for execution of the decree of specific performance after five years. No reason was given for not putting the decree in execution for five years. Further, under the decree, there was a specific direction to the decree holder to deposit the balance purchase price within the stipulated period. Under the said decree, a further direction was given to the judgment debtor to execute the sale deed on the vendee's depositing the balance purchase price. It was a case of a final decree. In the execution application, the judgment debtor applied for rescission of the agreement of sale on the ground of default on the part of the vendee in failing to deposit the balance price. Under the above circumstances, this Court held that the vendee, who had applied for extension of time to deposit the balance price, was not entitled to such extension. This Court observed that in deciding application under section 28(1), the Court has to see all the attendant circumstances including the conduct of the parties. On facts, this Court found that there was no default on the part of the vendor-judgment debtor. That no explanation whatsoever came from the vendee-decree holder for failure to deposit the balance price. In the circumstances, on facts, this Court refused extension of time to deposit the balance price. Therefore, the said judgment has no application to the facts of the present case.

H Applying the above tests to the facts of the present case, the decree in question is not a self operative final decree. It is a preliminary decree. It

merely directs the Trust to execute the lease on or before 24.10.1985. It does not prescribe any consequence of non deposit of premium. It does not prescribe any consequence of non tender of rent on or before 24.10.1985. Till date, the decree holder has paid the premium of Rs.30 lacs. It has paid rent amounting to Rs.96 lacs. In the circumstances, it cannot be said that the decree holder intended to abandon the contract dated 16.8.1980. There is no positive refusal on the part of the respondent to complete the lease. There is no explanation given by the Trust for not moving the application for rescission of the contract for nine years. The decree was passed on 25.7.1985 whereas the application for rescission of the agreement is dated 3.10.1994. As stated above, the Trust did not lead the evidence in suit no.176/81. The corresponding suit no.87/81 filed by the Trust was dismissed for non-prosecution. The Trust moved under Order IX Rule 13 CPC for setting aside the decree dated 25.7.1985. That application was dismissed for default vide order dated 1.8.1987. The Trust moved the application for restoration which was also dismissed for default on 16.7.1988. The Trust moved in appeal against the decree dated 25.7.1985. That appeal was also dismissed. The decree holder has referred to the entire correspondence between the parties which indicate that during this period of nine years in the guise of negotiations, the decree holder was prevented from filing execution application. The decree holder was repeatedly assured of settlement. The decree holder was repeatedly assured that lease would be executed in its favour. Attempt was also made by the Trustees during the interregnum to lease the property to Dilip Chand Kankaria and Smt. Sudha Kankaria. Lastly, in the present case, the decree holder was put in possession under the deed of assignment dated 20.8.1970. The respondent was not put in possession under the agreement dated 16.8.1980. In the circumstances, the trial Court erred in directing rescission of the said agreement dated 16.8.1980. For the aforesaid reasons, we do not find any merit in this appeal.

Before concluding, we may point out that till date the decree holder has deposited Rs.96 lacs including premium of Rs.30 lacs. The decree holder hereby undertakes to deposit the balance amount of Rs.19,20,000 within 30 days from the date of this judgment. He also undertakes to pay Rs.10,00,000 by way of compensation for loss, if any.

In the circumstances, we direct the decree holder to tender a sum of Rs.29,20,000 within 30 days from today to the Trustees. On receipt, the Trustees shall execute the lease in favour of the respondent herein for 70 years commencing from 1.5.1981 to 30.4.2051.

A In case the Trustees refuse to accept the said amount, the respondent herein shall deposit the aforestated amount of Rs.29,20,000 in the Court of 2nd Asstt. District Judge, Alipore, Calcutta. On such deposit, the Officer nominated by the trial Court shall execute the lease in favour of the respondent in terms of the agreement dated 16.8.1980 and as directed by the trial Court vide order dated 25.7.1985 in title suit no.176/81.

B In case of default, on the part of the respondent, in tendering/depositing the aforestated amount within the stipulated period of 30 days, the agreement dated 16.8.1980 shall stand rescinded and the title suit no.176/81 shall stand dismissed.

C As regards the payment of corporation tax, learned counsel appearing on behalf of the respondent has invited our attention to clause 4 of the lease dated 25.11.1960 which reads as under:

D “The entire occupier’s share of Corporation rates and taxes and the excess of Owner’s share of Corporation rates and taxes over and above the rental amounts as hereinbefore provided will be paid by the Lessee in respect of the portions of the properties hereby demised in addition to the monthly rents hereby reserved.”

E Relying on clause 4, learned counsel for the respondent submitted that the Trust has failed to pay its share of corporation tax in terms of clause 4 quoted above. It was contended that the respondent has till date paid an amount of Rs.40 lacs towards corporation taxes. That the respondent was entitled to recover from the Trustees the owners’ share of corporation tax.

F In order to put an end to the dispute, we suggested to the learned counsel appearing on behalf of the respondent not to press its above claim for contribution of corporation tax from the Trustees. Learned counsel appearing on behalf of the respondent has accepted our suggestion that for the past period, the respondent will not make a claim for contribution of owner’s share of the corporation tax. To that extent, the respondent agrees

G not to press its above claim.

H In the written arguments dated 25.10.2004, the appellants herein have filed their Statement of Account. A bare perusal of the said Statement indicates the claim for interest @ 8.33% per annum on monthly basis. We do not find any basis for such claim. The entire Statement is for recovery of occupation

charges and interest. The items mentioned in the Statement do not fall within the purview of the oral lease agreement dated 16.8.1980. In the circumstances, it is not possible for this Court to grant relief under Article 142 of the Constitution, as prayed. A

Subject to the above, the appeal fails and is dismissed, with no order as to costs. B

S.K.S.

Appeal dismissed.