



Harish

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9800 OF 2012

Nandu Maruti Pol & Anr.

...Petitioners

Versus

Satishkumar Satyanarayan Agarwal

S/d ; by heirs

Meena Satishkumar Agarwal (Mittal) & Ors.

...Respondents

Mr. Atul Damle, Senior Advocate i/by Mr. Sushil Inamdar for the
Petitioners.

Mr. Drupad S. Patil for the Respondents.

CORAM : SHARMILA U. DESHMUKH, J.

RESERVED ON : JULY 31, 2023

PRONOUNCED ON : SEPTEMBER 12, 2023

JUDGMENT :

1. The Petition takes exception to the order dated 21st June, 2012 passed by the Additional Judge, Small Causes Court and Joint Civil Judge, Senior Division, Pune below application Exhibit-“10” and Exhibit-“16” in Special Darkhast No. 170 of 2007 allowing the application below Exhibit-“10” and rejecting the application below Exhibit -“16”. During the pendency of the Petition, the Respondent Decree holder expired and his legal heirs were brought on record.

2. The facts of the case stated briefly are that the Respondent(now deceased) had filed Special Civil Suit No. 1922 of 1995 *inter alia* seeking specific performance of agreement for sale dated 20th February, 1989 in respect of property bearing Gat No. 1051 admeasuring 0H 53Rs situated at Village Markal, District- Pune. Vide judgment and decree dated 14th September, 2004 the suit came be decreed as under:

Order

1. Suit is decreed with cost.
2. The plaintiff is entitled for specific performance of contract on depositing balance consideration amount within one month from the date of this order.
3. The defendant no. 1 and 2 are directed to execute a registered sale deed of the suit land, and hand over physical possession of the suit property in favour of the plaintiff after obtaining necessary permissions from the District Collector and of the Resettlement of project Displaced Persons Act 1976 within two months from the date of this order, failure to which the plaintiff has to get it execute the registered sale deed and obtained necessary permissions through by the Court Commissioner appointed to that effect on the charges incurred for registered Sale Deed by the Plaintiff.
4. Decree be drawn up accordingly.

3. In the year 2007, execution application being Special Darkhast No. 170 of 2007 was filed by the Respondent-decree holder seeking execution

of the judgment and decree dated 14th September 2004.

4. In the execution proceedings, an application came to be filed on 18th December, 2008 by the Respondent seeking extension of time for depositing the balance amount of consideration. On 17th February, 2009, an application under Section 47 of Code of Civil Procedure, 1908 was filed by the Appellants- judgment debtors seeking dismissal of the execution application. Both these applications were heard together and by common impugned order dated 21st June, 2012 the executing Court allowed the application below Exhibit -“10” filed by the decree holder and rejected the application below Exhibit -“16” filed by the judgment debtors.

5. Heard Mr. Atul Damle, learned Senior Advocate appearing for the Petitioners and Mr. Drupad S. Patil learned counsel appearing for the Respondents .

6. Mr. Atul Damle, learned Senior Advocate for the Petitioners points out Clause No. 2 of the operative part of the judgment dated 14th September, 2004 directing payment of balance consideration within one month and would contend that neither balance consideration was paid within the stipulated period nor application was filed for extension of time and instead execution application was filed. He submits that the

execution application was filed in the year 2007 and the application for extension of time came to be filed on 18th December, 2008 after lapse of about four years and three months. He would urge that extension of time in absence of any explanation for the delay could not be granted. He submits that as there was non compliance of direction of deposit, objection was raised seeking dismissal of the execution proceedings. In support of his contentions, he relies upon the following decisions of the Apex Court.

- **V. S. Palanichamy Chettiar Firm vs. C. Alagappan & Anr., [(1999) 4 SCC 702] ,**
- **Balwant Singh vs. jagdish Singh & Ors. [(2010) 8 SCC 685]**
- **Kishor Ghanshyamsa Paralikar vs. Balaji Mandir Sansthan Mangrul (Nath) & Anr. [2022 SCC Online SC 1863]**

