

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.2531 OF 2014

Prakash s/o. Vitthal Kale (died),
Age : 37 years,
Occ. Agri., r/o. 244,
Bhavani Peth, Near Petrol Pump,
Jalgaon,
through legal representatives-
1-A. Sau. Ashalata w/o. Prakash
Kale, Age : 69, Occ. Household,
r/o. 244, Bhawani Peth,
Jalgaon – 425 001
and others

..Petitioners

Vs.

Maharashtra Pulse Mills,
Jalgaon, a registered
Partnership Firm,
through its Partner
Laxmichand Hirji Gala (died),
Age : 72 years, Occ. Business,
r/o. Sangeeta Apartment,
Opp. Mahesh Pragati Hall,
Ring Road, Jalgaon
through Legal Representatives -
1-A. Mrs. Raksha Anil Kenya,
Age : 47 years, Occ. Household,
r/o. 2nd Floor, Methilda Building,
Ash Lane, Ranade Road,
Shivaji Park,
Dadar (W), Mumbai
and others

..Respondents

Mr.R.N.Dhorde, Senior Advocate i/b. Mr.V.R.Dhorde, Advocate for petitioners

Mr.K.C.Sant, Advocate for respondent nos.1-A, 1-B, 1-C-1, 1-C-2 and 1-d

Respondent Nos.2 to 5 - served

CORAM : R.G. AVACHAT, J.
RESERVED ON : FEBRUARY 18, 2021
PRONOUNCED ON : FEBRUARY 23, 2021

ORDER :-

The challenge in this Writ Petition is to the order dated 25.02.2014 passed by 6th Joint Civil Judge, Junior Division, Jalgaon, below application, Exhibit-179 in Regular Darkhast No.152 of 2012 (Special Darkhast No.2 of 1978). By the impugned order, the respondent herein (decree holder) has been allowed to deposit Rs.42,000/-, petitioner no.1 (deceased) – original Judgment Debtor has been directed to execute sale deed and in the event of his failing to do so, the respondent – decree holder were given liberty to get executed the sale deed through Court.

BRIEF RESUME OF FACTS :

2 . The respondent, partnership firm, filed a suit being Special Civil Suit No.4 of 1975 for specific performance of agreement for sale against petitioner no.1. On 30.07.1977, the suit was decreed. The respondent/firm filed proceedings (Regular Darkhast No.2 of 1978) for execution of the decree on 06.02.1978. The petitioner/judgment debtor preferred First Appeal (295 of 1978). The same came to be dismissed on 23.06.1982. Under the decree, the petitioner/judgment debtor was directed to obtain Non-Agriculture (N.A.) permission from the concerned authority within a period of two months and then, execute sale deed in favour of the respondent/deGREE holder on receipt of Rs.42,000/-.

3. Since the petitioner/judgment debtor did not obey the decree, the executing Court passed order dated 06.09.1980 appointing a Court Commissioner for moving competent authority for seeking N.A. Permission. On 14.01.1983, the Collector rejected N.A. Permission. On 18.06.1991, however, the Collector, Jalgaon, granted N.A. permission for residential

purpose. The order granting N.A. permission was challenged by the petitioner/judgment debtor before the Commissioner. In January 1992, the Commissioner set aside the Collector's order granting N.A. Permission. He remanded the case back to the Collector with a direction to give the petitioner/judgment debtor an opportunity of hearing. The respondent/decreed holder challenged the said order before the State Government unsuccessfully.

4. The respondent/decreed holder challenged the Government's order before this Court in Writ Petition No.627 of 1994, which came to be allowed. In the meanwhile, the execution proceedings were dismissed on 30.04.1994 on the ground that name of the respondent/decreed holder - firm and its partners were changed. Soon after dismissal of the execution proceedings, petitioner/judgment debtor sold the land to respondent nos.2 to 5. The respondent/decreed holder challenged the order of dismissal of the execution proceedings in Civil Revision Application No.389 of 1994. This Court allowed said Revision Application on 19.06.2003.

5. It is only thereafter, on 13.01.2014, the respondent/decree holder filed application below Exhibit-179 seeking permission to deposit the amount of Rs.42,000/-. On hearing the petitioner/judgment debtor and the respondent/decree holder, the executing Court allowed the application below Exhibit-179 in term of the order stated herein above. Said order is under challenge in this Writ Petition.

