

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved for orders on :26/07/2021

Order passed on : 18/08/2021

WP227 No. 578 of 2018

- Kailash Malghani S/o Bedaram Malghani, Aged About 49 Years, R/o Khaparganj (Masanganj), Bilaspur, Tahsil and District Bilaspur Chhattisgarh. (Decree Holder), District : Bilaspur, Chhattisgarh

---- Petitioner/

Plaintiff

Versus

1. R.C. Lalwani S/o Pratap Rai, R/o H.No. B-20, Century Colony, Deendayal Upadhyay Nagar, Raipur, Tahsil and District Raipur Chhattisgarh., District : Raipur, Chhattisgarh
2. Smt. Manju Lalwani W/o R.C. Lalwani, R/o H.No. B-20, Century Colony, Deendayal Upadhyay Nagar, Raipur, Tahsil and District Raipur Chhattisgarh. , District : Raipur, Chhattisgarh

---- Respondents

Defendants/judgment Debtor

For Petitioner – Shri B.D. Guru, Advocate.

For Respondents – Shri A.K. Prasad, Advocate.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

CAV Order

18-08-2021

1. This petition under Article 227 of the Constitution of India has been brought being aggrieved by the order dated 18-05-2018 passed by the Court of District Judge Bilaspur in CS(A)/163/2015.

2. It is submitted that the petitioner is decree holder in Civil Suit No.163-A/2015, by the judgment and decree dated 09-05-2016 the petitioner was granted relief of specific performance of contract against respondent No.1 on the terms mentioned in the decree itself. The respondents then filed an application under Section 28 of the Specific relief Act read with Section 151 of the CPC praying for cancellation of decree on the ground that the petitioner has failed to get the sale deed executed on terms as ordered by the trial Court and

in the alternative it was prayed that the Court may passed order that the price of the suit land be fixed at the current market rate and other reliefs.

3. The learned trial Court after hearing on the application has passed the impugned order by which the agreement dated 29-10-2012 was rescinded and the respondents were ordered to make refund of the amount received by them in advance.

4. It is submitted by learned counsel for the petitioner, that the impugned order is arbitrary, illegal and contrary to the law applicable on the facts and circumstances of the case. The respondents/judgment debtors had concealed this fact from the Court, that the dispute was regarding possession and title of the suit land before the civil court. After the judgment and decree, the petitioner/decreed holder was always ready and willing to execute the sale deed. The respondents-judgment debtors then provided this information about the pendency of another dispute in civil court and also before the Court of Collector in which one Ashok Kumar Chaturvedi is a party and on this basis the judgment debtors gave assurance, that after settlement of dispute with the other party, they will execute the sale deed. Therefore, it was the fault on the part of the respondents and they have taken benefit of the same by leveling false allegation against the petitioner, that he has failed to execute his part in the performance of the contract. The learned Court below has not considered on this facts and circumstances and passed the impugned order which is not sustainable. The respondents have filed a civil suit against Ashok Kumar Chaturvedi which is registered as Civil Case No. 20A/2017 praying for relief of permanent injunction and other reliefs, which was a circumstance present.

Reliance has been placed on the judgment of Hon'ble the Supreme Court in the matter of **Chanda (dead) through LRs. Vs. Rattni and another**, (2007) 14 SCC 26. Reliance has been placed also on the judgment of Hon'ble the Supreme Court in the matter of **Surinder Pal Soni Vs. Sohan Lal (dead)**

through legal representatives, (2020) 15 SCC 771. It is prayed that the petition be allowed and the impugned order be set aside.

5. Learned counsel for the respondents opposes the petition, the argument submitted and raised objection on the ground of maintainability of this petition under Article 227 of the Constitution of India. It is submitted that the order passed under Section 28 of the Specific Relief Act is appealable order. Reliance has been place on the judgment of Madras High Court n the matter of **N.V.S.M. Anandvale Vs. K.T. Santhanakrishnan**, 2010 AIR [Madras] 204. It is submitted that the Madras High Court clearly held that the order passed under Section 28 of the Specific Relief Act amounts to decree of a Court, therefore, such order is appealable. Hence, the petition under Article 227 of the Constitution may be dismissed on this ground.

Another objection raised by the counsel for the respondents is this, that the present petition has become infructuous as the impugned order of the Court has been complied by the respondents and the refund has been made through a cheque which has been received and encashed by the petitioner. It is further submitted, that there had been no dispute of any title or possession of any person. The petitioner has made an attempt to take benefit of the civil suit filed by the respondents which has no connection with matter. The respondents were always ready to perform their part and comply with the order of the decree against them. It is clearly failure on the part of the petitioner that the sale deed could not be executed.

Reliance has been placed on the judgment of Hon'ble the Supreme Court in the matter of **Prem Jeevan Vs. K.S. Venkata Raman and another**, (2017) 11 SCC 57 in which it has been held that fault of the decree holder/purchaser to pay decretal amount within time stipulated has resulted in rescission of contract.

