

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.12776 OF 2021

Bhanudas Dadarao Bokade
(Died through L.Rs.)

1. Chandrakala Bhanudas Bokade
Age: 70 years, Occu.: Household,
2. Vimal Balaji Dure
Age: 60 years, Occu.: Household,
Both R/o. Village Wasangaon,
Tq. and Dist. Latur.
3. Suman Apparao Tambare
Age: 58 years, Occu.: Household,
R/o Sarsa, Tq. and Dist. Latur.
4. Sow Padmini Ganpati Kadam,
Age: 55 years, Occ.: Household,
R/o Shirshi Babhalgaon,
Tq. and Dist. Latur.
5. Sukumar Hanmant Tekale
Age: 53 years, Occu.: Household,
R/o Watwada,
Tq. & Dis. Osmanabad
6. Nirmala Madhukar Patil,
Age: 44 years, Occ.: Household,
R/o Nandgaon, Tq. and Dist. Latur.
7. Uttam Bhanudas Bokade,
Age: 54 years, Occ.: Agriculture
R/o Nandgaon, Tq. and Dist. Latur.
8. Anant Bhanudas Bokade,
Age: 46 years, Occ.: Agriculture,
9. Achyut Bhanudas Bokade,
Age : 43 years, Occ.: Agriculture,
10. Ramchandra Bhanudas Bokade,
Age: 39 years, Occ.: Agriculture,

R/Nos. 8 to 10 R/o. Wasangaon,
Tq. and Dist. Latur

.... Petitioners

Versus

Sanjay Shivshankar Chitkote
Age – 49 years, Occ.: Business,
R/o. Narayan Nagar, Latur,
Tq. and Dist.Latur.

.... Respondent

.....
Mr. P.R. Katneshwarkar, Advocate h/f Mr. R.P. Adgaonkar,
Advocate for the Petitioners
Mr. Ashwin Sakolkar, Advocate h/f Mr. V.G. Sakolkar, Advocate
for the Respondent

.....

[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON : 12th JULY, 2023

PRONOUNCED ON : 15th September, 2023

JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally
with the consent of the parties.

2. This petition is filed under Article 227 of the
Constitution of India, for following reliefs:

*“(B) The impugned order passed by the learned 3rd
Joint Civil Judge, Senior Division, Latur in
Special Darkhast No.12/2019, below Exh.11, 12,
13, 14 and common order below Exh.1, 15, 16,
18, 21, 23 and 27 dated 30.09.2021 may be
quashed and set aside.*

*(C) The further proceedings in Special Darkhast
No.12/2019, pending before learned 3rd Joint
Civil Judge, Senior Division, Latur may be
stated.*

*(D) Ad-interim relief in terms of prayer clause ‘C’
may be granted.*

(E) Any other just and equitable relief to which the present petitioner is entitled, may be granted in his favour."

3. Undisputed facts are that, Special Civil Suit No.217 of 2010 was filed by the respondent/original plaintiff against the petitioners/defendants for specific performance of contract in respect of agreement of sale of the suit property dated 16/03/2010. On 16/04/2016, the suit is decreed as follows;

"आदेश

1. वादीचा दावा खर्चासह मंजूर करण्यात येत आहे.
2. प्रतिवादी यांनी वादी यांना वाद मिळकतीचे खरेदीखत तीन महिन्यांच्या आत पूर्ण करून द्यावे. प्रतिवादी यांनी खरेदीखत करून देण्यास नकार दिल्यास अथवा टाळाटाळ केल्यास सदरचे खरेदीखत न्यायालयीन आयुक्तामार्फत पूर्ण करून घ्यावे.
3. वादी यांनी खरेदीखताची उर्वरीत रक्कम तीन महिन्यांच्या आत प्रतिवादी यांना द्यावी अथवा न्यायालयात जमा करावी. सदरची रक्कम न दिल्यास खरेदीखताबाबत झालेला हुकूमनामा रद्द झाल्याचे समजण्यात यावे.
4. प्रतिवादी यांनी स्वतः अथवा इतरांमार्फत वादी यांच्या वाद मिळकतीमधील कब्जे वहिवाटीस हरकत व अडथळा करू नये अथवा त्याची विक्री करू नये म्हणुन त्यांच्या विरुद्ध निरंतर मनाई आदेश पारीत करण्यात येत आहे.
5. वादी यांची रक्कम परत मागण्याची वैकल्पिक दाद नामंजूर करण्यात येत आहे.
6. येणेप्रमाणे हुकूमनामा तयार करण्यात यावा."

