



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

WRIT PETITION NO. 6194 OF 2019

Sayyad Altaf Hussain s/o Sayyad Vazir,
Aged about 67 yrs.,
Occupation – Private, (Dead)
R/o Sanjay Bagh Colony, Binaki,
Nagpur – 17.
Through the Legal Representatives.

(Amended as per order
dated 23-01-2023)

- i) Kaniz Fatma wd/o Sayyad Altaf Hussain, Aged about 61 years, Occupation – Household.
- ii) Sadekarani w/o Jaker Ali Sayyad, Aged 42 years, Occ.- Household.
- iii) Shagufta w/o Farooq Shaikh, Aged 42 years, Occ.- Household.
- iv) Sayyad Zafar Hussain s/o Sayyad Altaf Hussain, Aged about 38 years, Occupation – Business,
- v) Sayyad Zakir Hussain s/o Sayyad Altaf Hussain, Aged about 35 years, Occupation – Business,

All R/o Near Raza Masjid,
Plot No.44-A & Plot No.186-A,
Sanjay Bagh Colony, Nagsenwan,
Nagpur – 17.

.... **PETITIONERS**

VERSUS

- 1) Smt. Chandrabhaga w/o Udaram Khandekar,
Aged about 68 years,
Occupation – Agriculturist,

2) Umarao s/o Udarm Khandekar,
Aged about 45 years,
Occupation – Agriculturist,

Both R/o Bhilgaon, Tahsil – Kamptee,
District – Nagpur.

.... **RESPONDENTS**

Ms. A.P Gupta & Mr. J.M. Gandhi, Counsel for the petitioners,
Mr. S.R. Narnaware, Counsel for the respondents.

CORAM : ABHAY J. MANTRI, J.

DATE OF RESERVING THE JUDGMENT : 14-12-2024

DATE OF PRONOUNCEMENT OF THE JUDGMENT : 27-01-2025

JUDGMENT :

Heard the learned counsel for the parties at length. **Rule.**

2. The petitioners challenge the order dated 23-03-2018 passed by the learned 8th Jt. Civil Judge, Senior Division, Nagpur, in M.J.C. No.432/2016, which thereby rejected the application filed by the original petitioner under Section 148 read with Section 151 of the Civil Procedure Code (for short, the “CPC”) seeking setting aside the order dated 15-07-2016 passed in Misc. Civil Application No.44/2011 seeks an extension of time to deposit the balance consideration amount as per the Decree.

3. The facts, in brief, are as under :

(a) The original petitioner is the plaintiff in Special Civil Suit No.355/2008, who filed the suit for seeking specific performance of contract/agreement of sale dated 11-11-2002 executed by the respondents/original defendants in his favour. The said suit was decreed *ex parte* on 15-10-2010. As per the directions in the said decree, the original plaintiff had to deposit the balance consideration amount in the trial court within two weeks, i.e. till 29-10-2010. However, neither the plaintiff had deposited the said amount in time nor moved an application to seek an extension of time to deposit the said amount.

(b) Thereafter, on 18-01-2011, the plaintiff filed an application bearing M.C.A. No.44/2011, thereby praying that thirty days' time be extended to deposit the balance consideration amount. However, said application was pending in the Court till 15-07-2016. On 15-07-2016, the learned 7th Jt. Civil Judge, Senior Division, Nagpur, rejected the said application with costs of Rs.1,000/-.

(c) Instead of challenging the said order, the plaintiff had again filed an application under Section 148, read with Section 151 of the CPC before the same court and prayed to set aside the order dated 15-07-2016. After hearing the parties, the learned Judge passed a detailed order and rejected the said application on 23-03-2018.

Aggrieved by the same, the petitioners have preferred this petition.

The original petitioner expired during the pendency of the petition; therefore, his legal heirs are brought on record.

4. Ms. A.P. Gupta, learned counsel, argued that the learned Judge erred in rejecting the application for a grant of an extension of time to deposit the balance consideration amount even though the original petitioner was ready and willing to deposit the same. She further argued that the learned Judge ought to have decided the said application at the earliest instead of keeping the same pending and tagging it with the other application preferred by the respondents, thereby ignoring the settled position of law to decide the application for extension of time forthwith. Therefore, she submitted that the petitioners should not be blamed alone for deciding the application belatedly. However, the learned Judge did not apply his mind while passing the impugned order in that regard.

