

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO. 5503 OF 2015

- PETITIONERS:** 1 Smt. Chhayabai wd/o Tulsiram Fandi,
Org.Applicants Aged about 70 years, Occ. Household
2. Sanjay s/o Tulsiram Fandi,
aged about 31 years, Occ. Agriculturist,
3. Ratnamala d/o Tulsiram Fandi,
Aged about 29 years, Occ. Household,
4. Hemraj s/o Tulsiram Fandi,
aged about 28 years, Occ. Agriculturist,
5. Yogita d/o Tulsiram Fandi,,
aged about 26 years, Occ. Household,
6. Uttam s/o Lataruji Fandi,
Aged about 60 years, Occ. Agriculturist,

All petitioner Nos. 1 to 6 are
R/o. Sharda Chauk, Mouda, Tah. Mouda,
Dist. Nagpur.

...VERSUS...

RESPONDENT: Deorao s/o Sitaram Vaidya
Org.Non-applicant aged about 73, Occ. Business & Agriculturist,
R/o. Near Jai Stambh, Mouda, Tah. Mouda
Nagpur.

Smt. R.S.Sirpurkar, Advocate for petitioners.
Shri A.M.Ghare, Advocate for respondent.

CORAM : AVINASH G. GHAROTE, J.
DATE : 16/09/2021.

(Oral Judgment)

1] Heard Mrs. Sirpurakar, learned counsel for petitioners and Mr. Ghare, learned counsel for the respondent. The petition challenges the order dated 30.07.2015 passed by the learned Civil Judge, Junior Division, Mouda, whereby the application under Section 28 of the Specific Relief Act, 1963, (“the SR Act” for short), as filed by the Original Plaintiff/Tulsiram, in Special Civil Suit No.1063/97, decided on 4.1.2006, for rescission of the contract on account of non-compliance of the direction to deposit the consideration as contained in the decree, dated 4.2.2006, has been rejected and the application at Exh.12 filed by Deorao/Original Defendant for rejection of the application under Section 28 of the SR Act, has been allowed.

2] The facts in nutshell are as under -

 An agreement of sale came to be executed by Tulsiram/Original Plaintiff and his brother Uttam/Plaintiff No.2 in favour of Deorao/Original Defendant on 20.02.1984. As the proposed purchaser did not pay the consideration, a suit for specific performance came to be filed by the original vendors, namely

Tulsiram and Uttam, against Deorao, which came to be registered as Special Civil Suit No. 1063/1997, in which a decree came to be passed on 4.1.2006 in the following terms.

- "i) The suit is partly decreed with proportionate costs.
- ii) The defendant shall do pay an amount of Rs.2,00,000/- to the plaintiffs alongwith interest @ 12% per annum from the date of suit i.e. 09/10/1997 till its realization, upto 30/04/2006. If the defendant fails to make the payment within given time, the plaintiffs may recover the same by executing the decree through the court.
- iii) The defendant may get the sale deed executed from the plaintiff in respect of the suit property on his own expenses, after making the payment of the above said amount and may transfer the license of Saw Mill on his name by taking an appropriate action, before the concerned Authority.
- iv) A decree shall be drawn up, accordingly"

3] It is the contention of the learned counsel for the petitioner that Deorao - the Original Defendant did not make the deposit as directed under the decree, dated 4.1.2006, as a result of which default, the provisoin of Section 28 of the SR Act became attracted. The original plaintiff No.2 and the L.Rs of Tulsiram/Original Plaintiff No.1, therefore, filed an application under Section 28 of the SR Act, seeking rescission of the contract

which came to be registered as MJC No. 8/2012. It was contended that since the mandate of the decree dated 4.1.2006 was not satisfied by depositing the amount as directed within the time given, which was upto 30.4.2006, it was necessary to rescind the contract by exercise of the power under Section 28 of the SR Act. In this MJC, an application came to be filed by the Original Defendant/Deorao for dismissal of the application under Section 28 of the SR Act.

4] Mrs. Sirpurkar, learned counsel for the petitioner submits that the impugned order dated 30.7.2015, clearly suffers from non consideration of the application below Exh.1 altogether for the reason that the application below Exh.1 has not been decided on its own merits, but has been dismissed merely upon observations made in W.P. No. 2871/2012, and W.P. No. 929/2012, which were not germane for the purpose of deciding the application under Section 28 of the SR Act. It is her contention that the application under Section 28 of the SR Act has to be decided on its own merits, uninfluenced by anything, muchless by the observations in the above two writ petitions. By inviting my attention to the impugned order, she submits that there is not even a whisper regarding the consideration of the merits of the application Exh.1 based upon the

requirements of law upon which application under Section 28 of the SR Act has to be decided. She therefore submits that on this ground alone the impugned order has to be quashed and set aside and the matter needs to be remanded back to the learned court below for the purpose of deciding the application under Section 28 of the SR Act on its own merits.

5] Mr. Ghare learned counsel for the respondent/original Defendant - Deorao fairly submits that except for the reliance upon the judgments in W.PNo. 929/2012 and W.PNo. 2871/2012, the impugned order does not dilate upon the averments made in the application under Section 28 of the SR Act. He however faintly tries to impress the Court by contending that the judgments in the aforesaid writ petitions narrate the entire position in the instant matter.

6] A perusal of the judgment in W.PNo. 929/2012 would indicate that a challenge therein was raised to the order passed by the Deputy Conservator of Forest, dated 7.1.2012 and the action of putting seal on the Saw Mill which was standing upon the portion of the suit property. In W.PNo. 2871/2012, the challenge was to the

order dated 23.9.2009 passed by the Joint Civil Judge, Senior Division, in MANRJE No. 48/2009, which was an application filed by Deorao seeking permission to deposit the amount as per the decree dated 4.1.2006. It is therefore apparent that any observations made in the judgments in W.P.No.929/2012 and W.P.No. 2871/2012 would have no relevance or bearing upon the issue of deciding the application under Section 28 of the SR Act, in view of which, since the impugned order does not dwell on the issue altogether, the same cannot be sustained and is accordingly quashed and set aside. The matter is remanded back to the Civil Judge, Junior Division, Mouda for considering and deciding the application under Section 28 of SR Act, as filed by the present petitioner, on its own merits.

7] The parties agree to appear before the learned Civil Judge, Junior Division, Mouda on 24.9.2021, who shall thereupon proceed to hear and decide the application under Section 28 of the SR Act, in the manner and mode and on the parameters as permissible in law.

8] It is made clear that MJC No. 8/2012 shall be endeavoured to be decided by the learned Court below

within a period of one year from the date of receipt of the order of this Court.

9] The petition is therefore, accordingly allowed in the above terms. In the circumstances, there shall be no order as to costs.

JUDGE

Rvjalit