4. The respondent/plaintiff preferred First Appeal No.3691 of 2016, challenging the decree. He only challenged the part of the decree with a specific pleading that, he is

preferring the appeal only to the extent of part of refusal to return the consideration amount, and claimed that the Trial Court ought to have granted alternate remedy of refund of amount paid by him.

5. In First Appeal, on 21/02/2019, the Division Bench of this Court (Coram : T.V. Nalawade and Sunil K. Kotwal, JJ.) passed following order:

"2. Decree of specific performance of contract of sale of immovable property is given by the trial Court. Time of three months was given for depositing consideration amount. Plaintiff was found to be in possession and so the relief of injunction is also given in favour of the plaintiff.

3. The submissions made show that though the decree was given on 16.04.2016, till today the consideration amount is not deposited by the plaintiff / Decree Holder, but he has filed the present appeal. Learned Counsel for the appellant submitted that the price of property came down and so the consideration was not paid. Learned Counsel for the respondent / defendant submitted that legal representatives of the deceased defendant are still ready to accept the consideration shown in the agreement. In view of this circumstance, stand over to 25 February 2019 in urgent category. Further orders like dismissal of appeal as not tenable, will be passed on 25 February 2019."

6. Thereafter, on 25/02/2019, the Division Bench of this Court (Coram: T.V. Nalawade and Sunil K. Kotwal, JJ.) passed following order:

" Learned counsel for the appellant, on instructions, submits that the appellant is interested in getting the decree executed and therefore, he wants to file execution proceeding as on the last date i.e. 21st February, 2019, a statement was made on behalf of judgment-debtor that the judgment-debtor is ready to accept the consideration amount shown in the agreement. The statement made on 21st February, 2019 can be used by the appellant in the execution proceeding.

2. Today, Mr. R.K. Ashtekar, learned counsel for respondent No.1 submits that the judgment-debtor is not now ready to execute the sale-deed as time given for depositing consideration amount has expired. All these circumstances can be considered by the Executing Court. In view of above, the First Appeal stands disposed of."

7. Special Darkhast No.12 of 2019 in Special Civil Suit No.217 of 2010 was filed by the respondent/plaintiff (decree holder) on 25/04/2019. In the said Darkhast, on 02/02/2021, the decree holder filed Application Exhibit-11, contending that due to market situation, the decree holder is unable to deposit part consideration amount, therefore, he prayed for time for depositing the said amount. On this Application, without calling upon the other side, the Executing Court passed order;

"*allowed as prayed*". Thereafter, by filing Application Exhibit-12 on 08/03/2021, the decree holder asked for permission to deposit an amount of Rs.20,00,000/-. Thereafter, from time to time, the decree holder sought permission to deposit the amount, which was granted by the Executing Court as follows;

Exhibits	Date	Amount
Exhibit-13	25/03/2021	Rs. 23,00,000/-
Exhibit-14	02/04/2021	Rs. 10,00,000/-
Exhibit-15	08/04/2021	Rs. 13,00,000/-
Exhibit-16	22/04/2021	Rs. 15,00,000/-
Exhibit-18	08/06/2021	Rs. 55,00,000/-
Exhibit-21	28/06/2021	Rs. 65,00,000/-
Exhibit-27	22/07/2021	Rs. 1,00,000/-

8. The petitioners/judgment debtors, thereafter, filed application Exhibit-23 under Section 28(1) of the Specific Relief Act, contending that in view of conduct of the decree holder the decree be rescinded. The decree holder opposed the said application by filing detail say at Exhibit-29. After hearing the parties, by common order passed below Exhibits 1, 15, 16, 18, 21, 23 and 27, the Executing Court rejected the objection of the petitioners/judgment debtor vide Order XXI Rule 22 of the Code of Civil Procedure, so also Application Exhibit-23 for rescission of contract. The Executing Court further directed the Assistant Superintendent to accept the

Demand Drafts payments as were tendered vide applications Exhibits-15, 16, 18, 21 and 27 as per rules, without prejudice to the rights of the judgment debtors. The decree holder was directed to deposit the balance consideration amount, if any, forthwith. The decree holder and the judgment debtors were directed to comply their respective part as per Order XX, XXI of the Code of Civil Procedure. This order is impugned in the present petition.