6. Mr.Dhorde, learned senior counsel appearing for the petitioner/judgment debtor, would submit that the application below Exhibit-179 was moved thirty six years after the suit was decreed and ten years after Writ Petition No.627 of 1994 was allowed setting aside the order of dismissal of the execution proceedings. The application is conspicuously silent to state reasons, as to why the application was filed so belatedly. According to learned senior counsel, the relief of specific performance is discretionary. A decree granting specific performance is a preliminary decree until the same is executed. The respondent/decree holder has all along to be ready and willing to perform his part of the contract. The

respondent/decreed holder was to deposit the amount of balance consideration within a time frame of two months after passing of the decree. In support of his submissions, learned senior counsel placed reliance on the following authorities :-

- (i) V.S.Palanichamy Chettiar Firm Vs. C. Alagappan and anr., (1999)4 SCC 702;
- (ii) Bhupinder Kumar Vs. Angrej Singh, (2009)8 SCC 766;
- (iii) Prem Jeevan Vs. K.S.Venkata Raman and anr., (2017)11 SCC 57;
- (iv) Ravi Setia Vs. Madan Lal and ors., (2019)9 SCC 381;
- (v) Azhar Sultana Vs. B. Rajamani and ors., (2009)17 SCC 27

According to learned senior counsel, the respondent/decreed holder did not offer any explanation for not depositing the amount within a reasonable time. Same indicates the respondent/decreed holder to have not been ready and willing to perform his part of the contract. The executing Court, therefore, ought not to have allowed the application Exhibit-179.

7. Mr.Sant, learned counsel for the respondent/decreed holder, would, on the other hand, submit that it was the petitioner/judgment debtor, who is responsible for such a long delay in execution of the decree. He has not come with clean hands. Equitable consideration would, therefore, not be in his favour. Under the decree, no time limit was given for depositing the amount. Section 28 of the Specific Relief Act, 1963 ("the Act", for short) would, therefore, have no application. The executing Court, on balancing the equities, exercised its discretion in granting the application below Exhibit-179. No interference with the impugned order is, therefore, warranted. Learned counsel places reliance on the following decisions:-

- (i) Kumar Dhirendra Mullick and ors. Vs. Tivoli Park Apartments (P) Ltd., (2005)0 SCC 262;
- (ii) Hari s/o. Ramji Vs. Mahadu s/o. Kerba Tekale died through L.Rs. Shivaji Mahadu Tekale and ors., 2006(6) Mh.L.J.110;
- (iii) Kisan s/o. Shripat Patil and anr. Vs. Ragho s/o. Vedu Patil, 2007(4)Mh.L.J. 313;
- (iv) Surinder Pal Soni Vs. Sohan Lal (D), Through L.R. and ors., 2019(9)SCALE 564;

(v) Surya Dev Rai Vs. Ram Chander Rai and
ors., AIR 2003 SC 3044

8. It was a suit filed in the year 1975. The suit was decreed in July, 1977. The proceedings for execution of the decree were initiated in the year 1978. The appeal preferred against the decree was dismissed in June. 1982. Thus, the decree granting specific performance of agreement for sale attained finality. Since then, the petitioner/judgment debtor, instead of obeying the decree, could successfully stall the execution of the decree. Learned counsel for the respondent/decreed holder was justified in submitting that even the proceedings for execution of the decree could be managed to be dismissed in default. Within days of dismissal of the execution proceedings, petitioner/judgment debtor transferred the suit land in favour of respondent nos.2 to 5.

9. It is true that the respondent/decreed holder has not offered any explanation in application Exhibit-179, for not depositing the amount soon after initiation of the execution

proceedings. The application Exhibit-179 is also silent to explain the delay of little over ten years in preferring the said application after Writ Petition No.627 of 1994 was allowed in December, 2004 setting aside the order of dismissal of the execution proceedings.