7. *Per contra*, Mr. Patil, learned counsel for the Respondents submits that along with the present Petition, the facts of the connected Petitions are also required to be taken into consideration as sufficient explanation has been tendered in the applications filed in the execution applications which are subject matter of connected Petitions. He would submit that there were three decrees passed, the first the subject matter of the present Petition was passed on 14th September, 2004 whereas, the second and third decrees were passed on 6th November, 2006 and, the period of one

month in the second and third decree expired on 6th December, 2006. He submits that on 3rd January, 2007, application was filed before the Trial Court for extension of time which came to be rejected by order dated 6th January, 2007 on the ground that the Court has become functus officio and that the application has to be presented to the executing Court. He would submit that it was in this circumstances, execution application was filed and subsequently application was filed before the executing Court for extension of the time. He would submit that after notices were issued to the judgment debtors application for extension of time was filed. According to him failure to deposit the amount within the stipulated period will not result in dismissal of the suit. He would further submit that the provisions of Section 5 of the Limitation Act are not applicable as it is not an application for condonation of delay. He would further urge that there is no application filed by the decree holders for rescission of the contract and, as such, the decree does not stand extinguished. In support of his submissions he relies upon the following decisions:

- **Sardar Mohar Singh vs. Mangilal @ Mangtya [(1997) 9 Supreme Court Cases 217]**
- **K. Kalpana Saraswathi vs. P.S.S. Somasundaram Chettiar [(1980) 1 Supreme Court Cases 630]**
- **Shobha w/o Vilas Thakare vs. Narendra s/o Tumdeo Hulke & Ors.[2000 (4) Bom.C.R. 56]**

- **Surinder Pal Soni vs. Sohan Lal [(2020) 15 Supreme Court Cases 771]**

8. In rejoinder Mr. Damle, submits that the application filed under section 47 of the CPC is in the nature of seeking rescission of the contract.

9. Considered the submissions and perused the papers with the assistance of learned counsel appearing for the parties.

10. The fact is that three suits seeking specific performance of different agreements in respect of different properties were adjudicated independently resulting in three separate judgments viz one dated 14th September, 2006 and two judgments dated 6th November, 2006. Separate execution proceedings were adopted by the Respondent-decree holder. Learned counsel for the Respondents wants this Court to consider the pleadings of the applications filed in the other two execution applications as part and parcel of the application filed in the instant execution proceeding. The decree in the instant case was passed on 14th September, 2004 in an independent suit which was adjudicated separately. The litigation was in respect of different properties being subject matter of different agreement for sale resulting in separate decrees which were put in execution by way of separate execution proceedings. The executing Court has independently adjudicated the applications and passed separate orders. The application in the instant case does not incorporate the

pleadings of other applications by reference. As such, the contention is liable to be rejected.

11. No Appeal was filed against the judgment and decree dated 14th September 2004 and, as such, the same attained finality. Despite the judgment directing the payment of balance consideration to be made within a period of one month and to get the registered sale deed executed within period of two months upon failure of the Petitioners, the Respondent neither paid the balance consideration within one month nor took steps through Court Commissioner for obtaining necessary permission and getting the sale deed executed upon failure of the Petitioners to do so for a period of almost two and half years.

12. On 13th March, 2007, Special Darkhast No. 170 of 2007 was filed seeking execution of the decree dated 14th September, 2004, without filing an application for extension of time for deposit of balance consideration under the provisions of Section 28 of Specific Relief Act, 1963. Before the executing Court on 18th December, 2008, after a lapse of about 4 years and 3 months the application below Exhibit “10” was filed seeking extension of time for deposit. On 17th February, 2009 by an application under Section 47 of CPC, the Judgment Debtors sought dismissal of the execution proceedings on the ground that the executing

Court cannot go behind the decree; that the Decree holder has no right to execute the decree and there is no option kept open to extend time to deposit balance consideration, and, by not complying with condition of deposit the decree holder has failed to show his willingness to purchase suit land and now his claim is non-existent. It was further contended that value of the property has increased and the decree holder has no existing right to execute the decree after period of four years.

13. Considering the facts of the present case, two issues requiring determination is whether the executing Court had jurisdiction to extend the time for deposit and secondly, whether the discretion, if any, has been rightly exercised.

14. As regards the jurisdiction of the executing Court to extend the time for depositing the balance consideration, the said issue is no longer *res integra*. The Apex Court in ***Hungerford Investment Trust Ltd vs. Haridas Mundhra***, [AIR 1972 SC 1826] observed in paragraph No. 24 as under:

“The Specific Relief Act, 1963 is not an exhaustive enactment and under the law relating to specific relief, a Court which passes a decree for specific performance retains control over the decree even after the decree has been passed. Therefore, the Court, in the present case, retained control over the matter despite the decree and it was open to the Court when it is alleged that the party moved against

had positively refused to complete the contract, to entertain the application and order rescission of the decree if the allegation was proved.”

