

(2002) 06 BOM CK 0045

In the Bombay High Court

Case No : Civil Revision Application No. 1865 of 2001

Smt. Vatsala Shankar Bansole

APPELLANT

Vs

Shri Sambhaji Nanasaheb Khandare and Another

RESPONDENT

Date of Decision : 06-06-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12A, 115
Specific Relief Act, 1963 — Section 28

Citation : AIR 2003 Bom 57 : (2002) 4 ALLMR 374 : (2002) 6 BomCR 126

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Advocate : S.C. Deshpande and A.R. Choudhari, for the Appellant; Dilip Bodake, for the Respondent

Judgement

R.M.S. Khandeparkar, J.—Heard the learned Advocates for the petitioner and the respondent No. 1. None present for the respondent No. 2, though served. The notice was specifically issued to the respondents for final disposal of the matter and accordingly when the matter was taken up for final hearing on Monday last, by consent the same was adjourned for final hearing today, and accordingly the Advocates for the petitioner and the respondent No. 1 were heard. Perused the records.

2. The petitioners challenge the order dated 8th August, 2001, passed in special Civil Suit No. 200 of 2000 under Exh. 35-A by the trial Court. By the impugned order, the trial Court has dismissed the application filed by the petitioner for extension of time to deposit the amount which the petitioner was required to deposit under the decree dated 6th July, 2001 in the said suit consequent to the suit for specific performance of the agreement between the parties having been decreed in favour of the petitioner.

3. The facts, in brief, relevant for the decision in the matter are that the petitioner herein filed the said suit for specific performance of the agreement between the parties in relation to Plot No. 13-B situated in C. T. S. No. 601/B at

Solapur. The same was contested by the respondent No. 1. The trial Court after considering the evidence led by the parties decreed the suit by decree dated 6th July 2001. Accordingly, the respondent No. 1 was directed to execute the sale-deed of the suit property in favour of the petitioner on or before 8th August, 2001 on the petitioner is depositing in the trial Court a sum of Rs. 1,35,000/- minus costs of the suit and the earnest amount of Rs. 35,000/- within a month. It was also observed that in case of failure on the part of the petitioner to deposit the said amount as directed, the suit shall stand dismissed. It was further directed that if the respondents fail to execute the sale-deed on deposit of the amount as directed, the petitioner may apply to the Court for execution of the sale deed and the petitioner would be entitled for possession of the property after the execution of the sale-deed. The petitioner did not deposit the amount within a period of one month from the date of the said decree but on 8th August, 2001, filed an application before the trial Court being Exh. 35A, contending that the petitioner was ill for about 15 days prior to the filing of the said application and, therefore, prayed for extension of one month's time for deposit of the amount. The same was dismissed by the trial Court by observing that, "Rejected since not tenable". Thereafter the petitioner filed another application on 11th Sept. 2001 seeking permission to deposit the balance amount. The same was also rejected by the trial Court observing that the Court was functus officio, in view of the Judgment and decree dated 6th July 2001 in the said suit.

4. The impugned order is sought to be challenged mainly on the ground that the Court below erred in dismissing the application dated 8th August, 2001, holding the same to be not tenable when, in fact, the decree passed in the said suit being for the specific performance of the agreement in favour of the petitioner and the same was a preliminary decree and the Court had ample jurisdiction and power to extend the time fixed under the said decree till passing of the final decree. Reliance is placed in the decision of the Nagpur High Court in the matter of Gokul Prasad v. Fattelal reported in AIR 1946 Nag 29 of the Madras High Court in Metta Rama Bhatlu Vs. Metta Annayya Bhatlu and Others, of the Division Bench of the Allahabad High Court in Someshwar Dayal v. Widow of Lalman Shah reported in AIR 1958 All 438 of the Apex Court in the matter of Smt. Periyakkal and Others Vs. Smt. Dakshyani, ; as well as of learned single Judge of this Court in the matter of Daza N. Gandhi and another Vs. Indira Maruti Varadkar and another, . It was also sought to be contended that delay of 2 days in filing the application for extension of time cannot be considered to be fatal so as to deny the right to the petitioner which had been accrued pursuant to the decree in her favour for specific performance of the agreement between the parties. On the other hand, it was sought to be contended that the suit pursuant to the decree stood dismissed on 6th August 2001 on account of failure on the part of the petitioner to deposit the amount within one month from the date of the decree and, therefore, the Court below was functus officio and no fault can be found with the order of the trial Court rejecting the application being not tenable. According to the respondents, in case the petitioner had any grievance in relation

