

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2023
(@ SLP (C) No.24720 OF 2023)

SANJAY SHIVSHANKAR CHITKOTE

APPELLANT(S)

VERSUS

BHANUDAS DADARAO BOKADE (DIED) THROUGH L.Rs.

RESPONDENT(S)

O R D E R

Leave granted.

2. A suit for specific performance of an agreement to sell dated 16.03.2010 was filed in Special Civil Suit No. 217/2010 before the Court of Civil Judge (Senior Division), Latur. The said suit was decreed by judgment and degree dated 16.04.2016. Nevertheless, the said decree was assailed by the plaintiff/appellant who had succeeded in the suit in First Appeal No.3691/2016, which was disposed of by the High Court. Thereafter the execution proceedings were initiated by the appellant herein before the concerned Executing Court. During the pendency of the said proceedings, applications were filed from time to time seeking permission to deposit the balance sale consideration in the very execution proceedings. Four such applications were allowed by the Executing Court. These

applications were allowed on 02.02.2021, 08.03.2021, 25.03.2021 and 02.04.2021.

3. In respect of the application filed thereafter by order dated 28.06.2021, notice was issued to the respondent-defendant to file objections on the same. During the pendency of the consideration of the fifth application, seeking permission to deposit the balance consideration amount on 08.07.2021, the respondent-defendant/seller of the suit scheduled property filed an application under Section 28(1) of the Specific Relief Act, 1963 (hereinafter referred to as the "Act" for the sake of convenience) in the execution proceeding. By order dated 30.09.2021, the Executing Court rejected the application filed on 08.07.2021 under Section 28 of the Act and therefore, the plea of rescission of contract was rejected. The payments sought to be tendered vide application Exhibit Nos.15, 16, 18, 21 and 27 were accepted without prejudice to the rights of the judgment debtor(s). The appellant-decree holder was directed to deposit the balance consideration amount, if any, forthwith and the decree holder and judgment debtor(s) were directed to comply with the respective directions as per Order XX Rule 21 of the Code of Civil Procedure, 1908 ('CPC', for short).

4. Being aggrieved by the order of the Executing Court dated 30.09.2021, the respondent-judgment debtor herein preferred Writ Petition No.12776 of 2019 before the High Court. By the impugned order dated 15.09.2023, the said Writ Petition was allowed and the order dated 30.09.2021 passed by the Executing Court (3rd Joint Civil Judge, S.D., Latur) in Exhibit Nos.1, 15, 16, 18, 21, 23 and 27, in Special Darkhast No.12/2019 was quashed and set aside. The application(s) filed by the respondent (Exhibit 23) was allowed. The judgment debtor(s) was directed to return the earnest amount paid by the decree-holder within a period of twelve weeks from the date of the said order with simple interest of 6% from the date of payment of the amount till realisation. The balance consideration amount deposited by the decree-holder from time to time before the Executing Court was ordered to be refunded along with accrued interest.

5. Being aggrieved by the order dated 15.09.2023 passed by the High Court, the appellant has preferred this appeal.

6. We have heard learned senior counsel Ms. Meenakshi Arora for the appellant-decree holder and Mr. Vinay Navare, learned senior counsel appearing for the respondents-judgment debtor at length and perused the material on record.

7. The controversy between the parties is in a very narrow compass. The controversy is central to Section 28 of the Act. For immediate reference, Section 28 of the Act is extracted as under:

"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.”

8. On a reading of sub-section (1) of Section 28 of the Act it is clear that any application seeking rescission of the decree of specific performance or an application seeking further period for the payment of purchase money or other sum which the court has ordered the judgment debtor to pay in a decree in a suit for specific performance will have to be made “in the same suit in which the decree was made” either, to have the contract rescinded or for seeking further time period to make the payment.

When Section 28 says that the application should be filed "in the same suit", it means in the suit itself i.e. on the original side and not in the execution proceedings. [*Ramankutty Guptan v. Avara, (1994) 2 SCC 882*]. Therefore, the Executing Court cannot extend the time granted by the Court which passed the decree but an application, though made on the execution side may be transferred to the original side. However, the Executing Court can direct depositing balance price where the trial and appeal courts have not given directions. Further, the power under Section 28 being discretionary, the order of rescission cannot be passed on flimsy grounds but in a clear case of default so as to nullify the decree of specific performance. The Court has also discretion to extend the time upon an application made by the party required to act within a stipulated time period. Extension of time can be granted even after the expiry of the period originally fixed.

Further, as per Section 28(1), the power of the Court either to extend the time for compliance of the decree or grant an order of rescission of the agreement is clear. When the Court passes the decree for specific performance, the

contract between the parties is not extinguished. It is in the nature of a preliminary decree and the suit is pending even after the decree. Thus, the court on passing a decree of specific performance does not become *functus officio*. On the other hand, it has the power to order rescission of the agreement as well as the power to extend the time to pay the amount or to perform the conditions of decree for specific performance despite the application for rescission of the agreement or decree. In deciding such an application under Section 28(1) of the Act, the Court has also to see all the attending circumstances including the conduct of the parties.

