IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

THURSDAY, THE 6TH DAY OF AUGUST 2015/15TH SRAVANA, 1937

CRP.No. 716 of 2013

ORDER DTD.11.9.2013 IN IA.1442/2012 IN OS.NO.16/1996 OF SUB COURT, KANNUR
....

REVISION PETITIONER(S)/DEFENDANT:

KANIYATTIL UMMAKULSUMMA, AGED 51 YEARS,
W/O.AHAMMED KUTTY, KOLAKAM, EDAYANNUR [P.O].,
KANNUR DISTRICT.

BY ADV. SRI.P.U.SHAILAJAN

RESPONDENT(S)/PLAINTIFF:
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P.T VIJAYAKUMAR, AGED 51 YEARS,
S/O.KALLYANI AMMA, RESIDING AT VELLUR AMSOM, DESOM,
P.O.VELLUR, (VIA) PAYYANUR, TALIPARAMBA TALUK,
KANNUR DISTRICT - 670 346.

BY ADV. SRI.A.KRISHNAN

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 06-08-2015, ALONG WITH CRP. 719/2013, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

msv/

CRP.No. 716 of 2013

<u>APPENDIX</u>

<u>PETITIONER(S)' ANNEXURES:</u>

ANNEXURE A1: CERTIFIED COPY OF THE IA.NO.710/2011 IN OS.NO.16/96 ON THE FILE OF THE SUB COURT, THALASSERY.

<u>RESPONDENT(S)' ANNEXURES:</u>

NIL

//TRUE COPY//

P.A.TO JUDGE.

Msv/

[CR]

B. KEMAL PASHA, J.

....

C.R.P. Nos. 716 and 719 of 2013

....

Dated this the 6th day of August, 2015

<u>O R D E R</u>

(1) Can an application under Section 28 (3) of the Specific Relief Act, 1963 be filed without making the deposit/payment of the purchase money?

(2) Is there any period of limitation prescribed for the deposit/payment of the purchase money for the execution of a decree for specific performance of a contract of sale of an immovable property?

(3) Is there any period of limitation prescribed for filing the application under Section 28(3) of the Specific Relief Act, 1963?

(4) Is there any remedy available to the judgment debtor against an unwilling decree holder in a case wherein a decree for specific

performance of a contract of sale of an immovable property is passed, without stipulating the time for the deposit/payment of the purchase money?

(5) Whether deliberate unwillingness to deposit/pay the purchase money is a valid ground for getting the contract for sale rescinded under Section 28(1) of the Specific Relief Act, 1963?

2. C.R.P. No.716 of 2013 is filed against common order dated 11.09.2013 passed by the Subordinate Judge's Court, Kannur, so far as it relates to I.A.No.1442 of 2012. The said IA was disposed of through the aforesaid common order along with IA No.1443 of 2012. It is by challenging that order in IA No.1443 of 2012, C.R.P. No.719 of 2013 has been filed.

3. The petitioner is the defendant in O.S.No.16 of 1996 of the Subordinate Judge's Court, Thalassery. The said suit was one for specific performance of a contract of sale of an immovable property. The defendant denied the execution

of the contract. According to the plaintiff, the total consideration was fixed at ₹2,50,000/-, out of which, an amount of ₹1,50,000/- was paid by the defendant to the plaintiff, as part of consideration. The suit was decreed in favour of the plaintiff on 17.07.1999. Challenging the judgment and decree, the defendant filed A.S.No.732 of 1999 before this Court on 29.10.1999. The said appeal was dismissed on 26.03.2009.

4. On 05.06.2010, the plaintiff filed IA No.2260 of 2010 before the Subordinate Judge's Court, Thalassery in O.S.No.16 of 1996, purportedly one under Section 28(3) of the Specific Relief Act, 1963(for short 'the Act'). In the said IA, it was specifically averred by the plaintiff that he had already deposited the balance consideration before the said court. In fact, the balance consideration was not paid or deposited. In the mean time, the defendant filed IA No.4139 of 2010 before the said Court under Section 28(1) of the Act for getting the contract rescinded on the ground that the

purchase money was not deposited or paid.

5. Thereafter, the plaintiff filed IA No.710 of 2011 before the Subordinate Judge's Court, Thalassery on 08.02.2011 with an averment that the plaintiff was under the impression that the balance consideration was deposited before the court below, and only by 05.02.2011 he could understand that the amount was not deposited before the court. Through the said IA, the plaintiff sought permission from the court below to permit the plaintiff to deposit the balance consideration of ₹1,00,000/- before the court below.