9. Heard the learned advocate for the petitioners and the learned advocate for the respondent.

10. Learned advocate for the petitioners submitted that the order passed by the Executing Court granting extension is without jurisdiction. He submitted that, admittedly, in the decree, the Trial Court directed the decree holder to deposit the balance consideration amount within three months from the date of decree. On failure to do so, the decree would stand cancelled. The decree holder has failed to deposit the said amount, within three months from the date of decree. By pointing out the ground Nos. I, XI and XII raised by the decree holder in the First Appeal, he submitted that the decree holder himself had challenged the decree of specific performance passed in his favour claiming that, he was not in a position to

perform his part of contract. There was no stay during the pendency of the First Appeal. The First appeal was disposed of by the Division Bench of this Court on order dated 25/02/2019 by observing that the judgment debtor is now not ready to execute sale deed, as time given for depositing consideration amount has expired. The Division Bench, then directed that all these contentions to be considered by the Executing Court. He submitted that, in these circumstances, first application was filed by the decree holder seeking extension of time, after a period of two years from the date of passing of the order by the Division Bench. There is no explanation about delay. The judgment debtors were not even called upon by the Executing Court while allowing the said application. There is nothing in that application as to how much of time was to be granted.

He submitted that the order passed by the Executing Court granting extension is without jurisdiction, and therefore, cannot be sustained. He further submitted that readiness and willingness on the part of the decree holder is totally absent in the applications filed by him while depositing the amount. No application for extension was filed within three months from the date either of judgment and order or within three months from the date on which the Division Bench of this Court has

passed the order in First Appeal. He submitted that application under Section 28 of the Specific Relief Act, for extension of time for depositing the balance consideration has to be filed before the same Court, which passed the decree and the Executing Court has no jurisdiction to entertain such application. The impugned order is, therefore, without jurisdiction and cannot be sustained. In support of his submissions, he relied on the following judgments:

- (i) ***V.S. Palanichamy Chettiar Firm Vs. C. Alagappan, 1999 DGLS (SC) 111 (Supreme Court).***
- (ii) **Bhupinder Kumar Vs. Angrej Singh, 2009 DGLS (SC) 1259 (Supreme Court).**
- (iii) ***Prem Jeevan Vs. K.S. Venkata Raman and another, DGLS (SC) 218 (Supreme Court).***
- (iv) ***Ravi Setia Vs. Madan Lal and others, 2019 DGLS (SC) 1313 (Supreme Court).***

11. Per contra, learned advocate for the respondent supported the impugned order by submitting that the application for extension of time was filed before the same Court i.e. Civil Judge, Senior Division, though as extension petition. If the argument of the petitioners is to be accepted, then in that case, even their application filed seeking

rescission of the decree also was not maintainable before the Executing Court. He further submits that the application for rescission of the decree is filed belatedly only after 90% balance consideration of amount deposited by the decree holder. In that view of the matter, the Executing Court is justified in granting equitable relief in favour of the decree holder. Further submission is, since the High Court has recorded in the order passed in First Appeal, his readiness and willingness to pay the balance consideration amount, onwards the decree holder is entitled to deposit the amount. According to him, in the execution petition filed by the respondent, it is stated that he is ready to deposit balance consideration amount on such extended date that may be allowed by the Court, so that also can be treated as Application under Section 28 of the Specific Relief Act, seeking extension. Learned advocate for the respondent supported the impugned order and submitted that there is no substance in the petition, and the writ petition may be dismissed. In support of his submissions, he relied on; *Sardar Mohar Singh Through Power of Attorney Holder, Manjit Singh Vs. Mangilal Alias Mangtya, (1997) 9 Supreme Court 217* and *Surinder Pal Sone Vs. Sohan Lal (Dead) through Legal Representatives, (2020) 15 SCC 771*.

