

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3466 OF 2005

Murlidhar s/o Gopal Sonar
Age 70 years, Occ. Cultivation
R/o. Jamner, District Jalgaon

...Petitioner
(Ori. Decree holder)

Versus

1. Ambersing s/o Laxman Pawar
Since deceased, by his heirs
And legal representatives, namely

1A. Gogibai Ambersing Pawar
Age 60 years,

1B. Dashrath Ambersing Pawar
Age 36 years,

1C. Mohan Ambersing Pawar
Age 50 years,

1D. Mishrilal Ambersing Pawar
Age 35 years,

R. Nos. 1A to 1D R/o. Bhilmaliwada
Mandave Digar, Tq. Bhusawal,
Dist. Jalgaon

1E. Yashodabai Ambersing Pawar
@ Mrs. Yashodabai Jayram Jadhav
Age 37 years, Occ. Household
R/o. Pimpalkotha, Tq. Parola
District Dhule

1F. Mirabai Ambersing Pawar
@ Mrs. Mirabai Bhaiya Chavan
Age 42 years, occ. Household
R/o. Rohini, Tq. Shirpur
District Dhule

1G. Sagarbai Saidas Naik
Age 37 years, R/o. Dhobichi Varad
Tq. and district Jalgaon

2. Gokul Laxman Pawar
Age 58 years, Occ. Agri.
R/o. Mandve Digar, Tq. Bhusawal ...Respondents
District Jalgaon (Judgment debtors)

.....
Mr. L.V. Sangit, advocate for the petitioner.
Mr. Swapnil S. Patil, advocate for respondent Nos.1A to 1D and 2
.....

CORAM : V. K. JADHAV, J.

**Date of Reserving
the Judgment : 14.02.2020**

**Date of pronouncing
the Judgment : 27.04.2020**

JUDGMENT :-

1. By this writ petition, the petitioner seeks quashing and setting aside the order dated 24.09.1999 passed by the learned Civil Judge, Junior Division, Bhusawal, below Exh.41 and 72 in Regular Darkhast No. 4 of 1989.

2. Brief facts giving rise to the present writ petition are as follows:-

The petitioner-original plaintiff had instituted Regular Civil Suit No. 137 of 1978 for specific performance of contract and possession. The learned Civil Judge, Junior Division, Bhusawal by judgment and decree dated 16.07.1986 decided the suit exparte and further the legal heirs of deceased defendant No.1 and defendant No.2 were

directed to execute the sale deed in favour of petitioner-plaintiff and deliver the possession of the suit land on receiving the amount of Rs.3000/- within a period of one month from the date of order. The said judgment and decree has attained finality. Admittedly, the petitioner has not deposited the amount within one month but deposited the said amount of Rs.3000/- on 01.04.1989. The petitioner had also deposited the Court Commissioner's fees and accordingly the Court Commissioner had executed the registered sale deed on 06.09.1991 under the orders of the court and submitted report to the court regarding registration of the sale deed. Pending Darkhast, the petitioner had filed an application Exh.41 praying for possession warrant for execution of decree. However, the respondents-judgment debtors filed an application Exh.72 contending therein that the decree cannot be executable as it suffers from various infirmities, including the fact that the petitioner failed to deposit the amount on or before 15.08.1986. The petitioner-decree holder has strongly resisted the application Exh.72 by filing say at Exh.79. By the impugned order dated 24.09.1999 passed below Exh.41 and 72, in Regular Darkhast No. 4 of 1989, the learned Judge of the executing Court sustained the objection raised vide Exh.72 and held that once the possession warrant cannot be issued the decree will not survive. Hence, this writ petition.

3. Learned counsel for the petitioner submits that by filing an application Exh.41, the petitioner has prayed for issuance of

