



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 29.03.2021

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THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

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C.R.P. (MD) No.1924 of 2009

and

MP(MD) No.1 of 2009

Esakkiammal

... Petitioner

Vs.

1.Nambikonar (died)

2.Esakkiammal

3.Esakkimuthu

4.Lakshmi

5.Malaiyarasi

6.Krishnammal

(R2 to R6 has been impleaded

vide order dated 25.01.2021 in M.P(MD)No.1,2&3 of 2015)

made in MP(MD)Nos.1to3/15

..Respondents

Prayer: Civil Revision Petition filed under Section 115 of Civil Procedure Code, to call for the records and proceedings in fair and decreetal order passed in E.A.No.84/08 in E.P.No.16/03 in O.S.No.1077 of 1988 on the file of the Principal District Munsif, Valliyur, dated 18.09.2009 and set aside the same.

For Petitioner: Mr.P.Senthil

For R2 to R6 : Mr.S.Loganathan for
Mr.P.Senthur Pandian

ORDER

This revision is against an order made in E.A.No.84 of 2008 in E.P.No.16 of 2003, which was filed under Section 28 of the Specific Relief Act, 1963 seeking rescission of contract of sale on the ground that the decree holder/purchaser has not taken steps to deposit the decree amount within the reasonable time.

2.The facts, that led to filing of the Civil Revision Petition, are as follows:-

<https://hcservices.ecourts.gov.in/hcservices/>



3.The 1st respondent herein has sued for specific performance of a contract of sale dated 25.12.1986 in O.S.No.1077 of 1988. The suit was dismissed by the trial Court on 30.09.1991. The plaintiff preferred an appeal in A.S.No.46 of 1992. On 19.12.1994, the appellate Court decreed the suit. The appellate Court did not specify any time for deposit or

payment of the balance of sale consideration, while granting the decree for specific performance. Nearly after 8 years, the decree holder filed an execution petition in E.P.No.16 of 2003 on 21.08.2003. The decree holder did not choose to deposit the balance of sale consideration along with the execution petition also.

4.The execution petition came to be allowed by the Executing Court on 20.11.2007 with a direction to the decree holder to deposit the balance of sale consideration by 18.12.2007. The decree holder did not deposit the balance of sale consideration even by the said date, ie., 18.12.2007. He instead filed an application in E.A.No.12 of 2008 on 07.01.2008 seeking extension of time.

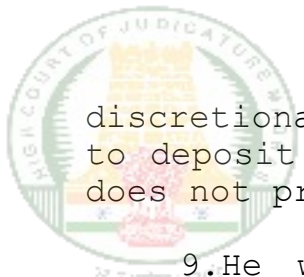
5.It is seen from the original records that the said E.A.No.12 of 2008 was allowed on the very date of filing without notice to the judgment debtor. Though the decree holder sought for a months time to deposit the balance of sale consideration, he did not make the deposit within the said time also. He filed another application in E.A.No.24 of

2008 on 04.02.2008 seeking further time to deposit the balance of sale consideration.

6.The said E.A.No.24 of 2008 also came to be allowed on the same day without notice to the judgment debtor. In this backdrop, the judgment debtor filed E.A.No.84 of 2008 on 01.04.2008 seeking rescission of the contract contending that the decree holder has not deposited the balance of sale consideration within a reasonable time. This petition came to be dismissed by the trial Court on the ground that the decree did not fix any time limit and the Court had in exercise of its powers under Section 28 of the Act, granted extension of time for depositing the balance of sale consideration. It is this order of dismissal has been challenged in this revision.

7.I have heard Mr.M.P.Senthil, learned counsel for the petitioner and Mr.S.Loganathan learned counsel for Mr.P.Senthur Pandian, learned counsel for the respondents 2 to 6.

8.Mr.M.P.Senthil, learned counsel appearing for the petitioner would submit that the refusal to rescind the contract under Section 28 of the Act by the trial Court amounts to refusal to exercise the jurisdiction vested in it. He would further point out that this



discretionary relief, the plaintiff cannot take his own sweet time to deposit the balance of sale consideration, even where the decree does not prescribe any time limit.

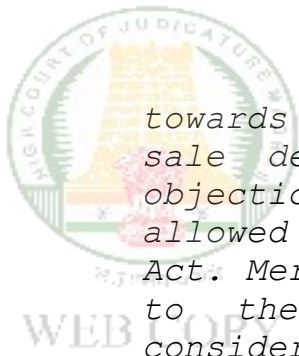
9. He would further submit that since the suit for specific performance does not end with the passing of the decree and Section 28 of the Specific Reliefs Act empowers the Court either to rescind the contract or extend the time for payment of the balance of sale consideration, the Court is seized off the matter till such time the decree is executed in full. The learned counsel would further submit that the plaintiff/deed holder must deposit the balance of sale consideration within a reasonable time from the date of the decree and seek execution. Even though a period of 12 years is available to him for execution of the decree, he cannot wait till the fag end of the limitation period to deposit the balance of sale consideration and seek execution of sale deed.