12. Perused the writ petition memo, annexures thereto, impugned order and the citations relied upon by the learned advocates for the petitioners and the respondent.

13. Before adverting the rival contentions of the parties, it is necessary to consider relevant provision of Section 28 of the Specific Relief Act, 1963. Section 28 of the Specific Relief Act, reads thus;

"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) Where a contract is rescinded under sub-section (1), the court—

(a) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and

- (b) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposit in connection with the contract.*
- (3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the Court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely:—*
- (a) the execution of a proper conveyance or lease by the vendor or lessor;*
- (b) the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease.*
- (4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.*
- (5) The costs of any proceedings under this section shall be in the discretion of the court."*

14. On plain reading of Section 28 of the Specific Relief Act, it is clear that in case of failure on the part of the plaintiff/decree holder to pay the purchase money within the period allowed by the decree or such further period as the Court may allow, the defendant/vendor may apply in the same suit in which the decree is made to have the contract rescinded. Section 28 also recognizes the power of the same Court, which passed the decree, to grant extension of time.

15. Indisputably, Special Civil Suit No.271 of 2010 was decreed by the learned Joint Civil Judge, Senior Division, Latur on 16/04/2016. As per clause (3) of the judgment and decree, the plaintiff was directed to deposit remaining consideration amount within three months. On failure of the plaintiff to deposit balance consideration amount within stipulated time, the decree was to be treated as cancelled. Pertinently, the decree holder challenged the part of the decree passed in his favour by filing First Appeal No.3691 of 2019. In the appeal memo, some of the grounds raised are;

"(I) That, the impugned judgment and award passed by the Civil Court is patently illegal and bad in law. The trial Court ought to have granted alternate relief to refund of huge amount paid by the appellant as earnest money to the respondents.

(XI) That, the trial Court while granting decree of specific performance of contract directed to deposit remaining consideration i.e. Rs.2,15,00,000/- in Court or pay to the defendants. This condition in decree has become final and conclusive. Since the plaintiff failed to deposit the remaining consideration amount in time and plaintiff is not praying for any stay to the decree nor praying the extension of time in decree. Hence this appeal against part of decree i.e. refusal to return the consideration amount.

(XII) That, the plaintiff is unable to deposit such huge amount because of his financial problem. Therefore is unable to execute the decree of part performance. Hence this appeal is preferred to the extent of part of refusal to return the consideration amount."

16. It is, therefore, clear that, the decree holder himself challenged the decree to the extent the Trial Court refused to return earnest money paid by the decree holder. He has specifically pleaded that he is unable to deposit such huge amount because of his financial problems, and therefore, he is unable to execute the decree of part performance. Obviously, the decree holder was not ready and willing to perform his part of contract, even at that point of time.

17. After disposal of the First Appeal, Special Darkhast No.12 of 2019 is filed by the decree holder in the Court of Civil Judge, Senior Division, Latur on 25/09/2019, for execution of

the decree. After almost lapse of two years period, therefore, application Exhibit-11 is filed by the decree holder on 02/02/2021, contending that, "*today in the present matter the decree holder is unable to deposit of part amount of consideration due to market situation. Therefore, time may be given for depositing the part amount of consideration. It is just and proper in the interest of justice*". Without calling upon the judgment debtors, who had appeared by that time, the Court allowed the application by an order; "*allowed as prayed*".

18. The ground Nos. I, XI and XII taken in the First Appeal, and absence of proper reasons mentioned in Application Exhibit-11, which was belatedly filed, disentitles the decree holder to the equitable relief of extension of time. The Executing Court has erroneously granted extension without hearing the other side.

19 The Executing Court has further committed an error in allowing application Exhibit-12 dated 08/03/2021, Exhibit-13 dated 25/03/2021, Exhibit-14 dated 02/04/2021 and Exhibit-15 dated 08/04/2021 filed by the decree holder seeking permission to deposit part consideration amount without hearing the judgment debtors.

20. Admittedly, there was no stay during the pendency of the First Appeal, and there was no extension granted by the competent Court in favour of the decree holder to deposit balance consideration amount as stipulated in clause (3) of the judgment and decree. By operation of clause (3), the decree stood cancelled.