9. Admittedly in the instant case, the appellant-decree holder has filed his application(s) seeking permission to deposit the balance sale consideration before the Executing Court which did not have the jurisdiction to entertain the said application(s). Similarly, the judgment debtor also filed his application seeking rescission of the contract under subsection(1) of Section 28 of the Act before the Executing Court which did not have the jurisdiction to entertain the same. The Court may be the same but the proceedings are distinct. A proceeding in an Executing Court is not a proceeding in a suit. What Section 28(1) speaks of is "in the same suit in which the decree was made".

10. In the circumstances, we hold that the order dated 30.09.2021 passed by the Executing Court was without any jurisdiction and therefore, the said order though questioned by the respondent-judgment debtor before the High Court has nevertheless received the imprimatur of the High Court inasmuch as the applications seeking time to deposit of the balance consideration and the orders passed thereon have been quashed but the application seeking rescission of the contract has been allowed. The High Court has lost sight of the fact that the said application seeking rescission was not maintainable before the Executing Court but in the suit in which the decree for specific performance granted. Therefore, for the aforesaid reasons, both the order of the High Court dated 15.09.2023 as well as the order of the Executing Court dated 30.09.2021 are set aside.

However, for the convenience of the parties since the Executing Court is also the very court where the suit for specific performance was filed and decreed, we direct the said Court to transfer the said applications to the Special Civil Suit No.217/2010. The said applications shall now be considered afresh in the suit as if filed on the respective dates in the suit.

11. Since parties are represented by their respective senior counsel, they are directed to appear before the said Court on 16.01.2024 without expecting any separate notices from the said Court. The concerned Court shall consider the said applications as if filed in the suit in accordance with law.

All the applications (Exh. Nos. 11, 12, 13, 14) shall also be reconsidered before the concerned court. But while disposing of the said applications, the Trial Court shall take note of the fact that they were allowed and the permissions were granted to the appellant herein to deposit various sums of amounts on different points of time before the said Court and there has been compliance of the same by the appellant herein.

The Trial Court shall take into consideration the fact that there have been permissions granted for accepting the deposits before the Court and cheques/demand drafts have been deposited in the executing proceeding and pass orders on the same in accordance with law.

12. All contentions on the applications filed by the respective parties are kept open to be advanced before the Trial Court.

13. The appeal is allowed and disposed of in the aforesaid terms.

No costs.

Since we are remanding the matter to the Trial Court for a fresh consideration, the respondent-judgment debtors shall not take any step for alienating the suit scheduled property till the disposal of the applications filed by the respective parties before the Trial Court.

Pending application(s), if any, shall stand disposed of.

.....J.
(B.V. NAGARATHNA)

.....J.
(UJJAL BHUYAN)

NEW DELHI;
DECEMBER 08, 2023

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Petition(s) for Special Leave to Appeal (C) No(s).24720/2023
(Arising out of impugned final judgment and order dated 15-09-2023
in WP No. 12776/2021 passed by the High Court of Judicature at
Bombay At Aurangabad)

SANJAY SHIVSHANKAR CHITKOTE Petitioner(s)

VERSUS

BHANUDAS DADARAO BOKADE DIED THROUGH LRS. Respondent(s)

(FOR ADMISSION and IA No.227334/2023-EXEMPTION FROM FILING O.T.)

Date : 08-12-2023 This petition was called on for hearing today.

CORAM :

HON'BLE MRS. JUSTICE B.V. NAGARATHNA
HON'BLE MR. JUSTICE UJJAL BHUYAN

For Petitioner(s) Ms. Meenakshi Arora, Sr. Adv.
Mr. Shirish K. Deshpande, AOR
Ms. Rucha Pravin Mandlik, Adv.
Mr. Shivnarayan J. Tapdia, Adv.
Ms. Harsimran Kaur Rai, Adv.
Mr. Chandratanay Chaube, Adv.
Mr. Nanakey Kalra, Adv.
Mr. Mohit Gautam, Adv.
Mr. Apoorv Sharma, Adv.

For Respondent(s) Mr. Vinay Navare, Sr. Adv.
Mr. Shashibhushan P. Adgaonkar, AOR
Mr. Ravibhushan P Adgaonkar, Adv.
Mr. Pradnya S Adgaonkar, Adv.

UPON hearing the counsel the Court made the following
O R D E R

Leave granted.

The appeal is allowed and disposed of in terms of the signed
order.

Pending application(s), if any, shall stand disposed of.

(RADHA SHARMA)
COURT MASTER (SH)

(MALEKAR NAGARAJ)
COURT MASTER (NSH)

(Signed order is placed on the file)