15. In the case of ***Ramakutty Guptan vs. Avara [(1994) 2 SCC 642]*** the Apex Court held that when the Court which passed the decree and the executing Court is the same, application under Section 28 can be filed in the executing Court. The position of law emerging from the judicial pronouncements is that the Court which passes the decree for specific performance retains control over the decree even after the decree has been passed and in event the Court which passed the decree and the executing Court is the same, the executing Court retains control over the decree and can extend the time for deposit or grant rescission of contract. In the instant case, it is not in dispute that the Court passing the decree and the executing Court is the same and, as such, the application for extension of time could be filed and considered by the executing Court.

16. Now, it will have to be considered whether the discretionary power has been rightly exercised by the Executing Court. Learned Counsel for Respondent submitted that the application is one seeking enlargement of time unlike an application under Section 5 of Limitation Act for condonation of delay and, as such, it is not necessary to explain each day's delay. It is correct to state that the application seeks enlargement of time,

however, fact remains that the contract subsists despite the decree and the obligation to complete the contract within a reasonable time continued. Can it therefore be stated that the reasonableness of the delay cannot be gone into while considering the application for extension of time. In my view, the answer is in the negative. The Apex Court in the case of *Smt. Periyakkal and ors. Vs. Smt. Dakshyani*, [AIR 1983 Supreme Court 428] in paragraph No. 4 held thus:

“4..... The parties, however, entered into a compromise and invited the court to make an order in terms of the compromise, which the court did. The time for deposit stipulated by the parties became the time allowed by the court and this gave the court the jurisdiction to extend time in appropriate cases. Of course, time would not be extended ordinarily, nor for the mere asking. It would be granted in rare cases to prevent manifest injustice. True, the court would not rewrite a contract between the parties but the court would relieve against a forfeiture clause; And, where the contract of the parties has merged in the order of the court, the court's freedom to act to further the ends of justice would surely not stand curtailed.”

17. As held by the Apex Court, the time would not be extended ordinarily nor for the mere asking. In exercise of discretionary power, the Court adjudicating the application will have to consider the reasonableness and adequacy of the ground of delay alongwith the

attending circumstances.

18. In the instant case, the Appellant has not availed the right to seek rescission of the contract as envisaged under Section 28 of the Specific Relief Act, 1963, however, the failure of the Appellant to seek rescission of the contract cannot result in grant of time for deposit of balance consideration. As there is no consequence provided in the decree for failure to comply with the direction of payment, the issue becomes one of exercise of discretion. The pivotal issue is whether the Executing Court has rightly exercised the discretionary power in extending the time to pay the balance consideration. If the answer is in the negative, consequences of dismissal of the application for extension of time will follow.

19. Reliance has been rightly placed by Mr. Damle, learned Senior Advocate for the Petitioner on the decision of Apex Court in the case of *V.S. Palanichamy Chettiar Firm vs. C. Alagappan & Anr.*, (*supra*). In the facts of that case, the Decree holder filed execution application after five years of decree by trial court and three years after dismissal of appeals by High Court. In the appellate proceedings against the order of executing Court dismissing the execution application, an application was filed for extension of time to deposit the amount and the High Court remanded the matter to executing court to decide the same. The Apex Court after

analyzing the provisions of Section 28 of Specific Relief Act and considering various decisions on the subject held in paragraph Nos. 16 and 17 as under:

“16. In view of the decision of this Court in Ramankutty Guptan case when the trial court and the executing court are the same, the executing court can entertain the application for extension of time though the application is to be treated as one filed in the main suit. On the same analogy, the vendor judgment-debtor can also seek rescission of the contract of sale or take up this plea in defence to bar the execution of the decree. One of the grounds on which the trial court dismissed the execution application was that the decree- holder did not pay the balance of consideration as per the sale agreement and also did not pay within the time stipulated by the Court in the decree. The High Court could have certainly gone into this question when applications for extension of time were filed before it. However, on the objection by the judgment-debtor, it chose to send back the matter to the executing court for decision on these applications, which was perhaps, in the circumstances, not the correct procedure to adopt. But then, at the same time, the High Court put shackles on the discretion of the executing court by observing that the vendor might have felt that after the appeal filed by the vendor judgment-holder against the decree for specific performance was disposed of, they can even then deposit the amount at the time of seeking the execution of the sale deed.