5. She further propounded that in the proceedings for extension of time, the learned Judge ought to have called upon the parties to adduce their evidence in support of their applications. After that, the Court must decide the said application independently on its merits

instead of tagging it with the respondent's application to set aside the *ex parte* decree. For the said facts, the petitioners should not be suffered.

6. The learned Judge failed to hold that the original petitioner was not willing to comply with the order passed in the judgment and decree long back when already much time had lapsed for making the compliance by the petitioners. The said finding is contrary to the facts and record and cannot be sustained in the eyes of the law; therefore, she prayed for the setting aside of the same. During the argument, she took me through the reply filed by the respondents, the sale deed, and other documents. Lastly, she submitted that during the pendency of the proceedings, the respondents executed the sale deed to defeat the rights of the petitioners. Hence, she urged for allowing the petition.

To buttress her contentions, she strongly relied on the following judgments and submitted that the delay in deciding the application would not prejudice the petitioners' rights when they were ready and willing to perform their part of the contract.

- (a) N.P. Thirugnanam (dead) by LRs. v. Dr. R. Jagan Mohan Rao and others, (1995) 5 SCC 115,
- (b) Man Kaur (dead) By LRs. v. Hartar Singh Sangha, (2010) 10 SCC 512,
- (c) M/s. J.P. Builders and another v. Ramadas Rao and another, Civil Appeal Nos.9821-9822 of 2010, decided on 22-11-2010,

- (d) Nashik Municipal Corporation v. R.M. Bhandari and another, (2016) 6 SCC 245,
- (e) Ishwar (since deceased) through LRs. and others v. Bhim Singh and another, 2024 SCC OnLine SC 2338,
- (f) Sanjay Shivshankar Chitkote v. Bhanudas Dadarao Bokade (died) through L.Rs., Petition for Special Leave to Appeal No.24720/2023, decided on 08-12-2023.

7. *Per contra*, Mr. S.R. Narnaware, learned Counsel for the respondents, vehemently opposes the petition on the ground of delay. He submitted that the agreement was executed in 2002, the suit was filed in 2008, and an *ex parte* decree was passed in 2010. There was no stay to the said decree. Despite this fact, the petitioners have not complied with the said decree for the past fifteen years, thereby abusing the process of law.

8. He has taken me through the say filed by the respondents to the application before the learned trial Court and the order passed on the said application. He further contended that the petitioners had suppressed the facts of filing of the application by the respondents for setting aside *ex parte* decree. Therefore, he canvassed that the conduct of the petitioners can be gathered from the proceedings, stating that since 2002, the petitioners have been litigating the present proceedings, and twenty-two years have lapsed. However, the petitioners failed to take steps to comply with the said order. The said

fact itself shows that the petitioners were not due diligent and were in slumber for more than five years, and, therefore, the petitioners are not entitled to the reliefs as prayed. He further submits that after the execution of the sale deed, this writ petition became infructuous. Hence, on this ground alone, the same be rejected. Accordingly, he urged for the dismissal of the petition.

9. I have appreciated the rival contentions of the parties and perused the impugned order, record, and judgments relied on by the learned Counsel for the petitioners and written submissions of respondent No.2.

10. At the outset, it appears that the original plaintiff/petitioner claimed that on 11-11-2002, the respondents entered into an agreement to sell the land bearing Survey No.101/2, P.H.No.15, Mouza-Bhilgaon, Tahsil-Kamptee, District-Nagpur, admeasuring 2.30 Hectares (for short, the “*suit property/land*”) for total consideration of Rs.9,00,000/-, out of which an amount of Rs.2,00,000/- was paid by the plaintiff at the time of agreement and balance amount of Rs.7,00,000/- was agreed to be paid *at the intervals of three months within two years*. Therefore, the original plaintiff filed the suit seeking relief of specific performance of an agreement to sell and contended

that he was and is ready to pay the balance consideration of Rs.7,00,000/- to the respondents, but the respondents are avoiding to execute the sale deed.

11. Despite service of the summons, the respondents/defendants failed to appear in the suit, and, therefore, the suit proceeded *ex parte* against them as per the order dated 19-07-2008 and accordingly decreed the same on **15-10-2010**. The operative part of the Judgment reads thus as under:

“(1) The suit is decreed with costs.

(2) The defendants do execute the sale-deed in respect of the suit property in favour of the plaintiff within 3 months from today, failing which the plaintiff may get it executed through the Court.

(3) The plaintiff does deposit balance consideration in the Court within two weeks.