6. According to the defendant, who is the petitioner herein, IA No.710 of 2011 was filed behind the back of the petitioner; without notice to the petitioner. Even though notice was ordered by the court below, no steps were taken on the said IA and no copy was served on the defendant. The said IA was taken up by the said court on 11.03.2011. The plaintiff alone was heard and the same was allowed and the plaintiff was permitted to deposit the amount. Even on

that date, the petitioner herein was not made aware of the said fact.

7. On the formation of the Subordinate Judge's Court, at Kannur, IA No.2260 of 2010 as well as IA No.4139 of 2010 were transferred to the Subordinate Judge's Court, Kannur where it was renumbered as IA Nos.1442/2012 and 1443/12 respectively. Through the common order, the Subordinate Judge's Court, Kannur allowed IA No.1442 of 2012 with costs and dismissed IA No.1443 of 2012 with costs.

8. Heard the learned counsel for the petitioner and the learned counsel for the respondent.

9. The learned counsel for the petitioner has argued that the respondent ought to have paid the balance consideration within 30 days from 17.07.1999, i.e. the date of decree. The appeal was filed only on 29.10.1999. Therefore, it could not be said that there was any obstruction in making the payment of purchase money on or

before 17.08.1999. Strangely, it can be noted that there was no request from the part of the plaintiff before the Subordinate Judge's Court, Thalassery for extension of time for the deposit or payment of the balance consideration. When the appeal was filed on 29.10.1999 only, in normal course, the plaintiff ought to have paid the purchase money on or before 17.08.1999 or ought to have filed an application for extension.

10. The question to be considered is whether IA 1442/2012, which was originally filed as IA No.2260/10 before the Subordinate Judge's Court, Thalassery by the respondent herein, could be treated as an application under Section 28(3) of the Act. As per Section 28(3) of the Act, if the purchaser pays the purchase money 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 such further relief in the suit, including the relief of, *(a) the execution of a proper conveyance by the vendor; and (b)*

the delivery of possession of the property on the execution of such conveyance.

11. Therefore, from the wordings of Section 28(3), it is evident that it is a pre-condition for filing an application under Section 28(3) that the plaintiff should pay the purchase money within the period mentioned under Section 28(1). It is true that as per Section 28(1), the court can allow such further period for the payment of purchase money. Section 28(1) enables the defendant to file an application for the rescission of the contract, on the failure of the plaintiff to pay the balance purchase money within the period allowed by the decree or within such further period as the court may allow. In such case, it is a pre-condition for filing an application under Section 28(1) by the defendant that there should be failure from the part of the plaintiff to pay the purchase money within the period prescribed in the decree or within such further period as the court may allow.

12. If an application is filed by the plaintiff seeking the

execution of the conveyance or delivery of the property, as the case may be, without paying the purchase money as contemplated under Section 28(1), such an application cannot be treated as an application under Section 28(3) of the Act.

13. Admittedly, the balance purchase money was not paid on 05.06.2010 when IA 2260 of 2010 was filed. There is a specific assertion in the affidavit filed in support of the said IA that *"This plaintiff has already deposited the balance consideration before this court and the chalan receipt is produced"*. Not only that the amount was not deposited, but also that the plaintiff had played fraud on court by making such a false averment in the affidavit in support of the IA in order to make it appear that it was a valid application under Section 28(3) of the Act. A person, who plays fraud on court, is not entitled to any relief from or assistance of the court. It cannot even be imagined that the respondent was unaware of the fact that the amount was not deposited. The same is

evident from the aforesaid assertion that *'the plaintiff had made the deposit before court and produced the chalan receipt'* also.

14. According to the learned counsel for the respondent, as the Subordinate Judge's Court, Thalassery has permitted the respondent to deposit the balance purchase money of ₹1 lakh vide order dated 11-03-2011 in IA No.710 of 2011, it has to be treated as an extension of time within the meaning of Section 28(1) of the Act.

15. The learned counsel for the respondent has relied on the decision rendered by the Madhya Pradesh High Court in ***Khoobiram v. Urmila Chouhan and Ors.*** *[2010 KHC 6784],* which was a case wherein the judgment debtor was directed through the decree to receive the balance consideration and to execute the sale deed within a period of two months from the date of decree. In that case, it was held that there was no direction in the decree to the decree holders to pay or deposit the balance consideration

within a period of two months. According to the learned counsel for the respondent, here in this case also the decree was one directing the defendant to execute or to register the sale deed in respect of the plaint schedule property in favour of the plaintiff after accepting the balance consideration of ₹1 lakh from the plaintiff within a period of 30 days from the date of decree, failing which the plaintiff could get the document executed through court.

