

PETITIONER:
HUNGERFORD INVESTMENT TRUST LIMITED (IN VOLUNTARY

Vs.

RESPONDENT:
HARIDAS MUNDHRA & OTHERS

DATE OF JUDGMENT 09/03/1972

BENCH:
MATHEW, KUTTYIL KURIEN
BENCH:
MATHEW, KUTTYIL KURIEN
HEGDE, K.S.

CITATION:
1972 AIR 1826 1972 SCR (3) 690
1972 SCC (3) 684
CITATOR INFO :
R 1980 SC 101 (3)
R 1982 SC 818 (27)
F 1983 SC 1272 (12)

ACT:
Specific Relief Act (1 of 1877) repealed by Specific Relief Act (47 of 1963)--Application for rescission of contract and decree in 1967 under s. 35 of 1877 Act--When right to rescission can be said to have accrued under s. 6 of General Clauses Act, 1897.
Specific Relief Act (47 of 1963) s. 28-Scope of.
Power of Court to order rescission under the law relating to specific relief--No time fixed in decree for specific performance -Effect of-Order of rescission by Court--Nature of.
Decree for specific performance--If could be executed by defendant as money decree.

HEADNOTE:

The appellant was the owner of 100% shares in Company 'A' By an agreement dated October 30, 1956, between the appellant and the respondent, the respondent purchased 49% of the shares with an option to purchase the balance of 51 % shares. The respondent exercised his option but as the shares were not transferred to him he filed a suit. The suit was decreed and the decree for specific performance provided that the 51 % shares should be delivered to the respondent against payment by him to the appellant of their value; and an injunction was also granted Restraining the appellant from voting except in accordance with the instructions of the respondent. Except as regards the injunction, the trial court, however, stayed execution of the decree and the stay was continued by the appellate court till the appeal was dismissed in 1965.

The appellant filed an application in 1965 praying that the respondent may be directed to pay the consideration amount within such time as the Court may direct, but the application was dismissed.

Meanwhile, there were certain orders of attachment of the decree, whose effect was that the respondent was prohibited and restrained from alienating, transferring or charging his right, title and interest in the decree or from obtaining

satisfaction thereof. Further, in February 1965, a company 'B' which had obtained a decree against a holding company of the appellant, applied for execution and got the 51% shares of the appellant attached. The executing court ordered that those shares should be produced for delivery to the respondent against payment of the consideration mentioned in the specific performance decree.

The 'A' Company also instituted a suit against the appellant in respect of payment made by 'A' to the Income-tax authorities on behalf of the appellant and prayed for possession and sale of the 51% shares in the

691

exercise of their lien on those shares. A receiver was appointed in respect of those shares and the Court directed that the Receiver would be at liberty deliver the 51% shares to the respondent on payment of the consideration. This order was communicated by the appellant to the respondent on January, 11, 1967, and even before that date the appellant wrote two letters to the respondent asking him to be ready with the amount to be paid by him and to take delivery of the shares. Those letters were refused by the respondent and in reply to the letter dated, January 11, 1967, the respondent raised the objection that the appellant was not in a position to give delivery of the shares and that the order of the Court was not binding on him because he was not a party to the suit in which that order was passed. By a letter dated February 11, 1967, addressed to the respondent, the appellant stated that the respondent had forfeited his right to purchase the 51% shares under the specific performance decree as he had failed to fulfil his obligation in pursuance of the notice of the appellant dated January 11, 1967. Thereafter, in March 1967, the appellant filed an application for rescission of the agreement of sale of 1956 as also the decree for specific performance of the agreement.

The trial court held that the respondent was not keen on paying the purchase money and get the transfer of 51% shares for the reason that the injunction granted by the Court restraining the appellant from voting except under the instructions of the respondent made the respondent virtually the owner of the 100% shares in 'A' company, with full control, that therefore, the respondent had committed breach of the contract which he was directed specifically to perform, that he created a situation which had made it impossible for him to perform his part of the obligation, and hence the decree for specific performance must be rescinded. The trial court appointed the Receiver in the suit by the 'A' company against the appellant as Receiver of the 51% shares and directed the respondent to pay the consideration money to the Receiver within a fortnight from the date of the order and directed the Receiver to hand over the shares to the respondent; and that, in default of such payment within the time specified the contract and the decree would stand rescinded, and that the appellant would be absolved from all obligations thereunder.

The appellate court however held that the application filed by the appellant for the rescission of the contract and decree was not maintainable under the Specific Relief Act of 1877 or of 1963.

Allowing the appeal to this Court,

HELD: (1) The Specific Relief Act, 1877 was repealed by the Specific Relief Act of 1963 and the appellant had no accrued right on the date of the repeal to file the application under s. 35 of the 1877 Act read with s. 6 of the General Clauses Act, 1897. [700G-H]

The right to rescind the decree under s. 35 can arise only if the purchaser makes default in paying the purchase money ordered to be paid under the decree. But before the lapse of reasonable time from the date of the decree the appellant could have no right to have the decree rescinded on the ground of default. Such a default had not occurred when the Specific Relief Act, 1877, was repealed as a reasonable time for the performance of the obligation under the decree had not elapsed from the date of the decree. There was no default till 1965 in the Present case, as the execution of the decree was stayed by orders of the trial court and the appellate court. [700D-G).