(4) The defendants do deliver the possession of the suit property to the plaintiff on the execution of the sale deed, failing which, the plaintiff may get it executed through the Court.

(5) Decree be drawn accordingly.”

A bare perusal of the above order reveals that the original plaintiff had to deposit the balance consideration in the Court within two weeks to show his readiness and willingness to perform his part of the contract. However, the plaintiff failed to deposit the same in time. Thereafter, on 18-01-2011, he moved an application under Section

148, read with Section 151 of the CPC, to enlarge the time to deposit the balance amount of consideration by a further thirty days. In the said application, he had mentioned that from the date of the judgment and decree, he was critically ill and confined to the bed and simultaneously, his mother was also sick and left for heavenly abode. However, he had not annexed any medical certificate or medical papers along with the said application to support his contentions. However, the death certificate of Kuberabi @ Hirubi Sayyed Vajir produced on record shows that on 13-08-2010, the mother of the original petitioner expired, i.e. two months prior to the passing of the judgment/decreed.

12. From the order dated 15-07-2016 passed below Exhibit 1, it appears that the said application was pending for more than five years when the original petitioner sought an enlargement of time for thirty days only, which was already over. Therefore, the learned Judge has rejected the said application.

13. The original petitioner, instead of challenging the said order before the superior court, had preferred further application under Section 148 r/w Section 151 of the CPC before the same Court for setting aside the order dated 15-07-2016 and to enlarge the time to deposit the said balance consideration amount. The respondents opposed the said application. The said application was also pending till

23-03-2018. On 23-03-2018, after considering the facts on record and perusing the contents made in M.J.C. No.185/2011 and M.J.C. No.44/2011, the learned Judge rejected the said application by passing a detailed order.

14. It is pertinent to note that as per the claim of the petitioners, in the year 2002, an alleged agreement to sell was executed between the original petitioner and the defendants. So also, on 15-10-2010, *an ex parte decree was passed, and the original plaintiff was directed to deposit the balance consideration amount within two weeks, i.e. till 29-10-2010*. Therefore, it was incumbent on the part of the plaintiff to deposit the said amount in time to show his bona fides, readiness, and willingness, as he had claimed. Moreover, though he claimed that he was and is ready and willing to pay the part consideration amount as agreed between him and the defendants in three instalments within two years, however, he failed to demonstrate that he has paid a single instalment out of three instalments to the defendants before filing the suit, to show his readiness and willingness to fulfil the condition of the agreement. *Prima facie*, nothing has been brought on record to make it his intention clear that he was ready and willing to pay the balance consideration amount of Rs.7,00,000/- to the defendants as agreed in the agreement to sell.

15. It also appears that the original plaintiff moved an application on 18-01-2011 and prayed to enlarge time to deposit the balance consideration amount within thirty days. In such an eventuality, it was obligatory on his part to deposit the amount along with the application, or as prayed within thirty days, or after completion of thirty days, he could have made the request to the Court for permitting him to deposit the said amount in the court to show his bona fides, readiness, and willingness to perform part of the contract. However, he failed to do anything and filed the application stating the reasons that he was critically ill. However, he had not filed any medical certificate or medical case papers to substantiate his contentions. The second reason was that his mother was sick and expired. She expired two months before the passing of the decree. Therefore, I also do not find prima facie substance in the reasons stated by the original petitioner in the said application: he was ready and willing to perform his part of the contract. As against, it seems that the said application was pending for more than five years in the court, i.e. till 15-07-2016, when the court passed the order. Had it been the fact that the petitioner was ready, willing, and vigilant, then indeed, he would have pursued the said application in time and deposited the said part consideration amount in the court. But he failed to pursue the said application and, on the contrary, contended that the litigant should not suffer for the mistake

of the court. Hence, I do not find substance in the said contention. The record shows that the plaintiff was neither vigilant nor attentive in pursuing his application. Therefore, it had been pending for five years, and on the day of the passing of the order, he was absent.

16. After that, he moved the application under the same provision for setting aside the said order on 16-08-2016. When, admittedly, an earlier application under the same provision was rejected, filing another application under the same provision or for the same reasons would do nothing but abuse the process of the law. It would not be tenable since Section 148 of the CPC deals with the enlargement of time, and Section 151 of the *CPC* deals with the court's inherent powers. The original plaintiff *prima facie* failed to show how the subsequent application under the same provision and for the same relief before the same court is tenable.

