

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.972 of 2016

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1. Most. Risi Devi Wife of Late Arjun Sah
2. Munna Kumar Sah
3. Manoj Sah @ Manoj Kumar Sah
4. Mukesh Kumar @ Mukesh Kumar Sah 2 to 4 are sons of Late Arjun Sah, All Residents of Mohalla- Gudari Bazar, Ward No. 14 (old), Ward No. 20 (new), Under Town Samastipur, Police Station and District- Samastipur. Appellant/s

Versus

1. Ram Dulari Devi Wife of Late Ganga Prasad Chaudhary, Resident of Mohalla- Mulchand Ward No. 16 (old) Ward No. 21 (new), P.O. + P.S. and District- Samastipur.
2. Sunita Devi Wife of Shri Shambhu Sah, Resident of Village + P.O. Munsurchak, District- Begusarai.
3. Sangita Devi Wife of Munchun Sah, Resident of Mohalla- Nimchak, Saidpura, Ward No. 30, P.O. and District- Muzaffarpur. Respondent/s

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Appearance :

For the Appellant/s : Mr. Manoj Kumar No.-1
For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR JHA

ORAL JUDGMENT

Date: 11-12-2017

Heard both sides.

2. The petitioners have filed this Civil Misc. petition against the order dated 23.07.2016 passed by learned Civil Judge (Senior Division-IV) in Miscellaneous Case No. 19 of 2010 (Annexure-5).

3. The petitioners are defendants in Title Suit No. 224 of 2001. The respondent/ plaintiff filed title suit No. 224 of 2001 for specific performance of contract. The suit was decreed ex parte. According to the decree the plaintiff/ decree holder had to pay Rs. 30,000/- to the judgement debtor within two months from the date of decree. The decree holder filed Execution case No. 01 of 2003. The plaintiff came with a mortgage deed to show that balance consideration amount of Rs. 30,000/- had already been adjusted in payment of mortgage money but there was no order as to payment of remaining consideration amount to the mortgagee. The mortgagee was not impleaded in the suit. The petitioners further



claimed that the judgement and decree was not complied with for a long time and, therefore, the contract is rescinded under Section 28 of the Specific Relief Act, 1963. The learned Sub-Judge dismissed the petition of the petitioner filed under Section 28 of the Specific Relief Act on 23.07.2016. Being aggrieved by the aforesaid order the petitioners, legal heirs of Arjun Sah, filed this Civil Misc. petition.

4. The learned counsel for the petitioners submits that Title Suit No. 224 of 2001 filed by the plaintiff was decreed ex parte and there was specific direction to the judgement holder to pay the remaining consideration amount to the judgement debtor within two months and got the sale deed executed. The decree holder did not file any petition for extension of time and, therefore, it is a clear case of violation of the terms and conditions of the judgement and decree and the contract itself is liable to be rescinded. The learned counsel for the petitioner placed his reliance on the judgement of the Supreme Court reported in ***AIR 2007 SC 1514 (Chanda Dead through L. Rs. v. Rattni & Anr.)*** in which it has been held that the decree for specific performance has been described as a preliminary decree. The power under Section 28 of the Act is discretionary and the court cannot ordinarily annul the decree once passed by it although the power to annul the decree exists yet Section 28 of the Act provides for complete relief to both the parties in terms of the agreement in the suit. It is further held that where the decree for specific performance specifically directed the defendant to execute sale deed on payment of remaining balance of consideration and get it registered within a period of two months from the date of decree the plea of decree holder raised for first time before S.C. that there was no direction to pay within a particular time was clearly unsustainable and untenable. It has been held that



petition filed under Section 28 of the Act by the judgement debtor on the ground that the decree holder had failed to deposit the balance for long six years was rightly allowed and no interference was called for. The learned counsel for the petitioner further placed his reliance on the judgement of the Supreme Court reported in **2015(3) PLJR SC 99 (P.R. Yelumalai & N. M. Ravi v. N. M. Ravi & P. R. Yelumalai)**.