17. The agreement of sale was entered into as far back on 16-2-1980, about 19 years ago. No explanation is forthcoming as to why the balance amount of consideration could not be deposited within the time granted by the Court and why no application was made under Section 28 of the Act seeking extension of time of this period. Under Article 54 of the Limitation Act, 3 years' period is prescribed for filing the suit for specific performance of a contract of sale from the date of the agreement or when the cause of action arises. Merely because a suit is filed within the prescribed period of limitation does not absolve the vendee-plaintiff from showing as to whether he was ready and willing to perform his part of the agreement and if there was non-performance, was that on account of any obstacle put by the vendor or otherwise. Provisions to grant specific performance of an agreement are quite stringent. Equitable considerations come into play. The court has to see all the attendant circumstances including if the vendee has conducted himself in a reasonable manner under the contract of sale. That being the position of law for filing the suit for specific performance, can the court, as a matter of course, allow extension of time for making payment of balance amount of consideration in terms of a decree after 5 years of passing of the decree by the trial court and 3 years of its confirmation by the appellate court? It is not the case of the respondent decree-holders that on account of any fault on the part of the vendor judgment-debtor, the amount could not be deposited as per the decree. That being the position, if now time is granted, that would be going beyond the period of limitation prescribed for filing

of the suit for specific performance of the agreement though this provision may not be strictly applicable. It is nevertheless an important circumstance to be considered by the Court. That apart, no explanation whatsoever is coming from the respondent decree-holders as to why they did not pay the balance amount of consideration as per the decree except what the High Court itself thought fit to comment which is certainly not bore out from the record. Equity demands that discretion be not exercised in favour of the respondent decree-holders and no extension of time be granted to them to comply with the decree.”

20. The decision in the case of ***V.S. Palanichamy Chettiar Firm*** (supra) was considered in a recent decision of the Apex Court in the case of ***P. Shyamala vs Gundlur Masthan***, [2023 SCC OnLine SC 184], where the judgment and decree of specific performance was passed on 12th October, 2013 and time for deposit was within two weeks. After a delay of of 853 days, an application was moved for enlargement of time. The Apex Court in that case also considered the decision in the case of ***Smt. Periyakkal and ors. Vs. Smt. Dakshyani***, [AIR 1983 Supreme Court 428] and observed in paragraph No. 24 as under:

24. Applying the law laid down by this Court in the aforesaid decision to the facts of the case on hand and considering Section 28 of the Specific Relief Act, we are of the opinion that the trial Court erred in exercising the discretion in favour of the plaintiff and erred in extending

the time in favour of the plaintiff to deposit the balance sale consideration of Rs. 15,00,000/- by condoning the huge delay of 853 days, which as observed hereinabove has not been explained sufficiently at all. As observed hereinabove, after the plaintiff was directed to deposit the balance sale consideration of Rs. 15,00,000/- within a period of two weeks from the date of ex-parte judgment and decree dated 12.10.2013, which the plaintiff failed to deposit/pay, even no application for extension of time under Section 148 CPC and Section 28 of the Specific Relief Act was made thereafter within a reasonable time and was made after a period of 853 days. Nothing is on record that in between any notice was given to the defendant to execute the sale deed as per the judgment and decree on deposit of the balance sale consideration. The application filed by the plaintiff under Section 148 CPC and Section 28 of the Specific Relief Act seeking extension of time to deposit the balance sale consideration was hopelessly delayed. As observed hereinabove, Section 28 of the Specific Relief Act seeks to provide complete relief to both the parties in terms of a decree of specific performance. Therefore, the trial Court failed to exercise the discretion judiciously in favour of the defendant and erred in exercising the discretionary power in favour of the plaintiff, that too with a delay of 853 days.”

21. – The Apex Court in the aforesaid decision was dealing with a case of delay of 853 days and has observed that discretion could not be exercised as the delay had not been sufficiently explained. In the instant

case, the agreement for sale was entered in the year 1989 for sale of 53R vatan land subject to new tenure for consideration of Rs 15,900/-. The earnest money paid was Rs 3,200/-. The suit was filed in the year 1995 and was adjudicated finally on 14th September, 2004. A period of almost 34 years have gone by from the date of agreement for sale. The execution application was filed without any application being filed seeking extension of time. The application for enlargement of time has been filed after a lapse of about four years and three months from the judgment of the year 2004. As indicated above, the Apex Court has applied principle of equity applicable to the suit for specific performance to the application for extension of time. That being so, in the instant case, it cannot be said that equity favours the Respondent. There is no explanation tendered for failure to pay the balance consideration within the period of one month or to take necessary steps within the period of two months to get the sale deed registered. It needs to be noted that the suit of 1995 was not contested by the Petitioners by filing written statement and even the evidence of the Respondent was not challenged. The only explanation tendered that while filing execution application when the papers were gone through he learnt that the purchase price had to be paid within one month. In my view, the pleadings cannot be said to constitute any explanation much less sufficient explanation. The application is filed as a