10. According to the learned counsel, the rise in price of the property in the interregnum must be taken into account by the Court while deciding on the question of rescission under Section 28 of the Act. Mr. M. P. Senthil in support of his submission would rely upon the judgment of this Court in **Narasimhan Vs. Balammal** reported in **1988 (2) MLJ 211**, wherein, this Court had considered the scope of the power under Section 28 of the Specific Relief Act, 1963. While considering the requirement of deposit within a reasonable time, even in the absence of a specific direction in the decree, this Court had held as follows:-

"19. On the facts of this case, the respondent has not proved her readiness and willingness to perform her part of the contract within a reasonable time after the decree. Though the decree in the present case has not specified any time to deposit the amount, it was the duty of the plaintiff to have performed her part within a reasonable time. The time taken viz., 3 years and odd cannot be said to be reasonable by any standard. Hence, the contract has to be rescinded as prayed for by the petitioner. The court below is wrong in dismissing the application filed by the petitioner. The application filed under Section 28 of the Specific Relief Act, will have to be allowed."

11. In **Raju Naidu Vs. M. Kolandaisamy and another** reported in **(1998) 2 CTC 585**, this Court had held that even if the direction to deposit the balance of sale consideration was not challenged, it would still be open to the judgment debtor to file an application under Section 28 of the Specific Relief Act, 1963 to rescind the contract on the ground of lack of readiness and willingness to perform on the part of the decree holder. In doing so, this Court had observed as follows:-

"14. The learned Senior Counsel appearing for the respondents has further submitted that when the amount



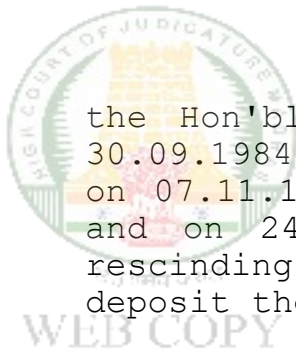
towards balance sale consideration was deposited and draft sale deed was filed, the petitioner did not take any objection. So, at this stage, the petitioner should not be allowed to file the application under Section 28 of the said Act. Merely because the petitioner did not take any objection to the deposit of the amount towards balance sale consideration, and to the filing of the draft sale deed, it cannot be said that he had lost his right under Section 28 of the said Act, especially when he has not positively accepted the amount. These facts cannot be construed as *res judicata* against the petitioner to invoke his right under Section 28 of the Specific Relief Act, 1963. While dealing with the application under Section 28 of the Said Act, we have to see only whether plaintiffs had performed their part of the contract promptly or not: In this case, as found earlier, the respondents had not performed their part of the contract promptly, and they have deposited the amount towards balance sale consideration long after the proceedings were over and so the order of the Court below cannot be sustained."

12. My attention is also drawn to the judgment of the Hon'ble Supreme Court in **Bhupinder Kumar Vs. Angrej Singh** reported in (2009) 8 MLJ 417, wherein, the Hon'ble Supreme Court had examined the scope of the power of the Court under Section 28 of the Specific Relief Act, 1963.

13. The Hon'ble Supreme Court had pointed out that the suit for specific performance would be deemed to be pending and in an application filed under Section 28 (1) of the Act, the Court should see all attending circumstances **including the conduct of the parties**. The Hon'ble Supreme Court found that a delay of about 2 years was fatal for the decree holder. In the said case, the suit was decreed on 13.10.1998 stipulating that the balance sale consideration is to be paid by 13.01.1999. The decree holder did not comply with the directions and sought for extension of time, after the judgment debtor filed an application for rescission on 13.08.2001. The Hon'ble Supreme

Court had held that the delay of 2 years and 7 months in making the application for extension would be fatal and the Court shall not extend the time.

14. Again in **Rajinder Kumar Vs. Kuldeep Singh and others** reported in 2014 (2) LW 540, the Hon'ble Supreme Court dealt with the scope of the power of the Court under Section 28 of the Specific Relief Act, 1963. While acknowledging the power of the Court to rescind the contract even after the decree, the Hon'ble Supreme Court had held that the executing Court had the power to rescind the contract under Section 28 of the Act, if it finds that the decree holder has not been quite serious in pursuing the case. On facts,



the Hon'ble Supreme Court found that though the decree is dated 30.09.1984, the execution petition came to be filed after 6½ years on 07.11.1990 and no serious steps were taken for almost a decade and on 24.04.1999, the respondents took out an application for rescinding the contract contending that the purchaser had failed to deposit the balance of sale consideration of Rs.12,60,000/-.