692

(2) Since s. 28 of the Specific Relief Act, 1963, provides only for an application for rescission, of a decree for specific performance for sale or lease of immovable property no application to rescind a decree for specific performance of an agreement to sell movables would lie under that section. [701-A-B]

(3) But the Specific Relief Act, 1963, is not an exhaustive enactment, and under the law relating to specific relief a Court which passes a decree for specific performance retains control over the decree even after the decree had been passed. Therefore, the Court, in the present case, 'retained control over the matter despite the decree and it was open to the Court, when it was alleged that the party moved against had positively refused to complete, the contract, to entertain the application and order rescission of the decree if the allegation was proved. [701B-C; 703B-C]

Ramdas Khatau & Co. v. Atlas Mills Co. Ltd., A.I.R. 1931 Bombay 151; Rahmath Unnissa Begum v. Shimoga Co-operative Bank Ltd., A.I.R. 1951 Mysore 59; Firm Kishore Chand Shiva Charan Lal v. Budaun Electric Supply Co., A.I.R. 1944 All. 66, 77; Mohommadali Sahib v. Abdul Khadir Saheb, (1930) 59 M.L.J. 351; Pearisundari Dassee v. Hari Charan Mazumdar Chowdhry, I.L.R. 15 Cal. 211; Someshwar Dyal v. Widow of Lalman shah, A.I.R. 1958 All. 488, Anandilal poddar v. Gunendra, A.I.R. 1966, Cal. 107 and Tribeni Tewary v. Ramratan Naina, A.I.R. 1959 Patna 460, referred to.

(4) The respondent had, by his conduct and letter evinced an intention not to perform his part of the contract. Therefore, the fact that no time had been fixed in the decree would not preclude the Court from adjudging the contract as rescinded. [705 E-H]

(a) If a contract does not specify time for performance the law will imply under s. 46 of the Contract Act that the parties intended that the obligation under the contract should be performed within a reasonable time depending on the circumstances of the case. The Contract between the parties was not extinguished by the passing of the specific performance decree and as the contract subsisted despite the decree, and as the decree did not abrogate or modify any of the express or implied terms of the contract it must be presumed that the parties to the contract were under the obligation to complete it within a reasonable time. [703E-H]

(b) The respondent, by exercising his option to purchase the 51% shares became entitled to obtain a conveyance of the share from the appellant on payment of the purchase money. There was no provision in the agreement as to when thereafter the appellant should convey the shares. Therefore, it was open to either party to make time essential by intimating the other party, after a reasonable period, about it after expressing its or his readiness and willingness to perform its or his obligation under the contract. The liberty was not taken, away because a decree

had been passed for specific performance of the contract without fixing the time for its performance. [703H; 704A-C] Observations in Fry on Specific Performance 6th edn. p. 546 and Halsbury's Laws of England 3rd edition vol. 36, 351 to 352, explained.

(5) As the receiver had the shares in his possession, and as there was an order of the Court directing him to deliver possession 'of the shares on payment of the purchase money, intimation regarding which was given by the appellant to the respondent, there is no substance in the objection that the appellant was not in a position to deliver the shares., [705F-G]

693

(6) When the Court adjudges rescission of a contract or a decree it is only concerned with the question whether, the person rescinding it was justified in doing so. In the present case when the appellant came to the Court with its application for rescission there was already a rescission of the contract and the decree by its letter dated February 11, 1967. It only wanted a declaration by adjudgment by the Court that it was justified in doing so. The Court did not create any right which the parties did not possess when it made a declaration that the contract had been validly rescinded. Merely because it is necessary for the Court to pass such an order it does not follow that it is the Court that rescinds the contract. It is only deciding upon the validity of the rescission already made by the party. [706A-E]

Therefore, the respondent could not complain that, because the appellant obtain a stay of the order passed by the trial court giving the respondent a fortnight's time to pay the purchase money the appellant prevented him from paying the purchase money, and resist the prayer for rescission. [706A-B]

Abram Steamship Company Ltd. v. Westville Shipping Company Ltd. L.R. [1923] A.C. 781, referred to.

(7) There is no substance in the contention of the respondent that the appellant was not in a position to give a good title to the shares because 'A' company claimed a lien in respect of the shares. [707C-D]

(8) It could not be contended that the remedy of the appellant was to execute the decree for specific performance as a decree for money. [709B-C]

A decree for specific performance is a decree in favour of both the plaintiff and defendant in the suit, but it could be executed only in the manner prescribed by O.31, r. 32, C.P.C. The appellant could not have executed the decree against the respondent as a money decree and realised the purchase money from him. Therefore, if the respondent refused to pay the purchase money there was nothing which prevented the appellant from applying for rescission of the decree. [707E-H; 708G-H; 709]

Heramba Chandra Maitra v. Jyotish Chandra Sinha, A.I.R. 1932 Cal. 579 and Bai Karimabibi v. Abderahman Sayad Banu, A.I.R. 1923 Bom. 26, referred to.

(9) The only question with which the Court was concerned was whether the respondent had disabled himself from performing his part of the obligation under the decree. The fact that attachments of the decree by creditors prevented him from performing his part of the obligation under the decree or obtain satisfaction thereof would not him any the less a defaulter so far as performance of his part of the obligation under the decree is concerned. [709E-G]

(10) There is no substance in the contention that the attachment, by B-company of the 51% shares made it

impossible for, the appellant to deliver the shares to the respondent as the attachment order directed that the 51% shares should be produced for delivery to the respondent against payment of the consideration mentioned in the specific Performance decree. [709G-H]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 488 of 1971.

--1031 Sup.CI/72

694

Appeal from the judgment and, decree dated September 14, 1970 of the Calcutta High Court in Appeal No. 148 of 1969.

S. Y. Gupte, S. B. Mukherjee, B. N. Garg, K. K. Jain, D. N. Sinha, Lina Seth, M. M. N. Pombra and H. K. Puri, for the appellant.

