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C.R.P (NPD).Nos.2177 & 2179 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.09.2023
PRONOUNCED ON : 20.10.2023

CORAM:

THE HON'BLE MR. JUSTICE V.LAKSHMINARAYANAN

C.R.P (NPD).Nos.2177 & 2179 of 2019 &
CMP.Nos.14069 & 14070 of 2019

1.S.Deivanai
2.S.Swaminathan
3.S.Vadivelu
4.S.Vasantha Kumar ... Petitioners in both C.R.Ps.

VS.

1. V.M.Kothandaraman
2.Saranya Gomathi
3.Nithyaprasad (Minor)
(Rep. by his mother/natural Guardian
Saranya Gomathi) ...Respondents in both CRPs.

Prayer in CRP.(NPD)No.2177 of 2019 : Civil Revision Petition filed under Section 115 of the Code of Civil Procedure against the Fair and Final order dated 30.04.2019 made in E.A.No.25 of 2018 in E.A.No.27 of 2017 in E.P.No.73 of 2015 in O.S.No.40 of 2009 on the file of the III Additional District Judge, Puducherry.

Prayer in CRP.(NPD)No.2179 of 2019 : Civil Revision Petition filed



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under Section 115 of the Code of Civil Procedure against the Fair and Final order dated 30.04.2019 made in E.A.No.27 of 2017 in E.P.No.73 of 2015 in O.S.No.40 of 2009 on the file of the III Additional District Judge, Puducherry

For petitioners : Mr.T.R.Rajagopalan, Senior Counsel,
for Mr.K.S.Karthik Raja

For respondent 1 : Mr.K.Sukumaran

For respondents 2 & 3: No appearance

COMMON ORDER

These revisions arise against an order passed in an application filed under Section 28 of the Specific Relief Act.

2. The parties will be referred to as the plaintiff and the defendants for the sake of convenience.

Facts leading to the revision:

3. The plaintiff entered into an agreement of sale with the defendants for the purchase of the suit schedule mentioned property. The agreed price was Rs.32,000/- per kuzhi and an advance of Rs.10,00,000/- was paid on 18.12.2006. The total sale consideration agreed upon



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between the parties was Rs.1,25,98,000/-. A written agreement was entered into between the parties on 18.12.2006.

4. Despite several negotiations and mediations, the plaintiff and the defendants could not enter into a sale deed. A suit for specific performance came to be filed on 13.04.2009 and the said suit was taken on file in O.S.No.40 of 2009 on the file of the learned third Additional District Judge at Pondicherry. Pending the suit, the third defendant died and his legal representatives were brought on record as the defendants 6 and 7. After receipt of the written statement and a detailed trial, the suit was decreed directing the plaintiff to deposit the balance of sale consideration of Rs.1,15,98,000/- (less Rs.10,00,000/- already paid) to the credit of the suit. This suit was decreed on 20.11.2014.

5. Aggrieved by the judgment and decree dated 20.11.2014, an appeal was filed before this Court in A.S.No.367 of 2015. The appeal was dismissed by the judgment and decree dated 22.06.2017. Thereafter, the matter was brought before the Court by the defendants / appellants under the caption "*for being mentioned*".

6. This Court on hearing both the parties, modified the judgment on 13.07.2017 directing as follows:



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“For the foregoing reasons, the appeal is dismissed. However, the plaintiff /1st respondent is directed to pay 6% interest per annum on the sale consideration, from the date fixed for performance of the contract under the sale agreement viz., 10.02.2007 till the date of deposit. The said amount has to be deposited by the plaintiff / 1st respondent, after adjusting the amount that has already been deposited before the Court below, within a period of eight weeks from the date of receipt of a copy of this Judgment. In the meantime, the appellants/defendants are permitted to withdraw the amount already deposited by the plaintiff from the Trial Court. No costs.”