10. I have carefully perused the authorities relied on by the learned senior counsel for the petitioner/judgment debtor. I find all those authorities to be distinguishable on facts. There could be no two views over what has been submitted by learned senior counsel for the petitioner/judgment debtor relying on the observations made in those authorities. A case has to be decided on its facts and circumstances. A little change of a fact here and there makes a precedent inapplicable. The gist of the observations made in the authorities relied on, is that a relief of specific performance of contract is discretionary. A decree passed in the suit for specific performance is a primary decree until the same is executed by execution of registered document/conveyance. The respondent/decree holder must prove to have always been ready and

willing to perform his part of contract. Contract between parties is not extinguished when Court passes decree for specific performance. The Court granting decree does not become *functus officio*. It remains vested with power to declare rescission of contract. Failure to deposit amount within time fixed by the Court is indicative of incapacity of the respondent/decree holder to perform his obligations. For seeking extension of time to deposit the amount of balance consideration, sufficient, substantial and cogent grounds must be pleaded.

11. It would be apposite to refer to Section 28 of the Act:-

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)

(3) "

12. Section 28 of the Act empowers the Court either to extend the time for compliance of the decree or grant order of rescission of agreement. The order of rescission of agreement could only be passed on an application moved in that regard. No such application has been preferred by the petitioner/judgment debtor, although reference to such relief has been averred in reply to the application Exhibit-179. Power to grant of relief of extension of time under Section 28 of the Act is discretionary. Section 28 has application only in a case, where, under the decree, a time limit has been prescribed for performance of a particular condition. It is, therefore, necessary to peruse the terms of the decree.

13. The decree passed in the suit reads as under:-

" It is hereby ordered that the defendant Prakash Vithal Kale do obtain N.A. permission from the concerned authority within a period of two months and execute the sale deed of the suit land in favour of the plaintiff on receipt of Rs.42,000/- from the plaintiff. If the defendant failed to do so such N.A. permission will be obtained through Court and the sale deed executed on behalf of the defendant through Court in favour of the plaintiff on his depositing Rs.42,000/- in the Court. On execution of the sale deed the plaintiff shall be entitled to possession of the suit land. The expenses for getting N.A. permission and registration of the sale deed are to be borne by the plaintiff. The costs of this suit shall be borne by the defendant with his own.

Decree be drawn up accordingly.

14. Aforesaid terms of decree, undoubtedly, indicate that the petitioner/judgment debtor was directed to obtain N.A. permission from the concerned authority within a period of two months and then execute sale deed of the suit land in favour of the respondent/decreed holder on receipt of Rs.42,000/- from the respondent/decreed holder. In the event of failure of the petitioner/judgment debtor to do so, N.A. permission was to be

obtained through Court and sale deed was to be executed in favour of the respondent/decreed holder through the Court, on his deposit of Rs.42,000/- in the Court. The aforesaid terms are crystal clear to indicate that the respondent/decreed holder was not directed to deposit the amount of balance consideration within a time frame. It was the petitioner/judgment debtor, who did not obey the decree and prolonged the execution till date. True, the respondent/decreed holder ought to have deposited the amount within a reasonable period when there was no time stipulation. The executing Court has observed in the impugned order that as soon as all the objections are decided, the respondent/decreed holder filed this application to deposit the remaining balance amount. The factual observations in the judgment and orders are presumed to be correct. Nothing has been brought to the notice of this Court that these observations are not consistent with the facts and circumstances of the case or the events in the execution proceedings.

15. Since under the decree, there was no time stipulation for the respondent/decreed holder to deposit the amount of balance consideration, Section 28 of the Act has no application. Even if it is assumed that Section 28 applies, the petitioner/judgment debtor has not filed an application for rescission of the contract. The power under Section 28 of the Act extend the time is discretionary. The executing Court has rightly exercised its discretion in permitting the respondent/decreed holder to deposit the amount of balance consideration.

16. I do not find any jurisdictional error in granting the application below Exhibit-179. No interference is, therefore, called for with the impugned order.

17. The Writ Petition fails. The same is dismissed.

[R.G. AVACHAT, J.]

18. After pronouncement of the judgment, learned counsel for the petitioner, prays for continuation of the interim relief granted earlier.

19. Since the interim relief was operating all along during pendency of the Writ Petition, the same to continue for next three weeks.

[R.G. AVACHAT, J.]

KBP