R. C. Dev, Somnath Chatterjee, M. Bose, S. Swarup and P. C. Bhartari, for respondent No. 1.

A. K. Sen, Shanker Ghosh, D. N. Gupta, N. Khaitan, Krishna Sen and B. P. Singh, for respondent No. 4.

S. S. Khanduja, Promod Swarup and Lalita Kohli, for respondents Nos. 7 and 8.

Gobind Das and B. D. Sharma, for respondent No. 1.

The Judgment of the Court was delivered by Mathew, J.- This is an appeal with certificate- from a judgment of a Division Bench of the Calcutta High Court, setting aside the order of a single judge of the Court allowing an application filed by the appellant for rescission of an agreement for sale dated October 30, 1956, as also the decree dated February 25, 1964, for specific performance of the agreement and for other alternative reliefs specified in the application.

Hungerford Investment Trust Limited, (in voluntary liquidation) hereinafter called 'Hungerford' was the owner of 100 per cent shares in Turner Morrison & Co., hereinafter called 'Turner Morrison. John Geoffrey Turner and Nigel Frederic Turner, both since deceased, were the owners of the 100 per cent shares of Hungerford. The entire share capital of Turner Morrison consisted of 4,500 fully paid up ordinary shares of Rs. 1,000/each.

By exchange of letters it was agreed that Haridas Mundhra, hereinafter called 'Mundhra' would purchase from 'Hungerford, 49 per cent shares of Turner Morrison. The agreement also provided for an option to Mundhra to purchase from Hungerford, the balance of 51 per cent shares of Turner Morrison within 5 years. A formal agreement dated October 30, 1956, was executed between Hungerford, John Geoffrey Turner and Nigel Frederic Turner on the one hand, and British India Corporation and Haridas Mundhra on the other, embodying the terms of the agreement. Pursuant to this agreement, 49 per cent of the shares in Turner Morrison was sold and transferred to Mundhra and his nominee British India Corporation. Thereafter, Mundhra exercised his option to purchase, the 51 per cent shares. But the

695

shares were not sold or transferred to him. So, on April 19, 1961, Mundhra filed a suit against Hungerford, Turner Morrison and others for specific performance of the agreement to sell the 51 per cent shares (Suit No. 600 of 1961). As Mundhra did not want to proceed against Turner Morrison, the suit was dismissed as against that company and a decree was passed on February 25, 1964. The decree provided that the agreement relating to the sale of 51 per cent ordinary shares of Turner Morrison ought to be

specifically performed and directed Hungerford to deliver to Mundhra, the 51 per cent shares against payment of the consideration of Rs. 86,60,000/-. An injunction was also granted restraining Hungerford and the other defendants in the suit from voting except in accordance with the instruction of Mundhra and restraining Hungerford from selling the shares to any person other than Mundhra. The decree, except as regards the injunction, was stayed by the trial judge, on the application of the appellant, for 3 weeks.

Hungerford, along with some other defendants, filed an appeal from the decree on March 18, 1964 (Appeal No. 69 of 1964) and obtained a stay of execution of the decree except in so far as it related to the injunction, until the disposal of the appeal. The appeal was dismissed on August 26, 1964, for the reason that it was withdrawn by the appellant, leaving Mundhra free to perform his part of the obligation under the decree.

By a Master's summons dated August 30, 1965, Hungerford made an application praying that Mundhra may be directed to implement the decree by paying Rs. 86,60,000/, the unpaid purchase money, within such time as the Court may direct, that Hungerford be directed to execute proper transfer deeds in respect of the 51 per cent shares within such time as the Court may direct; and that in default of payment of Rs. 86,60,000/- by Mundhra within the period to be fixed, the Court may order the rescission of the agreement and the decree. The application was dismissed on September 28, 1965, by Justice Ray, holding that the application was one for execution of the decree in Suit No. 600 of 1961 and must be in a tabular form and "that any imposition of time limit would be to engraft something on the decree which does not exist in the decree". Hungerford preferred an appeal against the said order (Appeal No. 286 of 1965). The appeal was dismissed on August 8, 1966. The application of Hungerford for leave to appeal to this Court was also dismissed on November 25, 1968.

Before the dismissal of appeal No. 69 of 1964 filed against the decree for specific performance in suit No. 600 of 1961, the Certificate Officer, 24 Parganas had attached that decree, as Mundhra failed to satisfy six certificates then pending against him.

696

In pursuance to a Memorandum issued by the Certificate Officer, Ray, J. made an order dated March 2, 1964, staying the execution of the decree until cancellation of the notice by the Certificate Officer or until the Certificate Officer or the debtor applied for execution of the decree. The decree in suit No. 600 of 1961 was also attached in execution of three other decrees, namely the decree obtained by Champaran Sugar Co. Ltd. and B British India Corporation Ltd. in suit No. 179 of 1960 of the Court of Civil Judge, Kanpur and those obtained by Kanpur Sugar Works Ltd. and British India Corporation Ltd. in suit No. 178 of 1960 in the Court of Second Civil Judge, Kanpur and the Life Insurance Corporation of India in special appeal No. 299 of 1961 of the High Court of Allahabad. The effect of these orders of attachment was that the decree-holder Mundhra was prohibited and restrained from alienating, transferring or charging his right, title and interest in the decree in suit No. 600 of 1961 or from obtaining satisfaction thereof. In February, 1965, Bank Hoffman A.G. obtained a decree D from Queen's Bench Division, London, for pound 657,345-17-9d. with interest at 41 per cent per annum from the date of decree against Romanigo Holdings S.A.H., a holding company

of Hungerford and also against Hungerford. Bank Hoffman executed the decree in the Court of District Judge, Delhi, and got the 51 per cent shares of Hungerford attached. The District Judge ordered the attachment and directed that the 51 per cent shares be produced in the High Court of Calcutta for delivery to Mundhra against payment of consideration mentioned in the specific performance decree.