to the decree, the remedy was by way of first appeal and not u/s 115 of the C.P.C. It was further contended that no evidence was placed on record in support of the claim of the illness of the party so as to justify the extension of the period nor even an affidavit in support of the application was filed. It was further contended that the extension of period by this Court in revisional jurisdiction would virtually amount to modify the decree in the revision application and such an exercise is not permissible under the law.

5. Before considering the rival contentions it will be worthwhile to scan through various decisions sought to be relied upon. In Gokul Prasad's case AIR 1946 Nag 29 (supra) the learned single Judge of the Nagpur High Court while dealing with the matter in the First Appeal against the decree for specific performance had observed that ordinarily the Court should avoid passing a decree in the form of a final decree and leave it to the vendor to move the Court for the order rescinding the contract, in case of failure on the part of the decree holder to deposit the amount within the period stipulated under the decree. It was also held that it is open to the lower Court to extend time for payment fixed in a decree for specific performance. It was also observed that the delay in payment of specific performance of a contract in which time is not the essence of the contract cannot entail the penalty of rescission unless there has been such persistent delay as to justify the rescission.

6. In Metta Rama Bhatlu Vs. Metta Annayya Bhatlu and Others, the learned single Judge of Madras High Court has held that the order for specific performance of a contract for transfer of immovable property being in the nature of preliminary decree, the Court passing such decree itself retains power to make any stipulation, it thinks fit with reference to the specific performance.

7. The Division Bench of the Allahabad High Court in Someshwar Dayal and Others Vs. Widow of Lalman Shah and Others, has held that the decree in a suit for specific performance partakes of the nature of a contract and unless it is rescinded or performed, it subsists and therefore the right of the Court to make the extension of time for payment also subsists.

8. Apex Court in Smt. Periyakkal and Others Vs. Smt. Dakshyani, has ruled that the time for deposit stipulated by the parties in a consent decree becomes the time allowed by the Court and this gives the Court the jurisdiction to extend time in appropriate cases. It has been cautioned that the time should not be extended as a matter of course or for mere asking. It has been observed that where the contract of the parties merges in the order of the Court, the Court's freedom to act to further the ends of justice does not stand curtailed in any manner.

9. The learned single Judge of our High Court in Daza N. Gandhi and another Vs. Indira Maruti Varadkar and another, has ruled that if the decree is for cancellation of the agreement on the defendants paying a certain amount within certain time, failing which the entire property were to pass on to the plaintiff, and if the defendants were to apply for extension of time for payment, the Court should not

hesitate to grant such relief.

10. It is also necessary to take note of some other judicial pronouncements which are very much relevant and necessary for the just decision in the matter.

11. In *Ramankutty Vs. Avara*, , the Apex Court has in no uncertain terms held that after passing the decree for specific performance, the Court does not cease to have jurisdiction in the suit but retains the control over the decree even after the decree has been passed. It is further held that it is open to the Court to exercise the powers u/s 28(1) of the Specific Relief Act either for extension of time or for rescinding of contract. In the said case, the plaintiff had deposited the amount after expiry of the period fixed by the Court under the decree for specific performance of agreement. The Apex Court while holding that the application for extension of time for payment of balance amount of consideration can be filed in the Court of the first instance as well as in the appellate Court, has observed that, "It is to be seen that the procedure is hand maid for justice and unless the procedure touches upon jurisdictional issue, it should be moulded to subserve substantial justice. Therefore, technicalities would not stand in the way to subserve substantive justice."