Reliance has also been placed upon the judgment of Hon'ble the Supreme Court in the matter of **Rajinder Kumar Vs. Kuldeep Singh and others**, (2014) 15 SCC 529 and on the judgment delivered by Hon'ble the Supreme Court in the case of **Bhupinder Kumar Vs. Angrej Singh**, (2009) 8 SCC 766. It is submitted that the petition would neither maintainable nor has any merits, therefore it may be dismissed.

6. In reply it is submitted by learned counsel for the petitioner that in the case of civil suit for specific performance of a contract, the Court does not become functus officio after passing of the decree. The Court while executing the decree has powers to pass orders for extension of time for execution of sale on performance of agreement. It is submitted that the cheque for refund of the amount in compliance of the Court order was received by the petitioner under protest, therefore, it cannot be said that the petitioner is not entitled to challenge the impugned order. The petitioner had been always ready and willing for performance of his part in the contract. It is failure of the respondents which has resulted in non-execution of the sale deed. In reply to the objection on maintainability of the petition, it is submitted that this petition under Article 227 of the Constitution is maintainable.

7. Considered on the submissions and perused the documents.

8. Objection on the ground of maintainability is dealt with at first. The Madras High Court had in the case of **N.V.S.M. Anandvale Vs. K.T. Santhanakrishnan** (supra) framed question on this context that whether preference of revision as against the order passed by the lower Court invoking Section 28 of the Specific Relief Act is appealable or revisional order. Para 9, 10 and 11 of the judgment are as under:-

“9. The learned senior counsel for the revision petitioner placing reliance on the decision of this Court in *Narasimhan v. Balammal* (1998) 2 MLJ 1995 would develop his argument to the effect that

earlier this Court in similar matter entertained revision and in such a case, this Court also could entertain these revisions. Whereas, the learned counsel for the defendant would submit that if the application under Section 28 of the Specific Relief Act is allowed, then there (sic) emerges a decree rescinding the very agreement to sell itself and it is quite obvious that from any decree, appeal would lie as per Section 96 C.P.C. read with Order 41 Rule 1 of C.P.C, but on the other hand, if such an application is dismissed, then alone the question of filing revision would arise. I would like to agree with the view expressed by the learned counsel for the defendant. In fact, the decision of this Court in *Narasimhan v. Balammal* (supra) as cited by the learned senior counsel for the revision petitioner was relating to a case where the petition under Section 28 of the Specific Relief Act was dismissed and whereupon, revision was filed and the said case was not relating to a case where application under Section 28 of the Specific Relief Act was allowed.

10. At this juncture, it is worth and necessary to refer to the definition of decree as per Section 2(2) of C.P.C. and the same is extracted here under:

“2(2) “Decree” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include –

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.” The ingredients of decree would run thus:

A “decree” has to have the following essential elements, namely: (1) There must have been an adjudication in a suit (ii) the adjudication must have determined the rights of the parties in respect of, or any of the matters in controversy, (iii) such determination must be a conclusive determination resulting in formal expression of the adjudication.

11. I would also incidentally like to refer to the decision of the Hon'ble

Apex Court reported in (2005) 9 SCC 262 (Kumar Dhirendra Mullick and others v. Tivoli Park Apartments (P) Ltd.) cited by the learned Senior Counsel for the revision petitioner himself, wherein the facts are that on the rescission of the agreement to sell under Section 28 of the Specific Relief Act, there arose an appeal and not a revision. Section 28 of the Specific Relief Act is reproduced hereunder for ready reference

This has been similarly held by Bombay High Court in the case of **Hari V. Mahadu Kerba Tekale (D) by L.Rs.**, AIR 2006 Bombay 327.

9. After considering on the submissions and the case law cited on the point of maintainability of this petition under Article 227 of the Constitution of India, I am of this view that the impugned order is appellable and the Court exercising the jurisdiction under Article 227 of the Constitution cannot act in a manner as the appellate Court acts and exercises the power in appeal and neither would go into the facts of the case to reverse the finding of the facts which has been arrived at in the trial Court. The question raised by the petitioner in this petition is based on fact that he was always ready and willing for performance of the contract which has been disputed by the respondents side. It was held in the case of **Shalini Shyam Shetty and another Vs. Rajendra Shankar Patil**, (2010) 8 SCC 329, that the supervisory jurisdiction under Article 227 is exercised for keeping subordinate Courts within the bounds of the jurisdiction. The jurisdiction under Article 227 is neither original nor appellate jurisdiction. Therefore, in this case the petitioner have remedy for filing appeal against the impugned order. Hence, the present petition is not maintainable which is dismissed and disposed off. However, the petitioner shall have liberty to file appeal to challenge the impugned order and seek relief in accordance with law.

Sd/-

(Rajendra Chandra Singh Samant)
Judge