Hungerford was in control of Turner Morrison upto February 25, 1964, when the injunction in regard to voting rights was granted. It had kept scripts of 707 shares out of 2,295 shares in the office of Turner Morrison. When Mundhra got control of Turner Morrison, these scripts went under his control and power. The Liquidators of Hungerford wrote on December 12, 1964, to Turner Morrison to deliver the scripts of 707 shares to M/s Sanderson and Margon, solicitors of Hungerford. The request for delivery of 707 shares was repeated by Sanderson and Margon on December 22, 1964. Turner Morrison wrote a letter on January 11, 1965 to K. N. Srivastava, Income Tax Officer, if the 707 shares' scripts could be delivered to Hungerford and if the Income Tax Officer had any objection to such delivery. On January 13, 1965, Turner Morrison's solicitors wrote to M/s. Sanderson and Morgan that 707 shares, had become the property of Mundhra and, for the first time, also claimed: that there was a lien on the shares. On January 18, 1956 K. N. Srivastava, the Income Tax.

697

Officer, wrote a letter raising objection to the delivery of 707 shares to Hungerford although the Income Tax Department had no claim on these shares.

Turner Morrison instituted a suit against Hungerford (Suit No. 2005 of 1965) in the Calcutta High Court claiming Rs., 79,70,802 as principal and Rs. 47,96,250.16 as interest, in respect of payment made by Turner Morrison to Income Tax authorities on behalf of Hungerford under section 23(a) of the Indian Income Tax Act, 1922. A claim was also made in the suit for possession and sale of the 2,295 shares in the exercise of their lien on those shares under Article 22 of the Articles of Association of the Company. Mundhra was not a party to the suit. Turner Morrison made an ex-parte application in the suit on July 8, 1966, for appointment of a receiver in respect of the 2,295 shares. Mr. K. B. Bose was appointed receiver, and he took possession of 1,588 shares from the First National City Bank. and 707 shares from the Police. On July 13, 1966, Sen J. passed an order confirming the order of appointment of the receiver and directing that the receiver will be at liberty to deliver the 51 per cent of shares to Mundhra on payment of Rs. 86,60,000/- in performance of his part of the obligation under the decree, if so required by the Court hearing appeal No. 286 of 1965. The order also provided that if Mundhra takes the shares on payment of the price directed to be paid by the decree, or in direction of the Court of appeal, the lien if any, as claimed by Turner Morrison will shift on to the money which the receiver would get from Mundhra.

Turner Morrison preferred an appeal against the order and applied for stay of the order. The stay was refused but the appeal was partly allowed on September 2, 1968, by setting aside the direction given to the receiver to tender the shares to Mundhra as also the direction that the lien of Turner Morrison would shift to the purchase money to be paid by Mundhra.

On March 21, 1967, the application from which the present appeal arises, was made by Hungerford (the appellant hero,-) before the High Court. The prayers in the application

were inartistically worded. It was prayed that the agreement dated October 30, 1956, and the decree dated February 25, 1964, passed in suit No. 600 of 1961 be rescinded, that the injunction granted by the decree in the suit be vacated unless Mundhra (the 1st respondent here) deposits Rs. 86,60,000/- in the Court or with the receiver in suit No. 2005 of 1965, that the receiver appointed in suit No. 2005 of 1965 be appointed as receiver in the suit for specific performance in respect of the said 2,295 shares, that the receiver be directed to tender, on a day certain, the said shares to

698

Mundra, and Mundhra be directed to pay the sum of Rs. 86,60,000/- to the receiver on that day and to declare that if Mundhra failed to pay the amount to the receiver on or before the day, the agreement dated October 30, 1956 and the decree dated February 25, 1964, would stand rescinded. This application was allowed by Masood J.

The learned judge overruled the objection of Mundhra that the application was not maintainable and held that it was maintainable under section 35 of the Specific Relief Act, 1877, notwithstanding the repeal of that Act by the Specific Relief Act, 1963, as the appellant had, an accrued right under the section to make the application even before the repeal.

The learned judge then found that Mundhra was not keen in paying the purchase money and getting transfer of the 51 per cent shares for the reason that the injunction granted by the Court in the decree in suit No. 600 of 1961 restraining the appellant from voting except in accordance with the instruction of Mundhra made him virtually the owner of 100 per cent shares in Turner Morrison, and if without paying any amount for the 51 per cent shares of Turner Morrison, he got control of Turner Morrison, it was to his interest not to pay anything to the appellant.

As regards the objection by Mundhra that since Turner Morrison claimed a lien on the 51 per cent shares and, therefore; the appellant was not in a position to deliver the shares free from encumbrance, he held that there was no bona-fides in the claim of Turner Morrison : firstly because the lien was not set up by Turner Morrison in its written statement in the suit filed by Mundhra for specific performance, secondly because in the suit filed by Turner Morrison claiming the lien, Mundhra, who was interested in the shares upon which the lien was claimed was not made a party and thirdly for the reason that by his letter dated November 29, 1955, Mundhra had agreed that Turner Morrison would pay the income tax liabilities of Hungerford to the extent of Rs. 46 lakhs. The learned Judge found it impossible to believe that Mundhra had no knowledge about the suit filed by Turner Morrison claiming the lien as he was in complete control of Turner Morrison at the time the suit was filed and said that Turner Morrison and Mundhra were colluding with each other to defeat the appellant in its attempt to get the purchase money from Mundhra and that suit No. 2005 of 1965 was instituted with the connivance, of Mundhra. The learned judge also found that even if Turner Morrison had a lien on those shares, since there was no covenant for tide, Mundhra was not justified in declining to take delivery of the shares on the score that Turner Morrison had a lien upon the shares.