12. In *K. Kalpana Saraswathi Vs. P.S.S. Somasundaram Chettiar*, , as per the decree therein, the amount was required to be deposited in the Court within the specified period failing which the suit was to stand dismissed. The amount was not deposited within the time limited under the decree. The application of the plaintiff for extension of the time was rejected and the decree for rescission of the contract being the consequential relief was passed. While setting aside the said order and decree, the Apex Court held that it is perfectly open to the Court in control of the suit for specific performance to extend the time for deposit.

13. In *Hungerford Investment Trust Ltd. v. Haridas Mundra* reported in , it, was held that, it is settled by series of decisions of the Indian High Courts that the Court which passes a decree for specific performance retains control over the decree even after the decree has been passed. This ruling has been given after referring to various decisions of Madras, Calcutta, Allahabad, and Patna High Courts, including *Mahammadalli Sahib v. Abdul Khadir Saheb* (1930) 59 M LJ 315 wherein it was held that the Court which passes a decree for specific performance has the power to extend the time fixed in the decree for the reason that Court retains control over the decree, that the contract between the parties is not extinguished by the passing of decree for specific performance and that the contract subsists notwithstanding the passing of the decree. Another decision is in the matter of *Pearisundari Dassee v. Hari Charan Mozumdar Chowdhury* ILR (1888) Cal 211 wherein the Calcutta High Court has held that the Court retains control over the proceedings even after a decree for specific performance has been passed, that the decree passed in a suit for specific performance is not a final decree and that the suit must be deemed to be pending even after the decree. The Apex Court also took note of similar views taken by the Allahabad High Court in *Someshwar Dayal and Others Vs. Widow of Lalman Shah* and

Others, . Further, the Apex Court also considered the decision of the Calcutta High Court in Anandilal Poddar Vs. Gunendra Kr. Roy and Another, , wherein it was ruled that the Court retains control over the matter even after passing a decree for specific performance and that virtually, the decree is in the nature of a preliminary one. Reference was also made to the decision of Patna High Court in Tribeni Tewary and Others Vs. Ramratan Nonia and Others, wherein it was held that the Court retains session of the case notwithstanding the fact that a decree for specific performance has been passed and that the decree is really in the nature of a preliminary decree. The Apex Court also took note of the law in England revealed from Fry on Specific Performance and Halsburys Laws of England. The extract from Fry on Specific Performance 6th Edn. p. 546 in relation to the Law in England quoted by the Apex Court in the said decision, read thus :

"It may and not infrequently does happen that after judgment has been given for the specific performance of a contract, some further relief becomes necessary, in consequence of one or other of the parties making default in the performance of something which ought under the judgment to be performed by him or on his part, as for instance. where a vendor refuses or is unable to execute a proper conveyance of the property. or a purchaser to pay the purchase money....."

"There are two kinds of relief after judgment for specific performance of which either party to the contract may, in a proper case, avail himself :

(i) He may obtain (on motion in the action) an order appointing a definite time and place for the completion of the contract by payment of the unpaid purchase-money and delivery over of the executed conveyance and title deeds, or a period within which the judgment is to be obeyed, and, if the other party fails to obey the order, may thereupon at once issue a writ of sequestration against the defaulting party's estate and effects.

(ii) He may apply to the Court (by motion in the action) for an order rescinding the contract. On an application of this kind, if it appears that the party moved against has positively refused to complete the contract, its immediate rescission may be ordered: otherwise, the order will be for rescission in default of completion within a limited time....."

The extract from the Halsbury's Laws of England, (Halsbury's Laws of England, 3rd Edn. Vol. 36, 351-2) quoted by the Apex Court read as under :

"Ancillary relief may be obtained after judgment in an action for specific performance where such further relief becomes necessary."