7. On the basis of the decree passed by this Court on 22.06.2017 and as modified by this Court on 13.07.2017, a memo was filed before the Court below on 02.08.2017. In the said memo, the following calculations were given:

Memo of Calculation

Total sale consideration	Rs. 1,25,98,000.00
Less 1/5 th Share Sold By L.Rs. of Third Defendant to petitioner/D.Holder as per the decree of this Honourable Court	<u>Rs. 25,19,600.00</u>
Balance sale consideration due to Defendants 1 to 4	Rs. 1,00,78,400.00



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Interest at 6% from 10.02.2007
(the date agreed under the agreement
to pay the balance sale price) to
03.08.2018 Rs. 63,40,280.00

LESS the Amounts deposited in court

Pending case amount already
Deposited in SBI Rs.92,78,400/-
Interest @ 9.15% from 17.04.15
17.04.17 accrued on 92,78,400
Rs.16,70,000/- Rs.1,09,48,400/-

Interest @ 6% from 18.04.17
to 02.08.2017 on Rs.1,09,48,400/- Rs. 1,90,772/-

Advance amount Rs.10,00,000/-
Interest @ 8.5% from 10.02.2007
To 15.10.2015 for 9 years interest
Amount Rs.8,00,000/- Rs. 18,00,000/-

Interest @ 6% from 16.10.15 to
02.08.17 on Rs.18,00,000/- Rs. 1,94,400/-
Rs.1,31,33,572/-

Less the amounts deposited in court Rs.1,31,33,572.00

Balance amount to be deposited
as per Order of the High Court Rs. 32,85,108.00

Counsel for the Petitioner/Decree holder

8. On the basis of the memo, a sum of Rs.32,85,108/- was
deposited into the Court on 02.08.2017. In the meantime, two of the three



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legal heirs of the third defendant came forward and received the amounts and executed a sale deed conveying their shares. The amount paid to them was Rs.25,19,600/-. Since the amount in favour of the mother, who is also a legal heir, had not been paid, an application was moved for extension of time to pay the balance amount of Rs.13,90,000/-. This was in CMP.No.10328 of 2018 in AS.No.367 of 2015. The said petition was also allowed on 24.08.2018. An amount of Rs.14,48,266/- was also deposited. The interest that was payable as per the decree passed in appeal was also deposited on 12.09.2018. This amount comes to Rs.2,70,466/-. To complete the narration, pending this revision, the Executing Court had directed the payment of Rs.38,27,837/- and that amount was also deposited.

9. As per the Appellate Court decree, the total sale consideration of Rs.1,25,98,000/- carries an interest at 6%. The 6% interest comes to Rs.75,53,691/-. Therefore, the total amount that ought to have been deposited is Rs.2,01,51,691/-. Of this amount by 2018, an amount of Rs.1,75,31,374/- had been deposited and subsequently, an amount of Rs.38,27,837/- had also been paid.



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10. Noting that the entire amount had not been deposited, an application was moved in E.A.No.27 of 2017 before the learned Trial Judge at Pondicherry. The averment in the affidavit is that the defendants should have paid Rs.72,92,600/- giving credence to the amount that has been paid by the plaintiff. It leaves out an amount of Rs.63,27,092/-. Paragraph 14 of EA.No.27/2017 proceeds that as the plaintiff has not deposited the amounts correctly before the Court, it had violated the order of the High Court and therefore, under Section 28 of the Specific Relief Act, the decree for specific performance has to be rescinded. I have to add here that nowhere in the affidavit do I find the statement that the plaintiff did not possess sufficient funds to deposit the amount.

11. To this, a counter was filed by the plaintiff stating that as per the decree, post the sale of 1/5th share by the legal heirs of the third defendant, the amount that is liable to be paid is Rs.92,78,400/- and that, amount had been paid on 17.04.2015. He gave a memo of calculation stating that the balance amount that has to be paid is Rs.32,85,108/- and he had paid the said amount on 02.08.2017. He pleaded that it was a case of genuine miscalculation and there was neither willfulness nor wantonness in the shortfall of the deposit. As per the undertaking given



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by him in the said paragraph of the said affidavit, as narrated above, an application was filed for extension of time before the High Court and the time also stood extended.

12. The plaintiff also took out an application in EA.No.25/2018 in EA.No.27/2017, in order to dismiss the application filed under Section 28. Learned Judge received a counter in EA.No.25/2018 which more or less is repetition of the averments made in EA.No.27/2017 and hence, both EA.Nos.27/2017 & 25/2018 were tried together and were dismissed by a common order dated 30.04.2019. In the said common order, the learned Judge came to the conclusion that the deposit that has been made is proper and since time was extended by the High Court, there is no question of allowing the rescission application.