699

The learned judge, after evaluating all the circumstances ultimately came to the conclusion that Mundhra committed breach of the contract which he was directed specifically to

perform, that he created a situation which made it practically impossible for him to perform his part of the obligation under the decree land that the agreement dated October 30, 1956 and the decree dated February 25, 1964, for specific performance must be rescinded. The learned judge, therefore, appointed the receiver in suit No. 2005 of 1965 as receiver of the 51 per cent shares and directed Mundhra to pay Rs. 86,60,000/- to the receiver within a fortnight from the date of the order and the receiver to hand over the 51 per cent of the shares to Mundhra's solicitors if the amount was paid as directed. The receiver was also directed to pay the amount to the solicitors of Hungerford. The stay order passed by Ray J. on March 2, 1964, was vacated and liberty was given to the Certificate Officer or the Tax Recovery Officer, 24 Parganas to take such steps against Mundhra as he thought fit. In default of payment of Rs. 86,60,000/- by Mundhra to the receiver within the time specified, the Court directed that the contract and the decree would stand rescinded and Hungerford absolved from all obligations under the said contract and the decree. Against the decision, the appellant filed appeal No. 148 of 1969 before a Division Bench of the Court and Mundhra filed a cross-objection.

The appellate Court found that if Mundhra was really interested in getting transfer of the shares by paying the money, he would not have allowed the opportunity to acquire the shares under the order dated July 13, 1966, to slip by, that Mundhra knew of the order of July 13, 1966, and also of the opportunity given to him by the order to get delivery of the shares on payment of the purchase money, but that he did not avail of the opportunity for the reason that, if without paying money, he could virtually enjoy the same advantage, it would be foolish from a businessman's point of view to invest any amount in purchasing the shares. The Court observed

"A businessman who files a suit for specific performance of a contract to buy shares and

prosecutes that suit to a successful termination in his favour, will not fritter away the benefit under the decree except for a higher or superior advantage and that advantage Mundhra got under the decree in suit No. 600 of 1961."

The Court then held that application filed by the appellant for rescission of the contract and the decree was not maintainable. The reasoning of the Court was two-fold. no Court 700

said that the appellant had no accrued, right to apply for rescission under section 35 of the Specific Relief Act, 1877, which would survive the repeal of that Act by the Specific Relief Act, 1963, and so, no application for rescission would lie under section 35 of the old Act read with section 6 of the General Clauses Act, 1897. It then, held that since section 28 of the Specific Relief Act, 1963, only provided for rescission of a decree for specific performance of a contract for the sale or lease of immovable property, the application was incompetent under the section and allowed the appeal and cross-objection in part.

We do not think that the appellant had an accrued right for rescission of the contract or the decree for specific performance under section 35 of the Specific Relief Act, 1877, when the Act was repealed by the Specific Relief Act, 1963, on March 1, 1964. It may be recalled that the decree in suit No. 600 of 1961 was passed on February 25, 1964 and

that the application for rescission of the decree was filed on March 21, 1967. Section 35 of the Specific Relief Act, 1877, so far as it is material for the purpose of this case, provided that where a decree for specific performance of a contract of sale or of a contract to take a lease has been made and the purchaser or lessee makes default in payment of the purchase money, which the Court has ordered him to pay, the decree may be rescinded as regards the party in default either by a suit or by an application. The right to rescind the decree under the section can arise only if the purchaser makes default in paying the purchase money ordered to be paid under the decree. Before the lapse of a reasonable time from the date of the decree, the appellant could have no right to have the decree rescinded on the ground of default of the purchaser. To put it in other words, the right of the appellant to have the decree rescinded was dependent upon the default of the purchaser in paying the purchase money. Such a default had not occurred when the Specific Relief Act, 1877, was repealed, as a reasonable time for the performance of the obligation under the decree had not elapsed from the date of the decree. The more important reason why there was no default in this case was that the execution of the decree in suit No. 600 of 1961 was stayed by orders of the trial and appellate Court till August 26, 1964. We, therefore, agree with the finding of the Division Bench that the appellant had no accrued right on the date of the repeal to file an application under section 35 of the Specific Relief Act 1877, which was saved under section 6 of the General Clauses Act, 1891. The mere right to take advantage of the provisions of an Act is not accrued right [see *Abbott v. The Minister for plans*(1)].

(1) [1895] A.C. 425.

701

We also agree with the finding of the Division Bench that since section 28 of the Specific Relief Act, 1963, provides only for an application for rescission of a decree for specific performance for the sale or lease of immovable property, no application to rescind a decree for specific performance of an agreement to sell movables, would lie under that section.

The question then is whether the application was maintainable under any other provision of the law. The Specific Relief Act, 1963, is not an exhaustive enactment. It does not consolidate the whole law on the subject. As the preamble would indicate, it is an Act "to define and amend the law relating to certain kinds of specific relief". It does not purport to lay down the law relating to specific relief in all its ramifications. In *Ramdas Khatau & Co. v. Atlas Mills Co. Ltd.*(1) it was held that the Specific Relief Act, 1877, was not exhaustive. In *Rahmath Unnissa Begum v. Shimoga Co-operative Bank Ltd.* another(2) the Court said that the Specific Relief Act, 1877, is founded on English equity jurisprudence and that it is permissible to refer to English Law on the subject wherever the Act did not deal specifically with any topic [see also *Firm Kishore Chand Shiva Charan Lal and another v. Budaun Electric Supply Co. Ltd.*(3)]. Although a matter on which the Act defines the law it might generally be exhaustive, the Act as a whole cannot be considered as exhaustive of the whole branch of the law of specific performance.