"Either party may also obtain an order rescinding the contract in default of completion within a fixed time."

14. In Tapan Kumar Chatterjee Vs. Kalyani Debi, referring to the decree passed in a suit for specific performance of an agreement, it was held that. "It being well settled by now that such a decree is a preliminary decree except for issues finally decided therein for passing such a decree, the Court still retains ample control

over the suit. The Court no doubt can fix a time limit for discharge of mutual obligations by the parties but those prescriptions are never so peremptory that they cannot be subsequently altered under any circumstances. The prescription as to time does not really constitute a substantial part of the decree and as such, condition for the decree so that the default clause based thereon does not make it a conditional decree." It was further held that, "necessarily, therefore, it should be held that in all cases, where a condition is imposed such condition is never so peremptory as to actually take away the jurisdiction of the Court. In our view, such a condition when imposed must be interpreted in the same manner as in the case of Mahanth Ram Das Vs. Ganga Das, to be in essence an order in terrorem not intended to divest the Court of its power to pass other consequential orders including an order for extension of time expressly conferred by the statute."

15. As already observed above, the decree in the case in hand, was for specific performance of the agreement between the parties, and under the decree the petitioner was required to deposit the balance amount within one month and thereupon the respondents were, required to execute the sale-deed and delivery the possession of the property to the petitioner. However, while passing the said decree, the trial Court has also observed that in case of failure of the petitioner to deposit the specified amount within the period prescribed under the decree, it would render the suit being dismissed and in case of deposit of the amount, the petitioner would be entitled for sale-deed in her favour by the respondents along with the possession of the property. The observation in the decree to the effect that if the plaintiff fails to deposit the amount as directed, the suit shall stand dismissed is sought to be construed as final disposal of the suit and, therefore, the trial Court being functus officio. This apparently is the view taken by the trial Court and strenuously argued on behalf of the respondents. Therefore, the point which arises is whether the decree in question is a preliminary decree or a final decree or a conditional decree? The decree for specific performance no doubt has to contain adjudication regarding the rights of the parties in relation to the agreement of which the specific performance is sought for and the right of the plaintiffs to get enforcement of the contract by the defendant. Undoubtedly, in terms of Order 20, Rule 12A of C.P.C. while passing such a decree, the Court has to specify the period for payment of consideration amount under the agreement. At the same time, as observed by the Allahabad High Court in the matter referred to above, the Section 35 of the Specific Relief Act, 1877, which was in force then, indicated that in event of a party to a decree for specific performance being in default, another party could either file a suit for rescission of the contract on which specific performance was granted or he could apply to the Court which would then rescind the decree. Section 28 of the Specific Relief Act, 1963 provides for certain steps to be taken by the Judgment debtor in a decree for specific performance of the agreement pursuant to the failure on the part of the decree holder to perform his obligation under the decree. Considering these provisions of law, Nagpur High Court as well as Madras High Court have clearly

ruled that the decree for specific performance of a contract for sale, has to be in the nature of a preliminary decree, and therefore, the Court does not become functus officio after passing such a decree as is fully empowered to extend the period fixed under the decree for deposit of the money by the decree holder. This view is confirmed by the Apex Court in *K. Kalpana Saraswathi Vs. P.S.S. Somasundaram Chettiar*, . Considering the said decision of the Apex Court along with the provisions of Order 20, Rule 12A of C.P.C. and other decisions particularly in the matter of *Ramankutty Vs. Avara*, as well as *Hungerford Investment Trust* it is to be held that decree in a suit for the specific performance has to be in the nature of preliminary decree.