17. Perused the M.C.A No.432/2016 wherein the petitioner averred that the respondents filed an application for setting aside the *ex parte* decree, which was rejected, against which they have preferred the appeal pending in the District Court. The learned Judge called upon the record of both the MJC proceedings and, after going through the same, has **observed that** 'in spite of the passing of the order in M.J.C.

No.44/2011 on 15-07-2016', "*no willingness was shown by the original plaintiff for making such deposit of the said amount. Already much period, i.e. more than fifteen years, have been lapsed for making payment of the balance amount. Therefore, under such circumstances, as no such willingness is seen on the part of the plaintiff to comply with the decree and judgment passed long back, it seems that the order passed in M.J.C. No.44/2011 on 15.07.16 is just and proper and hence, cannot be set aside.*"

18. The learned Counsel for the petitioners, despite the lengthy argument and relying on the judgments of various courts, failed to show that the impugned orders are illegal or perverse and cause interference in writ jurisdiction.

19. Perused the judgments the learned Counsel Ms. Gupta relied on for the petitioners, in ***N.P. Thirugnanam*** (supra), the Hon'ble Apex Court has observed that "*to adjudge whether the plaintiff/party was willing and ready to perform his part of the contract, the court must take into consideration the conduct of the party prior and subsequent of filing of the suit along with other attending circumstances*". In ***Man Kaur*** and ***M/s. J.P. Builders and another***,(supra), the Hon'ble Apex Court has held that "*to succeed in a suit for specific performance the*

plaintiff has to prove the valid agreement which fact need to be taken into consideration while deciding the suit for specific performance”.

Therefore, the law laid down in the said judgments is of no assistance to the petitioners in support of their contentions since the suit filed by the original plaintiff has already decreed, but he failed to comply with the said order in the stipulated time.

20. In the case of ***Nashik Municipal Corporation*** (supra), the High Court imposed costs of Rs.25,000/- upon the Corporation to be paid within a period of eight weeks from the date of order as a condition precedent for restoration of the execution petition. After completing formalities, the applicants moved applications to accept the cheque. The applications were dismissed as the time limit granted by the High Court was over, and the *executing court* had no power to extend the time granted by the High Court. So, the applicants therein preferred an application under Section 148 of the CPC seeking an extension of time for depositing costs before the High Court. The same was dismissed by confirming the order of the executing Court. Therefore, the Hon'ble Apex Court held that “*the CPC (Amendment Act), 1999 provides that the period shall not exceed thirty days in total.*” Hence, an extension beyond the maximum of thirty days can be permitted if the act cannot be performed for reasons beyond the control of the

party. However, in the case at hand, as per the original decree dated 15-10-2010, the time to deposit the balance consideration amount was for two weeks, i.e. till 29-10-2010. However, the plaintiff had failed to deposit the said amount, and thereafter, for a period of a month, he had not taken any step to comply with the same as provided under Section 148 of the CPC, that the period can be extended by thirty days. The original plaintiff failed to apply in time for a grant extension of thirty days, but after lapsing three months, he moved an application seeking to enlarge the time to deposit the amount. Moreover, the application does not disclose that the reasons for non-compliance with the order in time were beyond his control to invoke Section 151 of the CPC. Therefore, in my view, the observations made in the aforesaid case are not helpful to the petitioners in support of their contentions.

21. In *Ishwar and Sanjay Shivshankar Chitkote*, the decree attained finality upon the dismissal of the second appeal on 07-11-2013 and, finally, SLP on 07-11-2016, and in execution, the balance sale consideration amount was also deposited by the decree-holder therein promptly in the court. However, in the case at hand, the petitioner failed to deposit the balance consideration amount for 15 years thereafter under the garb that his application for enlargement of the time was pending before the court, undisputedly same was filed

beyond the period of limitation as prescribed in Section 148 of the CPC. Therefore, the facts in the said matters differ from the case at hand. Thus, the observations made therein may not apply to the facts in the present case.

22. With regard to the discussion above, it is evident that the plaintiff/original petitioner failed to comply with the order passed by the trial Court in time and further failed to show his willingness and readiness, as well as bona fides, to comply the same, but the record indicates that the conduct of the original plaintiff/petitioner was not due diligent or vigilant in performing the said contract but protracting the matter from 2008 till this date. Therefore, interfering in the impugned order, which is well reasoned, would not be proper.

23. In the backdrop above, the petition, being bereft of merit, stands dismissed. Rule stands discharged. No order as to costs.

Inform the trial Court accordingly.

(ABHAY J. MANTRI, J.)