It is settled by a long course of decisions of the Indian High Courts that the Court which passes a decree for specific performance retains control over the decree even after the decree has been passed. In *Mahommadalli Sahib v. Abdul Khadir Saheb*(4) it was held that the Court which

passes a decree for specific performance has the power to extend the time, fixed in the decree for the reason that Court retains control over the decree, that the contract between the parties is not extinguished by the passing of a decree for specific performance and that the contract subsists notwithstanding the passing of the decree. In *Pearisundari Dassee v. Hari Charan Mozumdar Chowdhry*(5) the Calcutta High Court said that the Court retains control over the proceedings even after a decree for specific performance has been passed, that the decree passed in a suit for specific performance is not a final decree and that the suit must, be deemed to be pending even after the decree. The same view was taken in *Someshwar Dayal and others v. Widow of Lalman Shahand others*(6).. In *Anandilal Poddar v. Gunendra Kr. Roy and another*(7) Raj J, speaking

(1) A.I.R.1931 Bombay 151.

(2) A.I.R. 1951 Mysore 59.

(3) A.I.R. (31) 1944 Allahabad 66 at p. 77.

(4) (1930) M.L.J. Vol. 59, p. 351.

(5) I.L.R. Calcutta Series, Vol. XV, p. 211.

(6) A.I.R. 1958 Allahabad 488.

(7) A.I.R. 1966 Calcutta 107.

702

for the Court, said that the court retains control over the matter even after passing 'a decree for specific performance and that virtually, the decree is in the nature of a preliminary one,. In *Tribeni Tewary and others v. Ramratan Nonia and others*(1) it was held that the Court retains seisin of the case notwithstanding the fact that a decree for specific performance has been passed and that the decree is really in the nature of a preliminary decree. Fry in' his book(2) on Specific Performance states the law in England as follows

"It may and not unfrequently does happen that after judgment has been given for the-specific performance of a contract, some further relief becomes necessary, in consequence of one or other of the parties making default in the performance of something which ought under the judgment to be performed by him or on his part; as for instance, where a vendor refuses or is unable to execute a proper conveyance of the property, or a purchaser to pay the purchase money.....

"There are two kinds of relief after judgment for specific performance of which either party to the contract may, in a proper case, avail himself :

(i) He may obtain (on motion in the action) on order appointing a definite time and place for the completion of the contract by payment of the un-paid purchase-money and delivery over of the executed conveyance and title deeds, or a period within which the judgment is to be obeyed, and, if the other party fails to obey the order, may thereupon at once issue a writ of sequestration against the defaulting party's estate And effects....."

(ii) He may apply to the Court (by motion in the action) for an order rescinding the contract. On an application of kind, if it appears that the party moved against has positively refused to complete the contract, its immediate rescission may be ordered; otherwise, the order will be for rescission default of completion within a limited time....."

(1) A.I.R. 1959 Patna 460.

(2) Fry on Specific Performance, 6th ed. p.546.

703

In Halsbury's laws of England(1) the law is stated as under

"Ancillary relief may be obtained after

judgment in an action for, specific performance where such further relief becomes necessary.....

Either party may also obtain an order rescinding the contract in default of completion within a fixed time."

As the Court retained control over the matter despite the decree, it was open to the Court, when it was alleged that the party moved against has positively refused to complete the contract to entertain the application and order rescission of the decree if the allegation was proved. We, therefore, think that the application of the appellant was competent.

It was contended on behalf of Mundhra that he was always ready and willing to pay the purchase money, but since the decree did not specify any time for payment of the money, there was no default on his part. In other words, the contention was that since the decree did not specify a time within which the purchase money should be paid and, since an application for fixing the time was made by the appellant and dismissed by the Court, Mundhra cannot be said to have been 'in default in not paying the purchase money so that the appellant might apply for rescission of the decree. If a contract does not specify the time for performance, the law will imply that the parties intended that the obligation, under the contract should be performed within a reasonable time. Section 46 of the Contract Act provides that where, by a contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time and the question " what is reasonable time" is, in each particular case, a question of fact. We have already indicated that the contract between the parties was not extinguished by the passing of the decree, that it subsisted notwithstanding the decree. It was an implied term of the contract and, therefore, of the decree passed thereon that the parties would perform the contract within a reasonable time. To put it in other words, as the contract subsisted despite the decree and as the decree did not abrogate or modify any of the express or implied terms of the contract, it must be presumed that the parties to the decree had the obligation, to complete the contract within, a reasonable time.

The matter can be looked at from another angle. Mundhra by exercising the option to purchase the 51 per cent shares, became entitled to obtain a conveyance of the shares from the appellant on payment of the purchase money. There was no (1) Halsbury's Laws of England 3rd Ed., Vol. 36. 351-52.

704

vision in the agreement at what time or within what period after the exercise of the option the appellant should convey the shares against the payment of the purchase money. But it was open to either party to make time essential by intimating the other party after a reasonable period about it after expressing its or his readiness and willingness to perform its or his obligation under the contract. That liberty was not taken away because a decree has been passed for specific performance of the contract without fixing the time for the performance. The appellant could, therefore, have called upon Mundhra to pay the purchase money and take delivery of the shares within reasonable time. The fact that the decree did not fix a time for completing the contract did not prevent either party from demanding performance from the other party within a reasonable time and thus make time essential, as the parties had that liberty

before the decree was passed and the decree did not abrogate that liberty in any way, and if the party 'from whom performance was demanded evinced by his conduct that he was unwilling to perform his part, then it was open to the party claiming performance to rescind the contract and obtain an order from the Court adjudging rescission of the contract and the decree thereon. We do not think, in case the Court comes to the conclusion that the party moved against has by conduct evinced an intention not to perform his part of the contract, the fact that no time has been fixed in the decree would preclude it from adjudging the contract as rescinded. The observation of Fry already quoted does not mean that unless a time is specified in the decree there can be no default. It only means that if the conduct of the party moved against is equivocal, an order for rescission will be made only in default of completion within a specified time. Nor can the observation quoted above from Halsbury's Laws of England bear any other construction. We have already indicated that section 28 of the Specific Relief Act, 1963, deals only with rescission of a decree for specific performance "of an agreement to sell or lease immovable property and so the terms of the section are hardly relevant in deciding the question whether there can be default without fixing the time for performance in a decree for specific performance of an agreement to sell movables. We think it unnecessary to decide the question whether, under any circumstances, there can be default of performance where a decree for specific performance of an agreement to sell or lease immovable property does not specify the time of performance for the purpose of an application for rescission of the decree.