15.The Hon'ble Supreme Court taking note of the considerable rise in prices of land in the interregnum period and the fact that the decree holder has not exhibited due-diligences in prosecuting the case concluded that he would be entitled to rescind the contract. The Hon'ble Supreme Court referred to the earlier judgment in **Hungerford Investment Trust Limited (in voluntary Liquidation) Vs. Haridas Mundhra and others** reported in **AIR 1972 SC 1826 : (1972) 3 SCC 684**, wherein, the Hon'ble Supreme Court has held as follows:-

"25.It was contended on behalf of Mundhra that he was always ready ready and willing to pay the purchase money, but since the decree did not specify any time for payment of the money, there was no default on his part. In other words, the contention was that since the decree did not specify a time within which the purchase money should be paid and since an application for fixing the time was made by the appellant and dismissed by the Court, Mundhra cannot be said to have been in default in not paying the purchase money so that the appellant might apply for rescission of the decree. If a contract does not specify the time for performance, the law will imply that the parties intended that the obligation under the contract should be performed within a reasonable time. Section 46 of the Contract Act provides that where, by a contract, a promiser is to perform his promise without application by the promise, and no time for performance is specified, the engagement must be performed within a reasonable time and the question "what is reasonable time" is, in each particular case, a question of fact....."

16.From the above decisions, the following principles emerge.

i) The Court has the power either to rescind the contract or to extend the time under Section 28 of the Specific Relief Act, even after the decree had been passed in a suit for specific performance.

ii) The said power either to rescind or to extend the time has to be exercised based on sound judicial discretion and not mechanically.

iii) The Executing Court has to take into account the conduct of the parties, while considering the application under Section 28 of the Act particularly for rescission of the contract.

iv) The Executing Court while considering the application for extension of time will have to put the respondent/judgment debtor on notice before granting an order, extending the time.

v) If the decree holder is found to have been extremely



negligent in prosecuting the proceedings, the Court will be empowered to rescind the contract under Section 28 of the Act.

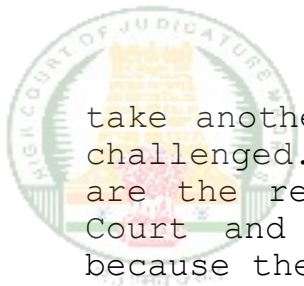
17. Adverting to the facts of the present case, it could be seen that a decree was passed in the appeal on 19.12.1994. The execution petition in E.P.No.16 of 2003 was presented in Court on 21.08.2003 ie., nearly after 9 years from the date of the decree. The balance of sale consideration was not deposited even at the time when the execution petition came to be filed. After 4½ years, the Executing Court passed an order in the execution petition on 20.11.2007, directing to deposit the balance of sale consideration by 18.12.2007. Though in the fair order passed in E.P.No.16 of 2003, a direction is found for depositing the balance of sale consideration by 18.12.2007, the same is not reflected in the decreetal order made in the said execution petition. Even this was not complied with and an application was filed on 07.01.2008 for extension in E.A.No.12 of 2008 and this application came to be allowed on the same day without notice to the respondents. Another application for extension was filed in E.A.No.24 of 2008 on 04.02.2008, which was also allowed on the very same day, without notice to the respondents. These orders of extension, in my opinion, cannot be sustained, since they were passed without any application of mind on the part of the Court.

18. As already pointed out, the Hon'ble Supreme Court has specifically held that the Courts while extending the time must consider the conduct of the parties. Unfortunately, the Executing Court has mechanically proceeded to pass orders for extension without even issuing notice to the other parties, who will be considerably prejudiced by such orders of extension.

19. The judgment debtor came up with an application in E.A.No.84 of 2008 seeking rescission of contract on 01.04.2008. The executing Court, while considering E.A.No.84 of 2008, has not considered any of the above. The executing Court has only relied upon the illegal extensions granted by it and had held that this application should be dismissed in the interest of justice. I am surprised with the language used particularly the words "ePjpad; eyk; nghUl;L". The narration of facts would show that it is ultimate injustice that has been done to the petitioner because of this order. I therefore have no hesitation in setting aside the order of the Executing Court. A plaintiff, who succeeds in a suit for specific performance, must exhibit his readiness and willingness to deposit the balance of sale consideration at least within a reasonable time.

20. The learned counsel appearing for the respondents 2 to 6 would submit that a petition for rescission would not lie after the deposit. Since I find that the orders extending the time without notice itself are nullity,

I do not think that the petitioner could be blamed for filing the application after the delay. It is clear that the petitioner has done behind his back. The learned counsel would



take another plea that the orders extending the time has not been challenged. As I have already said, the orders extending the time are the result of total non application of mind by the Executing Court and I have no doubt in concluding that they are nullity because they have been passed without notice to the judgment debtor.

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21. In **Narasimman Vs. Balammal's**, this Court had held that non deposit, even for a period of 3 years, would be fatal to the case of the decree holder. Here, the non deposit is for a period of 13 years ie., from December, 1994 to February, 2008.

22. In view of the above settled position of law, I am of the considered opinion that the decree holder has not exhibited readiness and willingness or seriousness in pursuing the execution petition. Hence, this Civil Revision Petition stands allowed. The application in E.A.No.84 of 2008 will stand allowed. The contract will stand rescinded. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

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Sub Assistant Registrar(CS)

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To
The Principal District Munsif,
Valliyoor.

+1 CC to M/s.P.SENTHUR PANDIAN, Advocate (SR-14224[F] dated 29/03/2021)

+1 CC to M/s.M.P.SENTHIL, Advocate (SR-14279[F] dated 30/03/2021)

C.R.P. (MD) No.1924 of 2009

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