21. The Executing Court has failed to appreciate the fact that in view of Clause (3) of the decree that, on failure of the decree holder to deposit the remaining consideration amount within three months, the decree stood cancelled. Even, if the appeal filed by the decree holder can be said to be continuation of the suit, the pleadings of the decree holder in first appeal show that he was not ready and willing to perform his part of contract. Order passed in the First Appeal expected that the Executing Court to consider the statements recorded in orders dated 21/02/2019 and 25/02/2019. The Executing Court has failed to consider these aspects and has erroneously proceeded to grant extension, without hearing other side.

Even if, it is presumed for the sake of argument, that the execution petition was filed before the same Court, which passed the decree, in absence of any plausible or any acceptable material placed on record by the decree holder, the

Court has erroneously proceeded to allow the applications for extension of time, in mechanical manner, and that too, without hearing the judgment debtors.

22. In *V.S. Palanichamy Chettiar Firm* (supra), the Apex Court considered the scope of Section 28 of the Specific Relief Act, and held;

"10. In the present case no such application has been filed by the respondent decree-holders before the trial court seeking extension of time to deposit the balance amount under the decrees. The applications which have been filed in the High Court have been transmitted to the executing court with a direction to the executing court to dispose them of by restoring the execution applications which had been dismissed.

11.

From the language of sub-section (1) of Section 28, it could be seen that the court does not lose its jurisdiction after the grant of the decree for specific performance nor it becomes functus officio. The very fact that Section 28 itself gives power to grant order of rescission of the decree would indicate that till the sale deed is executed in execution of the decree, the trial court retains its power and jurisdiction to deal with the decree of specific performance. It would also be clear that the court has power to enlarge the time in favour of the judgment-debtor to pay the amount or to perform the conditions mentioned in the decree for specific performance, in spite of an application for rescission of the decree

having been filed by the judgment- debtor and rejected. In other words, the court has the discretion to extend time for compliance of the conditional decree as mentioned in the decree for specific performance.

12.

13. *In K.S. Vidyanadam & Ors. vs. Vairavan (1997 (3) SCC 1) this Court referred to the circumstances to be considered in exercising the discretionary power of the Court to decree specific performance of agreement for the sale of immovable property. The Court was of the view that in spite of the fact that suit was filed within the period of limitation as prescribed in Article 54 of the Limitation Act, 1963, the Court can nevertheless see that even where time is not the essence of the contract, the plaintiff must perform his part of the contract in reasonable time and by looking at all the relevant circumstances including the express terms of contract and nature of the property. The case before the Supreme Court was an appeal by the defendants-vendors who had suffered decree of specific performance of agreement for sale of their immovable property located in Madurai in the State of Tamil Nadu. The Court noticed that in case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades. The Court then held as under :*

"In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2½ years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of

sale deed within six months. Further, the delay is coupled with substantial rise in prices - according to the defendants, three times - between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff."

14. *In N.P. Thirugnanam (Dead) By LRS. vs. Dr. R. Jagan Mohan Rao & Ors. [(1995) 5 SCC 115] this Court observed with reference to Section 16[c] and 20 of the Act that the continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance and that this circumstance is material and relevant and is required to be considered by the Court while granting or refusing to grant the relief. If plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The Court is not bound to grant the relief which is discretionary merely because there was a valid agreement of sale. It is equitable remedy and is in the discretion of the Court which discretion, however, has to be exercised according to the settled principles of law and not arbitrarily.*

23. The same view is taken by the Apex Court in ***Kumar Dhirendra Mullick and others Vs. Tivoli Partk Apartments Ltd., (2005) 9 SCC, 262.***

24. Applying the aforesaid ratio to the facts of the present case, it is clear that there is not merely a delay, but it is a case of inaction on the part of decree holder filed application seeking extension of time under Section 28 of the Specific Relief Act, for more than two years, which is in clear violation of clause (3) of the decree, which casted obligation on decree holder to pay balance consideration amount within three months from the date of decree. This unexplained delay and absence of material on record to show readiness and willingness on the part of the decree holder, disentitles him to the relief of specific performance and extension of time under Section 28 of the Specific Relief Act. There is absolutely no just and reasonable cause shown by the decree holder to extend time for depositing balance consideration amount.