It is no doubt true that after the, decree in suit No. 600 of 1961, a stay was obtained by the appellant preventing the execution of the decree: an appeal was also preferred against that decree and a stay obtained for the same purpose, from the appellate court and

705

that the order continued in force till the, disposal of the appeal. On August 26, 1965. Till then, there can be no question of Mundhra being in default because he was not required by the orders of Court to perform his part of the obligation under the decree. But the question is, was he in default after August 26, 1965, in performing his part of the obligation under the decree? Counsel for Mundhra relied upon the observations in the order of Ray J. passed on the application on the Master's summons as well as in the order passed in the appeal (No. 286 of 1965) therefrom on August 18, 1966, to show that there was no offer by the appellant to deliver the shares. and, therefore, Mundhra was not in default in paying the purchase money. It will be recalled that on July 13, 1966, Son J. passed the order in suit No. 2005 of 1965 directing Mundhra to pay the purchase price and take delivery of the shares from the receiver. The learned judge further directed that the lien, if any, of Turner Morrison would shift to the purchase money to be paid to the receiver. This order, though passed in suit No. 2005 of 1965 in which Mundhra was not a party, was communicated to him by the letter of the appellant dated January 11, 1967. Even before that, two letters had been sent on July 28 and July 29, 1966, by the appellant's solicitors to Mundhra asking him to be ready with the sum to take delivery of the shares before the Court hearing appeal No. 286 of 1965. This was refused by Mundhra by his letter dated August 2, 1966. In the reply of Mundhra dated January 25, 1967, to the letter dated January 11, 1967, from the appellant, he

raised the objection that the appellant was not in a position to give delivery of the shares and that the order dated July 13, 1966, was not binding on him, as he was not a party to the suit in which the order was passed. As the receiver had the shares in his possession, there was no point in the objection raised by Mundhra that the appellant was not in a position to deliver the shares. In other words, the receiver had the shares in his possession, and as there was an order by the Court directing the receiver to deliver possession of the shares on payment of the purchase money subject to the order of the Court hearing appeal No. 286 of 1965, there was no substance in the objection that the appellant was not in a position to deliver the shares. Mundhra did not raise any objection on the score that the appellate court has not made any direction asking him to pay the purchase money as against the delivery of the shares by the receiver or that the receiver was not directed by that Court to deliver the shares. The only legitimate inference from his conduct is that Mundhra was deliberately putting forward the plea that the appellant was not in a position to deliver the share-, and that it was not ready and willing to perform its part of the contract only to avoid payment of the purchase money. Nor is there any substance in the contention of counsel for Mundhra that because the appellant obtained a stay of the order passed by Masud T. giving-

706

Mundhra a fortnight's time to pay the purchase money for taking delivery of the shares, the appellant- was precluded from contending that Mundhra committed default in the payment of the amount. In other words, there is no point in the contention of counsel that since the appellant itself obtained a stay of the order passed by Masud J. giving liberty to Mundhra to pay the purchase money within a fortnight from the date of the order, the appellant prevented Mundhra from performing his part of the obligation under the decree in suit No. 600 of 1961. When the appellant came to the Court with its application for rescission, there was already a rescission of the contract and the decree by its letter dated February 11, 1967, stating that Mundhra had forfeited his right to purchase the 51 per cent shares in pursuance of the decree in suit No. 600 of 1961, as he failed to fulfil his obligation in pursuance to the notice 'of the appellant on January 11, 1967. it only wanted a declaration by adjudgment by the Court that it was justified in doing so. A court generally adjudicates upon the antecedent rights of the parties. When a Court adjudges rescission of a contract or a decree, it is only concerned with the question whether the person rescinding it was justified in doing so. The Court does not create any right which parties did not possess when it makes a declaration that a contract has been validly rescinded. Merely because it is necessary for the Court to pass an order of rescission, when a controversy arises, it does not follow that it is the Court that rescinds the contract. The Court is only passing upon the validity of the rescission already made by the party. In *Abram Steamship Company Ltd. and another v. Westville Shipping Company Ltd.*(1), their Lordships of the House of Lords said

Where one party to a contract expresses by word or art in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of

his election, if justified by the facts, terminates the contract, puts the parties in status quo ante and restores things, as between them, to the position in which they stood before the contract was entered into. It may be that the facts impose upon the party desiring to rescind the duty of making restitution in integrum. If so, he must discharge that duty before the rescission is, in effect accomplished. But if the other party to the contract questions the right of the first, to rescind, thus obliging the latter to bring an action at law to enforce the right he has secured for himself by his election, and he later gets a verdict, it is an entire mistake to suppose that it is this verdict which by itself terminates the contract and restores the antecedent

(1) Law Reports, Appeal Cases, 1923, p. 773 at p. 781.

707

status. The verdict is merely the judicial determination of the fact that the expression by the plaintiff of his election to rescind was justified, was effective, and put an end to the contract....."