possession warrant in view of execution of registered sale deed through the Court Commissioner in favour of the petitioner. Learned counsel submits that the present respondents-judgment debtors in the meantime had instituted the Regular Civil Suit No. 132 of 1994 for setting aside the judgment and decree passed in Regular Civil Suit No. 137 of 1978 and also filed an application for interim relief to protect their possession. However, the said application came to be rejected and the order was also confirmed by the learned District Judge in Misc. Civil Appeal No. 44 of 1997. Learned counsel submits that the time was not essence of the order passed by the trial court while passing the decree and it is apparent from the fact that when the application under Section 148 of Civil Procedure Code was filed, the amount was accepted by the executing court. Furthermore, the respondents-judgment debtors have not raised objection at any point of time in pursuance of acceptance of the said amount, though notices were issued to the respondents-judgment debtors to submit their say under Order XXI Rule 22 of C.P.C. On 18.09.1989, the respondents-judgment debtors though received notice of the Court Commissioner did not object to the execution of decree by executing the sale deed. Even after execution of sale deed through the Court Commissioner, the sale deed was registered with the office of Sub Registrar, Bhusawal and compliance report was submitted by the Court Commissioner to the Court. Learned counsel submits that later on by filing an application Exh.72 a feeble attempt was made to raise objection with regard to the exparte order

and the right of the minors to be represented by the guardian. Learned counsel submits that so far as application Exh.72 is concerned, there is no specific pleading to the effect that since the amount of Rs.3,000/- was not deposited within time, the execution petition is liable to be dismissed. What was objected by the respondents-judgment debtors was with regard to the nature of exparte decree and the rights of the minor being represented through the guardian. Learned counsel submits that the amount was accepted by the executing Court and since the sale deed also came to be executed, the application Exh.72 ought to have been rejected by the trial court. Learned counsel submits that the directions in the decree fixing the time to deposit the amount being incidental in nature, the executing court was competent to accept the amount by extending the time. Learned counsel submits that the executing court erred in arriving at the conclusion that there was non-compliance of provisions of Section 148 of C.P.C. and therefore, the decree is not executed. The executing Court has also erred in arriving at the conclusion that since there was delay of 3 years in depositing the amount and there was no explanation offered by the decree holder, no right is accrued in his favour to take the possession.

4. Learned counsel for the petitioners submits that the decree for specific performance has been described as preliminary decree. The power under section 28 of Specific Relief Act is discretionary

and the court cannot ordinarily annul the decree once passed by it. Although the power to annul decree exists yet Section 28 of the Specific Relief Act provides for complete relief to both parties. Learned counsel submits that the court does not cease to have the power to extend the time even though the trial court had earlier directed in the decree that the payment of balance price to be made by certain date and on failure suit to stand dismissed. Learned counsel submits that here in this case no further consequences in case if the amount is not deposited within specified period are mentioned in the decree.

Learned counsel for the petitioner, in order to substantiate his submissions, placed reliance on the following cases:-

- i) Gopal s/o Sambhaji Samarth since deceased through L.Rs. Geeta w/o Ltd. Gopal Samarth and others vs. Mukundrao Mahadeo Gedam, reported in 2012 (2) Mh.L.J. 602;
- ii) Yeshoda and another vs. K. Nagarajan, reported in (1996) 11 SCC 228;
- iii) Ramankutty Guptan vs. Avara, reported in AIR 1994 SC 1699

5. Learned counsel for the respondents submits that the petitioner after a period of three years simply filed an application Exh.3 on 20.01.1989 in Regular Darkhast No. 4 of 1989 seeking time

to deposit the balance consideration amount of Rs.3000/-. By application Exh.5, the petitioner has filed pursis mentioning therein that he has already deposited the said amount of Rs.3,000/- vide court receipt No. 1949. The said pursis came to be filed on 01.04.1989. Learned counsel submits that in application Exh.3, it is simply mentioned that as the petitioner was not well he could not deposit the amount and as such, the time may be granted to deposit the said amount. Thereafter, without any order permitting him to deposit the amount, on his own, the petitioner has deposited the amount and office of the Civil Judge, Junior Division, Bhusawal has accepted the said amount as per pursis Exh.5. Learned counsel submits that there is no explanation at all in application Exh.3 as to what prevented the petitioner to deposit the amount of consideration to the tune of Rs.3,000/- within a period of one month as directed in the judgment and decree. It was implicit in the direction that the petitioner-plaintiff was required to deposit the balance amount/consideration in the first instance and it was only then the respondents-defendants were required to execute the sale deed. The petitioner has not deposited the amount for long period of three years. Learned counsel submits that the trial court has rightly rejected the application Exh.41 and there is no substance in this writ petition and the writ petition is liable to be dismissed.