16. It seems that in the **Khoobiram's case*(supra)***, the Madhya Pradesh High Court has held that in such a case the defendant ought to have demanded the amount from the decree holder through a demand notice or the defendant ought to have executed the decree to get the balance purchase money from the plaintiff. With respect, this Court disagree with the said view. This court is of the view that the decision in ***Khoobiram's case(****supra)* cannot be considered as a persuasive precedent. If the judgment debtor has to file an execution petition against the decree holder for the

balance purchase money, Section 28(1) of the Act will become redundant. In a case wherein a decree for specific performance is passed, and the plaintiff/decree holder refuses to pay the purchase money and to get the conveyance executed, it cannot even be imagined that the defendant/judgment debtor has to execute the decree for the realisation of the purchase money and to execute the deed of conveyance in favour of such an unwilling plaintiff. If the defendant has to run after such an unwilling plaintiff, Section 28(1) of the Act should not have been there in the statute.

17. Even though IA No.710 of 2011 was filed on 08.02.2011, the decree holder has not sought for the extension of time for making the payment of purchase money or the deposit of purchase money. The learned counsel for the respondent is relying on the decision of this Court in ***Raveendran v. Gopi*** *[2014 (4) KLT 127]*. That decision has no application to the present case, as the

request in that case was one for rescission of the decree and not for the rescission of the contract. In that case, this Court found that what is contemplated under Section 28(1) is not the rescission of decree, whereas, it is one for the rescission of the contract. In that case, this Court has observed that when the defendant had denied the execution of the contract, he cannot be heard to say that the decree has to be rescinded. Principles in that decision are not squarely applicable to the facts and circumstances of the present case.

18. The learned counsel for the respondent has further relied on the decision of this Court in ***Sreenarayanan v. Huzain [2012 (3) KLT 326]*** wherein it was held that under Section 28, the court has power to grant extension of time for the deposit of balance sale consideration and as such the power could be exercised more liberally, than under Section 5 of the Limitation Act.

19. This Court is of the view that Section 29(2) of the

Limitation Act has no application to the peculiar facts and circumstances of this case. As per Section 29(2), where any special or local law prescribes for any suit or appeal or application a period of limitation different from the period prescribed by the Schedule, through the application under Section 29(2) of the Limitation Act, provisions contained under Sections 4 to 24 of the Limitation Act are made applicable. Any period of limitation has not been prescribed under Section 28(3) of the Specific Relief Act for the payment of purchase money. From the wordings of Section 28(1) of the Act, it is evident that the concerned court has the duty to stipulate a time for the payment of purchase money. The court has also power to extend the said time. Even in cases wherein the court has not fixed any time for the payment of purchase money, it cannot be said that the defendant is left without any remedy. In such cases also, the defendant can have resorted to Section 28(1) of the Act.

20. Once the purchase money is paid, situation

changes. As per Section 28(3) of the Act, in order to file an application, it is a precondition that the plaintiff should pay the purchase money. Apart from that, no period of limitation has been prescribed under Section 28(3) of the Act for filing an application under Section 28(3) of the Act. When no period of limitation has been prescribed for filing such an application, it seems that the position would be governed by Article 137 of the Limitation Act, which prescribes a period of three years for filing such an application and such period of limitation begins to run when the right to apply accrues. Section 28(3) of the Act does not contain any period of limitation at all. In such case, such an application should be filed within three years from the accrual of the right to file such an application. On the payment of purchase money, the right accrues. If the purchase money is paid and no application is filed within three years from the payment of the purchase money, it has to be considered that such an application would be barred by limitation.

21. The learned counsel for the respondent is relying on the decision in ***Ouseph Vs. Devassy*** *[2001 (1) KLJ 59]*, wherein it was held that the fact that Section 28 enables the court to extend time itself would imply that the mere failure to deposit the purchase money need not result in the rescission of the contract. In the decision in ***Ouseph*** (*supra),* it was held that such time could be extended by court by applying Section 148 CPC. With respect, this Court disagrees with the said proposition. As per Section 148 CPC, where any period is fixed or granted by the court for the doing of any act prescribed or allowed by the Code, the court may in its discretion, enlarge such period. The willful refusal by the plaintiff to make the deposit would be a relevant stand to rescind the contract under Section 28(1) of the Act.