matter of course without setting out any reasons for the delay. The Respondent has not taken any steps for payment of balance consideration or to obtain permissions and get the sale executed within period of two months. It cannot be believed that the Respondent was not aware that the amount of balance consideration had to be paid within one month. It needs to be noted that the Petitioners had not parted with the possession of the suit property in favour of the Respondent. In such circumstances equitable considerations cannot be stated to favour the Respondent.

22. The application below Exhibit-“16” rightly raised the plea of non payment of balance consideration as directed by the judgment of the year 2004 in defence to the execution of the decree as observed by the Apex Court in the case of *V.S. Palanichamy Chettiar*.

23. As laid down in the decision of *V.S. Palanichamy Chettiar*, the court has to see all attendant circumstances including if the vendee has conducted himself in a reasonable manner under the contract of sale. Viewing the facts of the instant case, it cannot be said that there was readiness and willingness on part of the Respondent Plaintiff and thus equitable considerations come into play. The agreement is of the year 1989. It can be inferred that as compared to the purchase price in the year 1989, the market value of the property must have increased substantially

in the year 2008. Even considering from the date of the judgment of the year 2004, the period of four years must have resulted in increase in the market value of the property.

24. Apart from the fact that the application was bereft of any acceptable material for extension of time, as held by the Apex Court in the case of *V.S. Palanichmay Chettiar Firm* (supra), if after period of four and half years, the application is filed it is an important factor to be taken into consideration in view of the limitation of three years provided for filing suit for specific performance.

25. The Executing Court has granted time to deposit the amount for the mere asking without taking into consideration whether equity demands the discretion to be exercised in favour of the Plaintiff. The common thread which runs through the decisions of the Apex Court considered above is that upon an application being filed under Section 28 of Specific Relief, 1963 whether for rescission of contract or for extension of time, equitable considerations come into play and the facts of the case are required to be taken into consideration while exercising discretionary power. In my view, considering the facts of the case as indicated above, the Executing Court was not justified in exercising the discretionary power in favour of the Respondents.

26. To buttress his submissions, reliance has been placed on various decisions by the learned counsel for the Respondent. As regards the decision in the case of ***Sardar Mohar Singh vs. Mangilal Alias Mangtya*** (supra) relied upon by the learned counsel for Respondent in the facts of that case, the Apex Court was considering the power of the executing court to extend time. The Apex Court considered the provisions of Section 28 of the Specific Relief Act and held that the Court does not become functus officio and has power to enlarge the time for deposit. There is no quarrel with the proposition laid down by the Apex Court. In the decision in the case of ***K.Kalpana Sawaswathi*** (supra) in the facts of that case, the time was extended for deposit of amount. In the case of ***Sau Shobha s/o Vilas Thakare vs Narendra s/o Tumdeo Hulke and others*** (supra), substantial amount was paid by the Plaintiffs and the Court while exercising jurisdiction allowed them to deposit balance consideration, which the Court held amounts to extension of time. The facts of the present case are completely different and, as such, the decision is not applicable. As regards the decision in the case of ***Surinder Pal Soni vs Sohan Lal*** (supra) is concerned, the Apex Court after considering the equities in the matter held that the Appellant had acted *bonafide*. The fact situation in that case was after affirmation of the decree by the Appellate Court barely a month thereafter the amount was deposited by the

Appellant therein.

27. Having regard to the above discussion, in my view, the Trial Court erred in exercising the discretion in favour of the Respondents. Upon overall consideration of the facts of the instant case, time ought not to been extended for deposit of amount after a lapse of about four and half years in respect of an agreement of sale executed in the year 1989.

28. Resultantly, Petition succeeds and the impugned order dated 14th September, 2004 is quashed and set aside. As a consequence, application below Exhibit “10” stands rejected and the application below Exhibit “16” stands allowed. Rule is made absolute in above terms.

(SHARMILA U. DESHMUKH, J.)