5. On the other hand the learned counsel for the respondent 1st set submits that the decree holder brought on record the mortgage deed and stated that she paid Rs. 30,000/- to the mortgagee of Arjun Sah and the executing court after specifying the fact that entire consideration amount was paid to the judgement debtor ordered for execution of sale deed through the process of the court. Before the suit was decided ex parte it has come that Arjun Sah received Rs. 50,000/- as consideration amount from the judgement holder on 20.11.2000. During the course of hearing of the suit it also transpired that Arjun Sah before execution of the deed of agreement to sale in favour of decree holder mortgaged the property in favour of Triloki Choudhary after receiving Rs. 30,000/- from him. The judgement holder paid the mortgage money to the mortgagee, Triloki Choudhary, and Triloki Choudhary also deposed in Title Suit No. 224 of 2001. The original mortgage deed was also brought on record. It is submitted that there is no violation of any covenant of the judgement and decree passed in Title Suit No. 224 of 2001 and the learned Sub-Judge has rightly dismissed the petition of the petitioners to rescind the contract.

6. On the submission of both parties the sole question arises for consideration whether the decree holder breached any condition of the decree and on such the contract is liable to be rescinded?



7. In order to appreciate the submissions of both parties, it would be appropriate to reproduce Section 28 of the Specific Relief Act, 1963 which is as follows:-

“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 deliver 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”.

8. From perusal of the Section 28 of the Specific Relief Act it



appears that it provides discretionary power and if the amount as directed by the decree is not deposited by the decree holder. This section itself provides that the court may extend the time if such an application is made on behalf of the decree holder. From perusal of the order impugned it appears that during the course of hearing of Title Suit No. 224 of 2001 it has come that Arjun Sah had received part consideration amount of Rs. 50,000/- from plaintiff on 20.11.2000 and he executed the deed of agreement to sale in favour of the plaintiff/ respondent 1st set but Arjun Sah prior to execution of the deed of agreement to sale mortgaged the same property in favour of Triloki Choudhary on 25.04.2000 after receiving Rs. 30,000/- from Triloki Choudhary but this fact has not been mentioned by Arjun Sah in agreement to sale the property. The plaintiff/judgement holder paid the mortgage money to the mortgagee, Triloki Choudhary, who also deposed in the suit itself and disclosed that the suit land was mortgaged to him by Arjun Sah. The learned Sub-Judge has found that no part of consideration money is lying due against the judgement holder and accordingly directed for execution of the sale deed. It has also come that Arjun Sah filed a petition under order IX Rule 13 of the Code of Civil Procedure for setting aside the ex parte decree which was dismissed by the court. After filing of the execution case the court found that the judgement debtor received the entire amount of consideration and the sale deed was executed through the process of the court. The petitioners contested the execution case but they did not ever challenge the execution of the sale deed by the court in favour of judgement holder. Therefore, I find that the learned Sub-Judge has rightly held that the stipulation of payment of remaining amount of consideration money has been complied with and thereafter he directed for execution of sale deed in favour of judgement holder and on such facts the



learned Sub-Judge has rightly dismissed the petition of the petitioners for rescinding contract and submission of learned counsel for the petitioner carries no substance.

9. In the case of *Chanda v. Rattni (supra)* the decree for specific performance has been described as preliminary decree and it has been held that power under section 28 of the Act to rescind the contract is discretionary and the court cannot ordinarily annul the decree once passed by it. Although the power to annul the decree exists yet Section 28 of the Act provides for complete relief to both the parties in terms of the decree in the same suit. The court does not cease to have power to extend the time even though the trial court had earlier directed in the decree that payment of balance price to be made by certain date and on failure suit to stand dismissed.

10. Having considered the facts aforesaid, I find no jurisdictional error in the order dated 23.07.2006 passed by learned Civil Judge (Senior Division-IV), Samastipur (Annexure-5). This civil Misc. petition is, accordingly, dismissed.

(Prabhat Kumar Jha, J)

BKS/-

AFR/NAFR	NAFR
CAV DATE	N.A.
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