22. Specific Relief Act is a self contained Code. As per Section 28(1) of the said Act, the court can extend time for the payment of purchase money. In such case, it is not

something to be done under the CPC. Therefore, Section 148 CPC has no application in such case. Even without the aid of Section 148 CPC, the court is empowered to extend the time fixed for the payment of purchase money, as per Section 28(1) of the Act.

23. Here, in this particular case, the petitioner has got a specific case that IA No.710/2011 was filed behind the back of the petitioner and that the petitioner was kept in darkness without revealing that such an IA was filed and an order for the deposit of purchase money was obtained from the Subordinate Judge's Court, Thalassery. Even though notice was ordered on IA No.710/2011, no notice was issued and no copy was served. It is evident from the order passed in IA No.710/2011 that the said order was passed by hearing the petitioner in the IA, i.e., the respondent herein alone. No opportunity of being heard was extended to the petitioner herein. When IA No.2260/2010 was filed without paying the purchase money, the court below ought not have treated the

said application as one under Section 28(3) of the Act.

24. The court below has committed a grave error in considering IA No.2260/2010 renumbered as IA No.1442/2012 as an application within the meaning of Section 28(3) of the Act. When the respondent has played fraud on court, by making a false averment in the affidavit in support of the said IA that the purchase money was deposited before court and challan receipt was produced, the respondent cannot seek any relief from the court. In such case, the order passed by the court below in IA No.1442/2012 is illegal, irregular and improper and, therefore, the same is liable to be set aside.

25. The learned counsel for the respondent has argued that IA No.4139/2010 filed by the defendant under Section 28(1) of the Act, which is renumbered as IA No.1443/2012, is devoid of merits as the defendant has not challenged the order in IA No.710/2011. As this Court has observed earlier, IA No.710/2011 was filed behind the back

of the defendant. According to the learned counsel for the petitioner, it was specifically contended in the counter to IA No.1442/2012 that the purchase money was not deposited. The said IA originally filed as IA No.2260/2010, was filed on 05.06.2010. The counter was filed on 29.11.2010. Even then, the amount was sought to be deposited only on 08.02.2011 through IA No.710/2011. Thereafter, the amount was deposited only after 11.03.2011.

26. It was on 14.10.2010 that the defendant had filed IA No.4139/2010 which was renumbered as IA No.1443/2012. As on that date, there was not even a request from the part of the plaintiff for the extension of the period for the deposit of the amount. The stand then taken by the plaintiff was that the amount had also been deposited. In such case, no doubt, the defendant was entitled to an order of rescission of the contract under Section 28(1) of the Act. The court below ought to have passed an order, thereby rescinding the contract within the

meaning of Section 28(1) of the Act.

27. From all the above, it is evident that there was no proper application from the part of the respondent herein under Section 28(3) of the Act. The purchase money was not deposited for filing such an application. It was for the plaintiff to deposit the amount and to file an application under Section 28(3) of the Act. In fact, the plaintiff ought to have deposited the amount on or before 17.08.1999 i.e., within 30 days from the date of decree. It cannot be said that the plaintiff ought to have filed the application within 30 days from the date of decree, whereas the plaintiff ought to have deposited the amount within 30 days of the decree. After depositing the amount, the plaintiff ought to have filed an application within the meaning of Section 28(3) of the Act within the period prescribed under Article 137 of the Limitation Act.

28. In case the plaintiff could not deposit the amount as ordered within 30 days from the date of decree, within

the meaning of Section 28(1) of the Act, the plaintiff ought to have sought for an extension of time. In this particular case, no such extension was sought for. Instead of that, a false assertion was made in the affidavit in support of IA No.2260/2010 that the amount was deposited before court. After making such an assertion on 05.06.2010, clandestinely, IA No.710/2011 was filed on 08.02.2011 behind the back of the defendant and the plaintiff obtained an order on 11.03.2011 for the deposit of the amount. Matters being so, C.R.P. No.716/2013 is only to be allowed.

29. When IA No.1442/2012 is liable to be dismissed, the matter squarely falls under Section 28(1) of the Specific Relief Act thereby enabling the defendant to get the contract rescinded. Therefore, IA No.4139/2010 renumbered as IA No.1443/2012 is an application perfectly qualifies as an application contemplated under Section 28(1) of the Act. No doubt, in this case, the defendant is entitled to get the contract rescinded.

In the result, C.R.P. Nos.716/2013 and 719/2013 are allowed. The impugned common order is set aside. IA No.1442/2012 stands dismissed and IA No.1443/2012 stands allowed.

Sd/- B.KEMAL PASHA, JUDGE

ul/aks

[True copy] P.S. to Judge