25. It is well settled that readiness and willingness of the plaintiff to perform essential terms of the contract are *sine qua non* for granting a decree of specific performance. There is absolutely no material to show that the decree holder was ready and willing to perform his part of contract. On the

contrary, there is record to show that the decree holder was not willing to perform his part of contract, which is clear from the aforestated grounds raised in the first appeal, filed by the decree holder challenging the decree passed in his favour. It is therefore clear from the record that the decree holder has failed to conduct himself in a reasonable manner and by operation of clause (3) of the decree, the decree stood cancelled. Ignoring this, the Executing Court has mechanically granted extensions to the decree holder merely for asking, without there being any explanation on the part of the decree holder for inordinate delay and as to why he did not perform his part of contract, within the time stipulated in the decree. Considering the settled legal position and the aforestated facts of the present case, the Executing Court ought to have allowed Application Exhibit-23 filed by the judgment debtors, and ought to have rescinded the agreement dated 16/03/2010.

26. In ***Bhupinder Kumar*** (supra), the Apex Court has considered power and duty of Executing Court, while considering the application under Section 28 of the Specific Relief Act, 1963, it is held;

"(7) The following questions arose for consideration before this Court:

(i) *Whether the Court has power to extend the time in favour of a decree holder to pay the balance amount/perform conditions as mentioned in the decree for specific performance?*

(ii) *Whether the appellant had shown sufficient and reasonable ground for extension of time?*

(8)

(9)

(10)

Even so, specific performance is an equitable relief and he who seeks equity can be put on terms to ensure that equity is done to the opposite party even while granting the relief. The final end of law is justice, and so the means to it too should be informed by equity. That is why he who seeks equity shall do equity. Here, the assignment of the mortgage is not a guileless discharge of the vendors debt as implied in the agreement to sell but a disingenuous disguise to arm herself with a mortgage decree to swallow up the property in case the specific performance litigation misfires. To sterilise this decree is necessary equity to which the appellant must submit herself before she can enjoy the, fruits of specific performance.

(11) *In Kumar Dhirendra Mullick and Others vs. Tivoli Park Apartments Ltd. (2005) 9 SCC 262, this Court, after analyzing earlier decisions, has concluded that when the court passes the decree for specific performance, the contract between the parties is not extinguished. The court does not lose its jurisdiction after the grant of*

the decree for specific performance nor does it become functus officio. The decree for specific performance is in the nature of a preliminary decree, and the suit is deemed to be pending even after the grant of such decree. Hence, the Court retains control over the entire matter even after the decree. Section 28 gives power to grant order of rescission of the agreement which itself indicates that till the sale deed is executed, the Trial Court retains its power and jurisdiction to deal with the decree of specific performance. Therefore, the court has the power to enlarge the time in favour of the decree-holder to pay the amount or to perform the conditions mentioned in the decree for specific performance. It is clear that Section 28 gives power to the court either to extend the time for compliance of the decree or grant order of rescission of the agreement. These powers are available to the Trial Court which passes decree of specific performance. In other words, when the court passes the decree for specific performance, the contract between the parties is not extinguished. To put it clear that the decree for specific performance is in the nature of preliminary decree and the suit is deemed to be pending even after the decree. Sub Section 1 of Section 28 makes it clear that the court does not lose its jurisdiction after the grant of decree for specific performance nor it becomes functus officio. On the other hand, Section 28 gives power to the Court to grant order of rescission of the agreement and it has the power to extend the time to pay the amount or perform the conditions of decree for specific performance despite the

application for rescission of the agreement/decree. In deciding application under Section 28 (1) of the Act, the Court has to see all attending circumstances including the conduct of the parties.