The rights of the parties became crystallized when the appellant, by its letter dated February 11, 1967, rescinded the contract and the decree based thereon and when Masud J. adjudged that the contract and the decree be rescinded. Mundhra cannot, therefore, complain that he was prevented by appellant from paying the purchase money in pursuance of the order of Masud J. and resist the prayer for rescission.

There is no substance in the contention of counsel for Mundhra that the appellant was not in a position to give a good title to the shares because Turner Morrison has a lien upon the shares. The question whether Turner Morrison has a lien upon the shares has been finally decided by this Court in Appeal No. 1223 (N) of 1970 filed by Turner Morrison, holding that they have no lien in respect of these shares.

It was contended that if Mundhra committed default in payment of the purchase money, the remedy of the appellant was to execute the decree for specific performance as the decree was a decree in favour of both the appellant and Mundhra and that the decree in favour of the appellant was a decree for money.

A decree for specific performance is a decree in favour of both the plaintiff and the defendant in the suit. In *Heramba Chandra Maitra v. Jyotish Chandra Sinha and others*(1) Rankin C.J., speaking for the Court, said that a decree for specific performance operates in favour of both plaintiff and defendant and that the decree is capable of being executed by either [see also *Bai Karimabibi v. Abderehman Sayad Banu*(2)]. Counsel for Mundhra, therefore, argued that it was open to the appellant to have executed the decree and realised the purchase money from Mundhra instead of resorting to the remedy of rescission. Order 21, rule 30 provides for execution of a decree for money. That rule can possibly have no application to the execution of a decree for specific performance, firstly for the reason that a specific mode for execution of a decree for specific performance is provided by Order 21, Rule 32 and secondly, because no decree for money is passed in a suit for specific performance. Order 21, Rule 32 provides as follows :-

"(1) Where the party against whom a decree for the specific performance of a contract, 'or

for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has

(1) A.I.R. 1932 Calcutta 579.

(2) A.I.R. 1923 Bombay ;6.

708

wilfully & Ref to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction by his detention in the civil prison, or by the attachment of his property or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of one year from the date of the attachment, no application to have the

property

sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any, of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree."

The execution of a decree for specific performance can only be in the manner prescribed by this rule sub-rule (1) of the rule says that if a decree for specific performance is not obeyed, the decree is to be enforced by the detention of the party in default in the civil prison or by attachment of his property or by both. The detention in the civil prison of the party who failed to obey the decree and the attachment of his property are simply the means

709

to compel him to obey the decree. That is made clear by Subrule (3) which says that if the judgment-debtor has failed to obey the decree when the attachment has remained

in force for one year the property attached may be, sold and out of the proceeds the decree-holder may be awarded such compensation as the Court thinks fit. Sub-rule (5) which provides that the Court may direct the act required to be done may be done by the decree-holder or some other person appointed by the court can only refer to an act other than an act of payment of money. We do not think that the appellant could have executed the decree against Mundhra as a money decree and realised the purchase money from him. Therefore, it Mundhra refused to pay the purchase money, there was nothing which prevented the appellant from applying for rescission of the decree.

It was then contended that the attachments of the decree in suit No. 600 of 1961 by the creditors of Mundhra prevented him from tendering the purchase money to the appellant and take delivery of the shares as the attachments prevented him from obtaining satisfaction of the decree by paying the purchase money and obtaining delivery of the shares. In other words, the contention was that because of the attachments Mundhra could not have paid the purchase money to the appellant as that would have been in contravention of the orders of the Court attaching the decree. We do not think that there is any substance in this contention. If the creditors of Mundhra attached the decree and he was prevented from tendering the money because of the attachment, he has only to blame himself. The only question with which the Court is concerned is whether Mundhra has disabled himself from performing his part of the obligation under the decree. The inability to pay off the creditors was the proximate cause of the attachments and the responsibility for the same was that of Mundhra. The fact that the attachments prevented him from performing his part of the obligation under the decree or obtaining satisfaction thereof would not make him any the less a defaulter, so far as the performance of his part of the obligation under the decree is concerned. Nor is there any substance in the contention of counsel for Mundhra that the attachment by Bank Hoffman of the 51 per cent shares under the order of the District Judge of Delhi made it impossible for the appellant to deliver the shares to Mundhra, as the attachment order directed that the 51 per cent shares should be produced before the Calcutta High Court for delivery to Mundhra against payment of the consideration mentioned in the decree in suit No. 600 of 1961.

We, therefore, allow the appeal and set aside the judgment under appeal and order the rescission of the decree for specific performance passed in suit No. 600 of 1961. We direct Shri K. B. Bose, Barrister, Member, Bar Library Club, Calcutta High

17-L1031SupCI/72

710

Court, the receiver appointed in suit No. 2005 of 1965 and who was appointed as receiver of the shares by the proceedings dated July 14, 1969, of Masud J. in suit No. 600 of 1961, to produce the 2,295 shares before this Court and give custody of the same to the Registrar of this Court. The Registrar will hand them over to the appellant.

The Receiver has informed this Court that the remuneration the shares in this Court in pursuance of this judgment.

We allow the appeal with costs.

ORDER

In modification of our earlier order dated March 9, 1972 we now direct the Receiver to deliver the shares to the Registrar of the Calcutta High Court on the original side within 10 days from this date. The Registrar will hand-over

the shares to Mr. B. M. Bagaria, a Solicitor of the Calcutta High Court, on behalf of Hungerford Investment Trust Ltd. (The Receiver has informed this Court that the remuneration due to him has not yet been paid. The Receiver may move the Calcutta High Court for necessary orders in this connection.

In modification of our earlier order dated March 9, 1972 regarding costs' we direct that in Civil Appeal No. 488 of 1971 the costs will be paid by the contesting defendants, V.P.S.

711

JUDIS