

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION No.12829 OF 2017

Shri Ramaji Premaji Patel

... Petitioner

Vs.

Smt.Vimal Jau Dhanve & Ors.

... Respondents

Mr.A.N. Naikwadi with G.B. Pawar for the Petitioner

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: AUGUST 1, 2018**

P.C. :

1. Respondents are served, however, nobody appears from them. The learned Counsel for the petitioner points out the affidavit of service dated 16.7.2018 filed by Ramaji Premaji Patel, the petitioner herein, stating that he tried to serve respondent Nos.1 and 2 in the trial Court, however, they have refused. Notices were also despatched on 27.9.2017 through R.P.A.D. on the addresses of the respondents. Refusal is deemed to be good service.
2. As a short point is involved, Rule. Rule made returnable forthwith and heard finally.

3. This is a very peculiar matter where the petitioner/defendants has filed S.C. Suit No.64 of 2012 for specific performance. He was a purchaser of an open land. According to him, he has paid Rs.20 lakhs earnest money to the respondents, who are the original defendants. During the pendency of the suit, the trial Court directed the defendants to deposit earnest money and the deposit was made on 21.12.2013 through Challan Nos.124 and 125 of Rs.10 lakhs each, totalling to Rs.20 lakhs. The said amount is invested in a fixed deposit and still lying as it is. However, the suit was dismissed on 2.12.2016. The plaintiff has not made any alternative prayer in the plaint and, therefore, specific relief was refused and in the absence of alternative prayer, the earnest money was not returned to the plaintiff though he has paid that money to the defendant towards part of consideration. After dismissal of the suit, he did not file any appeal as the plaintiff is suffering from Cancer.

4. The learned Counsel for the petitioner has submitted that the petitioner needs money for treatment and, therefore, he be allowed to withdraw the said amount. He further submitted that his applications filed on 29.6.2017 and 7.7.2017 were rejected by the

learned Civil Judge, Senior Division, Palghar by order dated 7.7.2017 and, therefore, he has challenged the same in this Writ Petition.

5. Under Article 227 of the Constitution of India, this Court enjoys supervisory jurisdiction on the subordinate Courts. The submissions made by the learned Counsel for the petitioner appear to be true. Unfortunately, the plaintiff has not asked for alternative relief. Even though there is no alternative prayer, in the interest of justice, in the fitness of circumstances, the trial Court has power to pass such order, if it deems fit.

6. Perused the judgment and the order dated 2.12.2016 passed by the learned trial Judge. My attention is drawn to para 7 of the judgment where the issues and the findings on it are incorporated.

Issue No.1 is as follows:

Issue	Finding
1) Does plaintiff prove that defendants agree to sale the suit land by accepting earnest amount Rs.25,00,000/- executed second Agreement to Sale dt.11/07/2011?	In the affirmative to the extent of execution of agreements and acceptance of Rs.20 lac only

Thus, it can be seen that the finding to the issue is in the

affirmative to the extent of execution of agreement and acceptance of Rs.20 lakhs only. The suit was dismissed on the ground that the plaintiff failed to prove that he was ready and willing to perform his part. In view of this finding, as the defendants have not challenged this finding before the appellate Court and the plaintiff has also not filed appeal, undoubtedly, this is the amount of the plaintiff which was paid by him to the defendant and which was deposited by the defendant in the Court pursuant to the order of the trial Court. The amount cannot lie idle in the court. When the true claimant files application, then, it is the duty of the Court to consider the facts and evidence adduced before the Court and arrive at a legal and correct finding. Hence, I am of the view that the order passed by the trial Judge is to be set aside and the application allowing the plaintiff i.e., the petitioner to withdraw the amount is to be passed. Accordingly, the following order is passed:

- i) Petition is allowed.
- ii) The petitioner is allowed to withdraw the principal amount of Rs.20 lakhs which was invested in a fixed deposit

by the defendant vide Challan Nos.124 and 125 of Rs.10 lakhs each, totalling to Rs.20 lakhs on 21.12.2013, alongwith interest accrued thereon.

iii) The Registry of the trial Court at Palghar to act accordingly.

7. Writ Petition is disposed of on the above terms.

(MRIDULA BHATKAR, J.)

Vishwanath
Satyanarayana
Sherla

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Vishwanath
Satyanarayana
Sherla
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