

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Revision No.7 of 2016

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Shobha Kant Kunwar @ Shobha Kant Kuer @ Shobha Kant Kumar, Son of
Late Hriday Kunwar, resident of village - Rampur Ekshila, Police Station -
Ujiarpur, District - Samastipur.

... .. Petitioner

Versus

Baidyanath Chaudhary, Son of Late Yogendra Chaudhary, resident of village -
Bhkhahat @ Lohagir, Police Station - Ujiarpur, District - Samastipur.

... .. Respondent

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Appearance :

For the Petitioner	:	Mr. Bindhyachal Singh, Advocate Mr. Vipin Kumar Singh, Advocate Mr. Rituraj Singh, Advocate Ms. Amriti Singh, Advocate
For the Respondent	:	Mr. Jitendra Kumar Singh, Advocate Mr. Subodh Kumar Jha, Advocate Mr. Pranav Kumar Jha, Advocate

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CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
ORAL JUDGMENT

Date : 15-02-2019

Heard learned counsel for the parties.

2. The petitioner had brought Title Suit No. 225 of 2005 against the opposite party herein for specific performance of contract to execute sale deed in favour of the petitioner in respect of the immovable property mentioned in the agreement. Ex parte judgment and decree was passed in the suit on 14.11.2006.

3. It has been informed that the opposite party has brought Miscellaneous Case No. 19 of 2007 for setting aside the ex parte decree. In the meantime, petitioner filed Execution Case No. 04 of 2007 for execution of the ex parte decree aforesaid. As per direction in the decree, the petitioner was to deposit remaining consideration amount of Rs. 40,000/- (rupees forty thousand) within ninety days. However, the same was not being deposited by the



petitioner, hence, by order dated 07.08.2010, the Execution Court directed the petitioner to deposit Rs. 40,000/- (rupees forty thousand) and to produce receipt of deposit. In pursuance of that the petitioner deposited Rs. 40,000/- (rupees forty thousand) and produced receipt which would be evident from the order dated 23.10.2010 passed by the Execution Court.

4. Thereafter, on 21.03.2013, the opposite party herein filed a petition under Section 28 of the Specific Relief Act, 1963 (in short the 'Act') for rescission of the contract. The court below has allowed the prayer by the impugned order dated 18.06.2014.

5. The impugned order reveals that the court below was conscious that separate petition should have been filed or a petition to that effect should have been filed in civil suit but the same was filed in the execution proceeding. The Execution Court was of the view that since it was original court having jurisdiction to decide the civil suit also, hence, entertained the application. The court examined the merit of the ex parte decree. Further considered that on different date adjournments were allowed in the execution case but the part consideration money was not deposited nor any permission for extension of time was sought for. Hence, the court rescind the contract.

6. The court below had taken notice of the order dated 06.02.2010 passed in the aforesaid execution case whereby the



petitioner was directed to deposit the remaining consideration money and concluded that this is a case of deliberate non-deposit of the remaining consideration money within time or extended time. Hence, this was a fit case for rescission of the contract.

7. Incidentally, it is mentioned that order dated 06.02.2010 whereby the petitioner was directed to deposit Rs.40,000/- (rupees forty thousand), the remaining consideration money was challenged by the opposite party herein before this court in C.W.J.C. No. 7477 of 2011. The writ application was disposed of on 08.08.2012 with a direction to the court in seisin with Misc. Case No. 07 of 2009 to dispose of the same within one month. However, the Execution Court was allowed to proceed with the pending matter before it. The Execution Court was only restrained from effecting delivery of possession of the land in question till the outcome of Misc. Case No. 07 of 2009.

8. It has been informed that said miscellaneous case is still pending before some other court.

9. Learned counsel for the petitioner submits that the impugned order would reveal that the court below has exceeded in exercise of jurisdiction by entertaining an application under Section 28 of the Act even after deposit of the consideration money way back in the year 2010 and only thing which was to be done, till filing of the petition by opposite party in the year 2013, was execution of the sale deed.



10. Section 28 of the Act reads as follows:

“(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.”

11. A perusal of the aforesaid provision would make it clear that on the date of order of rescission of contract or on the date of prayer of such rescission, the purchase money and other sum which was ordered by the court to be deposited was not deposited.

12. In the present case, the consideration money in pursuance of the agreement was deposited on 21.08.2010 itself much before filing of the petition under Section 28 of the Act. Therefore, the impugned order has been passed without proper application of provisions of Section 28 of the Act.

13. Learned court below has relied on the judgment of the Hon’ble Supreme Court in **Chanda** (Dead) Through L.Rs. vs.



Rattni & Anr. reported in **AIR 2007 SC 1514** for coming to the conclusion that when consideration money was not deposited for six years from the date of decree, the contract was fit to be rescinded. In Chanda's case (**supra**) consideration money was not deposited till rescission of the contract was ordered.

14. In the present case, the consideration money was deposited, though after delay of four years but in the year 2010 itself in pursuance of order of the Execution Court dated 07.08.2010 to deposit the remaining consideration money while making direction for deposit of the remaining consideration money, the Execution Court by necessary implication extended the time for deposit of the money.

15. In the case of **K. Narendra v. Riviera Apartments (P) Ltd.** reported in **AIR 1999 SC 2309** relied by the court below, the Hon'ble Apex Court was not considering the application of the provisions of Section 28 of the Act.

16. Learned counsel for the opposite party has supported the reasoning of the trial court that since the petitioner failed to deposit consideration money for years, this was a fit case for rescission of contract.

17. No doubt, the court could have rescinded the contract even soon after the time fixed for deposit of the part consideration money or after expiry of the extended time, if the money was not deposited. However, once consideration money was deposited, the power under Section 28 of the Act could not have



been exercised against the petitioner.

18. In the result, in my view, the impugned order suffers from irregular and improper exercise of jurisdiction. Hence, the same is set aside and this civil revision is allowed.

(Birendra Kumar, J)

Kundan/Rajan

AFR/NAFR	A.F.R.
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