Learned counsel for the respondents in order to substantiate his submissions, placed reliance on the following cases:-

- i) Chanda (Dead) Through L.Rs vs. Rattni and another, reported in 2007 AIR (SC) 1514;
- ii) Sonusing Dhanusing Patil and another vs. Bansi Chindu Kumbhar, reported in 1993 (2) Mh.L.J. 1141
- iii) Bhupinder Kumar vs. Angrej Singh, reported in 2009 (8) SCC 766;

6. I have carefully considered the submissions advanced by the learned counsel for the respective parties. With their able assistance, I have perused the pleadings, grounds taken in the writ petition and annexures thereto.

7. It is well settled that the suit for specific performance does not come to an end on passing of a decree and the court which has passed the decree for specific performance retains the control over the decree even after the decree has been passed. The decree of specific performance is preliminary decree. The court does not cease to have the power to extend the time even though the trial court had earlier directed in the decree that the balance price to be made by certain date.

8. In the case of ***Gopal s/o Sambhaji Samarth since deceased through L.Rs. Geeta w/o Ltd. Gopal Samarth and others vs. Mukundrao Mahadeo Gedam, reported in 2012 (2)***

Mh.L.J. 602, this court (Coram: R.K. Deshpande, J.) in para 10 to 14 has made the following observations:-

“10. The judgments relied upon by Shri Sourabh Chaudhari for the applicants/defendants, are rendered in the suit claiming right of pre-emption and the same are on the construction of the provisions of Order XX, Rule 14 of the Civil Procedure Code. Order XX, Rule 14 of the Code itself provides the consequences of dismissal of the suit, if the amount of purchase-money and the costs directed to be paid by the plaintiff within the stipulated period, have not been paid. The Court has held that in such a situation, there is no question of enlargement of time, and even if there is no condition incorporated in the decree that the suit shall stand dismissed upon failure to deposit the purchase-money and the costs, still the consequences of dismissal of the suit shall follow. The principles laid down in those judgments would not be applicable to a decree for specific performance of contract, which is governed by Order 20, Rule 12-A of the Civil Procedure Code. Rule 12-A of Order XX empowers the Court to direct purchase-money or other sum to be paid by the purchaser within the stipulated period in a decree for specific performance of contract for sale. However, the said provision does not provide the consequences for failure to deposit the amount within the stipulated period, as has been provided for under Rule 14, Order XX of the Civil Procedure Code. By necessary implication, the question of extension of time is left open to the discretion of the Court. Hence, the judgments relied upon by Shri Sourabh Chaudhari for the applicants/defendants are not applicable in the facts and circumstances of the present case.

11. In the judgment of this Court in Maruti Vishnu Kshirsagar v. Bapu Keshav Jadhav, reported in AIR 1970

Bombay 398, which has been held to be a correct view by the Apex Court in its judgment in Ramankutty Guptan v. Avara reported in AIR 1994 SC 1699, a decree for specific performance of contract was passed on 27-8-1964 and the direction was given to the decree-holder to deposit an amount of Rs.700/- within a period of three months of the decree. In Civil Appeal No.376 of 1964, the Appellate Court, by its judgment and order dated 13-8-1965, modified the decree directing deposit of the amount within a period of one month. The period of one month expired on 13-9-1965, but the amount of balance consideration was not deposited by the decree-holder. The decree-holder deposited the amount on 21-9-1965.

The Executing Court on 10-3-1966 condoned the delay and accepted the deposit. In appeal, the said order was set aside, against which approach was made to this Court. It has been held in the said judgment that the fixation of time is an incidental direction and granting extension of time does not result in the amendment of the decree. It has been further held that the Court has power to grant extension of time upon sufficient reasons being shown. A specific objection was raised that the application ought to have been filed before the Trial Court, but it was filed before the Executing Court and the said application could not have been decided by the Executing Court. It has been held that the Executing Court and the Trial Court being same and the suit having not been completely disposed of, the application for condonation of delay must be held to have been considered as a separate application made to the Trial Court.

12. *In view of the aforesaid view taken by this Court, the argument that the application ought to have been made to the Trial Court and the Executing Court was not competent to grant extension of time, is rejected. The contention of Shri Sourabh Chaudhari for the applicants/defendants that the*

application ought to have been moved in the suit decided, does not survive, as in the present case also the decree was passed by the Court of Civil Judge, Senior Division, Bhandara and the execution proceedings were also filed before the same Court, which has passed an order granting extension of time and rejecting the objection to the executability of the decree. The contention that granting of extension amounts to amendment of decree, is also rejected. The extension of time is for sufficient reasons. The direction fixing time to deposit amount being incidental in nature, the Executing Court was also competent to extend the time.