13. Challenging both the orders, CRP Nos.2177 & 2179 of 2019 have been presented.

14. Both the revisions were clubbed together and heard.

15. I heard Mr.T.R.Rajagopalan, learned Senior counsel appearing



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for Mr.K.S.Karthick Raja, learned counsel for the petitioner and

Mr.K.Sukumaran, learned counsel for the respondents.

16. Mr.T.R.Rajagopalan, learned Senior Counsel would submit as follows:

(1) The plaintiff had not sought for extension of time for deposit of the amount and therefore, the defendants did not have an opportunity to put forth their defence in such extension application.

(2) It is a case where the plaintiff is at fault for non-deposit and not a case where the defendants are at fault.

(3) He would say, the principles of Section 28 will apply in full force as the plaintiff had not deposited the amounts on time.

17. The deposits were made after the application under Section 28 was filed in the year 2017. He would further invite my attention to the proceedings of the Court dated 07.02.2022 and would point out that though the Court had directed the plaintiff to pay an additional sum of Rs.38,27,837/-, the same had not been paid till 21.04.2023. He would plead that a case under Section 28 had been made out and therefore, Civil Revision Petitions be allowed.



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18. Opposing this prayer, Mr.K.Sukumaran, learned counsel would argue that it is a case of bonafide miscalculation and therefore, Section 28 does not apply to the case strictly. He would submit, whatever directions had been made has been complied with strictly and therefore, it is not a case for rescission of contract. He would further submit that the plaintiff is willing to comply with any further directions that may be imposed by this Court and pleaded that the revisions be dismissed.

19. I have carefully considered the arguments made on both sides.

20. Mr.T.R.Rajagopalan, learned Senior Counsel had referred to a classic judgment of the Supreme Court in the case of ***K.Kalpana Saraswathi vs. P.S.S.Somasundaram Chettiar*** reported in (1980) 1 SCC 630. He would point out from paragraphs 4 and 5 of the said judgment that the nature of the decree passed in a suit for specific performance is only preliminary in nature and the Court always has the power to recall the decree.

21. Mr.T.R.Rajagopalan would rely upon a judgment of this Court in the case of ***Raju Naidu vs. M.Kolandaisamy and another*** reported in



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1998 (2) CTC 585 for the proposition that even if the judgment debtor did not take any objection for the deposit of balance of sale consideration, it cannot be said that he had lost its right under Section 28, especially when he has not positively accepted the amount.

22. Mr.T.R.Rajagopalan would then cite a judgment of the Supreme Court in the case of ***Chanda (Dead) through LRs. vs. Rattni and Another*** reported in ***(2007) 14 SCC 26*** at paragraph 14 to push on the point that the power under Section 28 is discretionary and the Court does not cease to lose jurisdiction over the decree. He would urge that in a suit for specific performance, the Court retains control over the decree, even after the decree has been passed and in appropriate cases, it can be rescinded. To the said effect, he would rely upon the following judgments viz.,

(a) ***Rajinder Kumar vs. Kuldeep Singh and others*** reported in ***(2014) 15 SCC 529***;

(b) ***P.R.Yelumalai vs. N.M.Ravi*** reported in ***(2015) 9 SCC 52***; and

(c) ***Prem Jeevan vs. K.S.Venkata Raman and Another*** reported in ***(2017) 11 SCC 57***.



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23. Mr.K.Sukumaran, learned counsel would rely upon the judgment in *Kumar Dhirendra Mullick and others vs. Tivoli Park Apartments (P) Ltd* reported in (2005) 9 SCC 262 and would submit that the Court while deciding an application under Section 28, would have to see all attendant circumstances including the conduct of the parties. He would say that unless and until, there is no explanation whatsoever from the plaintiff/decreed holder for failure to deposit the balance amount, the Court should not rescind the decree.

DISCUSSION:

24. The principles of law that emerge from the aforesaid authorities are:

(i) A decree for specific performance is only in a nature of a preliminary decree.

(ii) The Court retains jurisdiction over the decree, even after the suit has been decreed.

(iii) The Court has the discretion to order rescission.

(iv) Unless and until a clear case of default has been made out, the decree need not be rescinded.

(v) Justice must be done in terms of equity, equality and fairness.



