



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4943 OF 2022

Annasa Wamansa Kshatriya Since Deceased Through Lrs
Prabhavatibai Wamansa Kshatriya And Others

VERSUS

Kailas Ramdas Patil

- Mr. G. V. Wani, Advocate for the Petitioners
- Mr. C. S. Kulkarni, Advocate for the Respondent

CORAM : R. M. JOSHI, J

DATE : FEBRUARY 11, 2025

PER COURT :

1. This Petition takes exception to the order passed below Exh. 91 in Special Darkhast No. 07/2007 dated 03.03.2022 dismissing the application filed under Section 28 of the Specific Relief Act (for short 'the Act') by the Petitioner/Original Defendants/Judgment Debtor.

2. The facts which led to the filing of this Petition can be narrated in brief as under:

Petitioners are Defendants in Special Darkhast No. 07/2007. The said proceeding was filed for specific performance of contract. It came to be decreed. Specific performance was granted with following

directions:

"Suit is decreed with costs.

Plaintiff shall pay Rs. 5,00,000/- to defendant within two months and then, defendant shall execute a registered sale-deed of the suit-house in favour of plaintiff within 15 days after clearing the encumbrance of Co-operative Credit Society of Graduate Persons, Parola and also put plaintiff in actual possession of the suit-house at the time of executing such sale-deed.

In case, defendant fails to execute such sale-deed after plaintiff having made payment of the balance amount of consideration of Rs.5,00,000/-; then, plaintiff shall be entitled to get executed such sale-deed through Court.

Defendant shall pay costs of this suit to plaintiff and bear his own.

Decree be drawn up accordingly."

3. Defendants took exception to the said decree by filing First Appeal being RCA No. 33/2012 unsuccessfully. The judgment and decree passed by the Trial Court and confirmed by First Appellate Court, came to be confirmed by this Court in Second Appeal No. 5/2016.

4. During the pendency of the First Appeal,

execution proceeding came to be filed being Regular Darkhast No. 8/2012. After the dismissal of the Second Appeal filed by the Defendants, an application was moved on 15.10.2019 by Plaintiff/Respondent herein for deposit of sum of Rs. 5,00,000/- as directed under the decree. The Execution Court passed order permitting deposit of the said amount without prejudice to the rights and contention of the parties. In this backdrop, application Exh. 91 came to be filed under Section 28 of the Act for rescission of the contract. The Trial Court rejected the application by observing that once the Plaintiff is permitted to deposit amount, no objection in that regard can be permitted to be raised by the judgment debtor.

5. Learned Counsel for the Petitioners has drawn attention of the Court to Section 28 of the Act to contend that the Plaintiff has failed to pay purchase money as per the decree passed by the Trial Court. In order to support his submissions, he drew attention of the Court to the fact that the only for limited period there was stay to the said decree before the First Appellate Court, however, during the proceedings of the

Second Appeal there was no stay to the decree at all. Thus, it is his contention that when the Plaintiff has offered to deposit the amount, the same has not been done in accordance with the directions issued by the Trial Court while passing the decree. It is his contention that the Execution Court has permitted the said deposit without prejudice to the rights and contention of the parties and hence, acceptance of deposit by Execution Court is no decision on the said point. According to him, Execution Court has committed error in rejecting the application solely on the ground that once the Plaintiff is permitted to deposit the said amount, no objection to that extent can be raised by the judgment debtor.

6. Learned Counsel for Respondent supported the impugned order by contending that three Courts are in his favour and as such, there is no reason to deny execution of the decree. He drew attention of the Court to Section 28 of the Act to contend that no application could have been filed before the Execution Court for rescission of the contract. It is his submission that as per the said provision the said application would

lie only before the same Court i.e., the Court which has passed the decree in question. It is his submission that even in this case the decree has been transferred to other Court for execution and as such, it is not open for the said Court to entertain such application. In support of his submissions, he placed reliance on the judgment of the Hon'ble Supreme Court in case of *Ishwar (Since Deceased) thr. Lrs and Others vs. Bhim Singh and Another, 2024 SCC OnLine SC 2338.*