13. Much stress was laid by Shri Sourabh Chaudhari for the applicants/defendants on the fact that the decree itself provides the consequences of dismissal of the suit, which are required to follow upon failure to deposit the amount within the time stipulated by the Court. The learned counsel has further urged that it is not the application under Section 28 of the Specific Relief Act for rescission of contract filed by the applicants/defendants, on which an order of extension of time can be passed, as has been held in various judgments of the Apex Court relied upon by Shri Gupte for the non-applicant/plaintiff. The argument cannot be accepted. Once it is held that the direction to make the payment of balance consideration within the stipulated period is of incidental in nature and the fact that Order XX, Rule 12-A of the Civil Procedure Code nowhere provides the consequences of dismissal of the suit for failure to deposit the said amount within the stipulated period, and the Court has ample power to grant extension of time to deposit the amount, the condition of dismissal of suit stipulated in the decree is of no consequence. It also does not amount to going behind the decree passed by the Trial Court. The direction remains as it is, but the consequences of dismissal of the suit may occur if within the extended time the amount is not deposited. That is altogether different matter and this case is not concerned with

any such eventuality.

14. The Trial Court has already granted the extension of time to deposit the amount. The amount has been deposited on 14-9-2005. While rejecting the objection, the Trial Court has applied its mind to the reasons putforth for seeking extension of time to deposit the amount. It is not a case where the provisions of the Limitation Act are applicable and the condonation of delay is required to be sought by filing an application under Section 5 of the said Act. It is a matter of extension of time to be granted upon satisfaction of the reasons putforth by the party concerned. In view of this, no fault can be found with the view taken by the Trial Court in rejecting the objection raised by the applicants/defendants."

9. In para 14 of the aforesaid judgment, this court has observed that it is a matter of extension of time to be granted upon satisfaction of the reasons putforth by the parties concerned. In the instant case, there is inordinate delay in depositing the amount though directed to be deposited within one month from the date of decree and the amount has been deposited without any reasons explaining such inordinate delay. Moreover, the said amount of Rs.3,000/- has been deposited suo-moto without any order of the Court. I have gone through the record and proceeding of the Regular Darkhast No. 4 of 1989 particularly Exh.3 and 5. On perusal of application Exh.3 dated 20.01.1989 i.e. application filed by the petitioner seeking further time to deposit the amount (there was already delay of three years) and there is an order passed by the executing court only to the effect as "other side to say". Furthermore, by way of pursis Exh.5 the

petitioner has pointed out to the court that he has already deposited the amount of Rs.3000/- in the court vide receipt No. 1949. The said pursis came to be filed on 01.04.1989. There is only order of the court as "filed". There is one another application Exh.4 dated 15.03.1986 requesting the court to accept the amount of Rs.3,000/-. There is only order of the court "allowed". So far as application Exh.4 is concerned, even assuming that the court has allowed to deposit the amount, however, by order dated 20.01.1989 below Exh.3 when the petitioner has sought time again to deposit the said amount of Rs.3,000/- there is only an order "other side to say".

10. In the case of ***Chanda (Dead) Through L.Rs vs. Rattni and another, reported in 2007 AIR (SC) 1514***, relied upon by learned counsel for the respondents, wherein the Supreme Court has observed the conduct of the decree holder in not depositing the amount and observed that it is full of malafide. In the cited case, the decree holder has not deposited the amount for six years.

11. Learned Judge of the executing court has rightly observed that the petitioner decree holder remained silent for a period of three years and not complied with the direction given in the decree itself. The petitioner now without following the provisions of Section 148 of the C.P.C. wanted to take advantage by saying that there was automatic extension. Learned Judge of the executing court has correctly observed that there was no extension of time asked by the

petitioner decree holder at any point of time. In view of the same, I find no fault in the impugned order passed by the lower court. There is no substance in this writ petition. Hence, I proceed to pass the following order:-

O R D E R

- I. Writ petition is hereby dismissed. Rule discharged.
- II. Writ petition is accordingly disposed of.

(V. K. JADHAV, J.)

rlj/