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25. The calculation made in this case reveals the following:

THE AMOUNT TO BE PAID BY PLAINTIFF		AMOUNT PAID BY THE PLAINTIFF	
Sale Consideration	Rs.1,25,98,000/-	Advance	Rs.10,00,000/-
Interest 6%	Rs. 75,53,91/-	Deposit	Rs.92,78,400/-
		Paid to defendant 6, 7	Rs.25,19,600/-
		Court deposit	Rs.32,85,108/-
		Court Deposit	Rs.14,48,266/-
TOTAL	Rs.2,01,51,691/-	TOTAL	Rs.1,75,31,374/-
			-

Therefore, from the aforesaid calculation, it is clear that apart from Rs.26,20,317/-, the plaintiff had by 2018, paid the major portion of Rs.1,75,31,374/-.

26. I would hold that in a suit for specific performance though the Court retains jurisdiction over the decree, the same strict rules which apply prior to the decree need not be necessarily applied, post the decree. The Court should normally lean in favour of the decree holder who had succeeded, after a prolonged litigation, before the Trial Court and the Appellate Court.

27. In the case on hand, the agreement was entered into in the



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month of December 2006. A perusal of the judgment of the Trial Court and the Appellate Court, shows that the plaintiff had always been ready and willing in converting the sale agreement into a sale deed. In fact, the Appellate Court has recorded, at no point of time, the readiness and willingness of the plaintiff was ever challenged by the defendants, though the plaintiff had let in positive proof to that effect.

28. The aforesaid calculation made by me shows, there is a shortfall in the deposit of the amount, but is that shortfall so serious that it calls for rescission of the decree made by the Trial Court and as confirmed by the lower Appellate Court? I think not.

29. A perusal of all the authorities cited by either side shows, a case for rescission is made out only when there is a default decree or where the plaintiff has not demonstrated his willingness to pay the balance of sale consideration. The plaintiff in this case has shown that he has deposited a sum of Rs.92,78,400/- immediately and also paid a sum of Rs.25,19,600/- to purchase the share of the defendants 6 and 7. In addition, he had also paid the share of the legal representative of the third defendant namely the mother of the defendants, a sum of Rs.14,48,266/-



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together with interest. After the decree of the Appellate Court, he had also paid a sum of Rs.32,85,108/-. All these deposits made by the plaintiff shows that the plaintiff was reeling under a situation of miscalculation of the amount that he had to pay.

30. The mistake committed by the plaintiff is that he had calculated the amount that he had paid in advance (Rs.10,00,000/-) and deposit of interest thereon as a part of the sale consideration, which he is not entitled to be adjust. This is an act of miscalculation and I feel that it is not a clear case of default. The entire discussion above constrains me to conclude that it is only a case of miscalculation of the amount liable to be paid.

31. Mr.T.R.Rajagopalan is correct in pointing out that though the order was passed by the Trial Court on 07.02.2022 directing payment of balance of sale consideration, the said amount was deposited by the party only on 21.04.2023. I am surprised that the Executing Court having come to the conclusion in and by way of its order dated 30.09.2014 that the calculation that was given by the plaintiff is correct, should reconsider its order on 07.02.2022. An Executing Court could not review its order



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when the matter is pending revision before this Court. I am saved of the trouble of testing the order dated 07.02.2022 because the defendant has not challenged the order and the plaintiff had subsequently, complied with the same.

32. Section 28 being a discretionary remedy, having come to a conclusion that it is not a case of clear default, but it is a case of miscalculation, I have to see what is the equitable order that should be passed in this case. While disposing the revision, I am ordering compensation as that is the view that has been taken by the Supreme Court in the case of ***Kumar Dhirendra Mullick and others vs. Tivoli Park Apartments (P) Ltd*** reported in ***(2005) 9 SCC 262*** and therefore, I am passing the following orders:

(1) the plaintiff shall pay an interest at the rate of 12% on the amount of Rs.38,27,837/- from 07.02.2022 till the date of deposit i.e., 21.04.2023.

(2) In addition, he shall pay a compensation of Rs.25,00,000/- to the petitioners within a period of three weeks from the date of receipt of a copy of this Order.

(3) The payment of interest on the aforesaid amount and the



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payment of compensation, if not paid, the decree shall stand rescinded

without further reference to this Court.

33. With the aforesaid direction, these civil revision petitions are disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

20.10.2023

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Index: Yes/No

Internet: Yes/No

Speaking Order/Non-Speaking Order

To

The III Additional District Judge, Puducherry.



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