- (12) If we apply the above principles to the facts of the present case, the order of the Executing Court and the High Court cannot be faulted with. The suit for specific performance is in the nature of discretionary remedy and on equity, the appellant was not entitled to get the decree executed since he failed to place relevant materials about his inability to tender or deposit the decreed amount. It is relevant to mention that the sale agreement was executed on 20.11.1990, the suit for specific performance was filed on 13.12.1991 and suit was decreed on 13.10.1998 stipulating that the balance sale consideration was to be paid by 13.01.1999. In fact, only after the judgment debtor filed application for rescission of agreement on 28.05.2001, the application for extension of time was moved on 13.08.2001. As discussed earlier, though the court has power and discretion to extend the time for fulfillment of the contract, in the case on hand, there is neither any material to show that the appellant was having required money nor had he tendered or deposited the same as per terms of the decree. Both the Executing Court and the High Court found that there was no just and reasonable cause to extend time for depositing the balance consideration.*

(13) In the circumstances and the material placed, we are satisfied that due to bereft of any acceptable material for extension of time, the Executing Court rightly declined to extend the time, consequently rescinded the contract as requested by the respondent judgment-debtor. The High Court, after analyzing all these aspects and finding that the decision arrived at by the Executing Court is just and equitable, dismissed the revision. We are in entire agreement with the said conclusion. Consequently, the appeal fails and the same is dismissed."

The aforesaid ratio supports the case of the petitioners.

27. In ***Sardar Mohar Singh*** (supra), it is held;

"4. From the language of sub-section (1) of Section 28, it could be seen that the Court does not lose its Jurisdiction after the grant of the decree for specific performance nor it becomes functus officio. The very fact that Section 28 itself gives power to grant order of rescission of the decree would indicate that till the sale deed is executed in execution of the decree, the trial Court retains its power and jurisdiction to deal with the decree of specific performance. It would also be clear that the Court has power to enlarge the time in favour of the judgment-debtor to pay the amount or to perform the conditions mentioned in the decree for specific performance, in spite of a application for rescission of the decree having been filed by the judgment-debtor

and rejected. In other words, the Court has a discretion to extend time for compliance of the conditional decree as mentioned in the decree for specific performance, It is true that the respondent has not given satisfactory explanation of every day's delay. It is not, unlike Section 5 of the Limitation Act, an application for condonation of delay. it is one for extension of time. Under these circumstances, the executing Court as well as the High Court had exercised discretion....."

In the case in hand, since there is no plausible explanation given by the respondent for the delay, this ruling is of no help to the case of respondent.

28. In ***Surender Pal Soni*** (supra), the Apex Court considered the provisions of Section 47 and Order XLI Rule 5 of the Civil Procedure Code. In that case, applicability of doctrine of merger was considered. The said decision is rendered in different facts and is of no assistance to the case of the respondent.

29. While passing the impugned order, the Court has misread and misconstrued clause (3) of the judgment and decree, Section 28 of the specific Relief Act, and the settled legal position. Subsequent events after passing of the decree, pleadings of the parties, and the conduct of the decree holder

is ignored by the Court, while passing the impugned order. The impugned order is, therefore vitiated on the ground of non application of mind on the part of the Court. The Court has also lost sight of the fact that the decree holder has failed to show readiness and willingness to perform his part of contract and without citing any just and proper reasons, belatedly sought extension of time, which the Court has granted without hearing the other side. The impugned order is, therefore unsustainable in law and facts of the case. In the result, following order:

ORDER

- (I) The writ petition is allowed.
- (II) Impugned order dated 30/09/201 passed by learned 3rd Joint Civil Judge, Junior Division, Latur, below Exhibits-1, 15, 16, 18, 21, 23 and 27 in Special Darkhast No. 12 of 2019 is hereby quashed and set aside.
- (III) Application Exhibit-23 is allowed.
- (IV) The judgment debtors shall return the earnest amount paid by the decree holder within a period of twelve weeks from today along with simple interest @ 6% from the date of payment of the said amount till its realization.

- (V) The balance consideration amount deposited by the respondent/decreed holder from time to time in the Court of 3rd Joint Civil Judge, Senior Division, Latur in Special Darkhast No.12 of 2019 be refunded to him along with accrued interest.

Rule is made absolute in above terms with no order as to costs.

30. At this stage, learned advocate for the respondent seeks stay to this order. In the interest of justice, this order shall remain stayed for a period of two weeks from today.

[NITIN B. SURYAWANSHI]
JUDGE

S.P. Rane