7. There cannot be any dispute with regard to the proposition of law sought to be canvassed by the learned Counsel for the Respondent about invocation of Section 28 of the Act by filing application before the Court which has passed the decree in question. The Hon'ble Supreme Court in case of *Ishwar* (supra) has reproduced the observations made in *Ramankutty Guptan v. Avara, [1994] 1 S.C.R. 542* case, which reads thus:

"9. The question then emerges is whether it should be on the original side or execution side. Section indicates that it should be "in the same suit". It would obviously mean in the suit itself and not in the execution proceedings. It is equally settled law that after passing the decree for specific performance, the Court does not cease to have any jurisdiction. The Court retains

control over the decree even after the decree has been passed. It was open to the Court to exercise the power under Section 28(1) of the Act either for extension of time or for rescinding the contract as claimed for. Since the execution application has been filed in the same court in which the original suit was filed, namely, the court of first instance, instead of treating the application on the execution side, it should have as well been numbered as an interlocutory application on the original side and disposed of according to law. In this view, we feel that the judgment of the Bombay High Court laid down the law correctly and that of the Andhra Pradesh High Court is not correct. The High Court, therefore, is not right in dismissing the application treating it to be on execution side, instead of transferring it on the original side for dealing with it according to law."

(Emphasis supplied)

8. These observations clearly shows that the Court cannot go into the technicalities and whether the Trial Court and the Execution Court is the same, it may be open for the party to make such application under Section 28 of the Act even before the Execution Court. Though all these issues are relevant for the decision by the Execution Court, in the impugned order Execution Court has not at all dealt with the same. Perusal of the impugned order shows that solely on the ground that

Plaintiff was permitted to deposit Rs. 5 lacs on 15.10.2019, application came to be rejected. Execution Court has not considered the order passed by it while permitting deposit of the said amount. For the sake of convenience, the said order is reproduced thus:

"Heard both parties. Without prejudice to rights of parties, D.H. is permitted to deposit the Demand Draft as prayed. Asst. Supt to accept the same for payment to J.D. or any other persons on their behalf, as per order, which will be passed in future."

9. This order clearly indicates that the right of the Plaintiff was not decided by the Execution Court when the deposit of Rs. 5 lacs is permitted. Once the Court passes the order without prejudice to the rights of the parties, it is within the right of the judgment debtor to make application under Section 28(1) of the Act. In such circumstances, it was absolutely essential for the Execution Court to pass order on merit rather than dismissing the application on the ground that amount was permitted to be deposited without prejudice to the rights and contention of parties.

10. It would be relevant to take note of Section 28 of the Act, which reproduced thus:

28. Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed.—

(1) Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser or lessee does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.

(2) Where a contract is rescinded under sub-section (1), the court—

(a) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and

(b) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposit in connection with the contract.

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

(a) the execution of a proper conveyance or lease by the vendor or lessor;

(b) the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease.

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

(5) The costs of any proceedings under this section shall be in the discretion of the court.

11. This provision clearly demonstrates that in a decree of specific performance, if there is no payment of purchase money in time specified or extended period, it is open for the judgment debtor/vendor to apply for rescission of contract. Once such application is made, it is obligatory on part of the Court before which such prayer is made to decide the same on considering merit of the case. The Execution Court dealt with application

but failed to record any reason as expected by this provision to decide the same.

12. Though now submissions are sought to be made on the points which are not considered by the Execution Court, this Court in exercise of writ jurisdiction does not wish to enter upon it for the first time. Doing so will amount to denial of remedy as per law to the unsuccessful party. The only option left for this Court therefore is to set aside the impugned order and relegate back proceeding to Execution Court for decision afresh on Exh. 91.

13. In the result, order impugned passed below Exh. 91 in Special Darkhast No. 07/2007 dated 03.03.2022 is set aside. Execution Court to decide Exh. 91 afresh on merit without being influenced by observations made above.

14. Since the execution proceeding is more than 10 years old, the Execution Court is directed to decide the said proceeding within three months from today. All contentions of the parties are kept specifically open.

(R. M. JOSHI, J.)