16. Once it is clear that a decree for specific performance has to be in the nature of preliminary decree, merely because there are certain other observations in such a decree like the consequences for failure to deposit the amount within a specified period under the decree, it would not partake of the nature of the final decree or conditional decree. This is also apparent from provisions of law found in the said Section 28 of the Specific Relief Act. According to Section 28 of the Specific Relief Act, when the decree for specific performance of a contract for the sale, has been passed, and the purchaser does not within the period allowed by the decree pay the purchase price, the judgment debtor may apply in the same suit in which decree was passed, to have the contract rescinded and on such application the Court may by an order rescind the contract either so far as it relates the party in default or altogether, as the case may require. In other words, mere failure on the part of the decree holder to deposit the amount within the stipulated period under the decree for specific performance, that by itself would not amount to rescission of the contract which was the subject matter of the suit. In order to rescind the contract, even in such a case, it would be necessary for the defendant to move the Court for effective order u/s 28 of the said Act. Considering the scope of Section 28 of the Specific Relief Act, therefore, the observation regarding the dismissal of the suit in case of non-payment of balance amount within specified period in decree for specific performance, it could not result in such a decree partaking of the nature of a final decree and, therefore, it cannot be said that Court becomes functus officio once such a decree is passed.

17. Undisputedly, in the case in hand, the time granted to the decree holder/petitioner to deposit the balance amount was of one month from the date of the decree. The application filed for extension of the time apparently discloses that the petitioner was ill for about 15 days prior to the filing of the application and, therefore, she prayed for extension of one month's time to pay the balance amount. The time was apparently granted under the decree to facilitate the petitioner to make payment of the balance amount, and in terms of Order 20, Rule 12A, it is necessary for the Court to grant the time to pay the balance amount while decreeing the suit for specific performance. It should be always remembered that the final end of law is justice, and so the means to it too should be informed by equity as has even ruled by the Apex Court in *K. Kalpana*

Saraswathi Vs. P.S.S. Somasundaram Chettiar, . Being so, merely because there was failure to pay the said amount within one month and the extension was asked for only for one month, it was not a case of the petitioner being a persistent defaulter. Besides the time having been granted for the benefit of petitioner to enable her to deposit the balance amount, she could not have been denied the fruits of the decree in her favour merely on account of few days delay in making payment of balance amount.

18. Before parting with the matter it is necessary to take note of the decision of the learned single Judge in Bhujangrao Ganpati Vs. Sheshrao Rajaram, , though both the parties have made no reference to the said decision. The said decision was passed following an un-reported decision of the Division Bench of this Court in Civil Appeal No. 3964/1958 dated 19-8-1959 and referring to that of the Apex Court in Mahanth Ram Das Vs. Ganga Das, . The Apex Court in the said case has ruled that Section 148 of C.P.C. empowers the Court to deal with the events those might arise subsequent to an order for the purpose of enlarging the time for payment even though it had been peremptorily fixed, but also observed that such procedural orders, though peremptory (conditional decrees apparent) are, in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely stops the Court from taking note of events and the circumstances which happen within the time fixed. Considering the said ruling of the Apex Court, the learned single Judge held that "it is, therefore, quite clear that whilst laying down, in effect, that Section 148 must be liberally constructed, the Supreme Court has excluded from its ambit conditional decrees like the one in the present case." It is to be noted that in the case before the learned single Judge, the time specified for payment of amount in the decree for specific performance had already expired and a request for extension of the said time was rejected by the lower appellate Court. In view of provisions of law contained in Order 20, Rule 12-A of CPC, and the decision of the Apex Court in K. Kalpana Saraswathi Vs. P.S.S. Somasundaram Chettiar, and Ramankutty Guptan's (supra), which were delivered subsequent to the decision in Mahant Ram Das's case, it is apparent that the law as regards the nature of decrees in suit for specific performance is well settled and it is to be held that the settled law now is that mere specification of time to pay the amount and observation therein that in case of failure to pay amount within the specified time, the suit would stand dismissed, that would not render such a decree either to be conditional or final decree and, therefore, the decision of the learned single Judge in Bhujangrao Ganpati's case is no more a good law and is not binding upon this Court in view of the above referred Supreme Court decisions which have been delivered subsequent to the said decision in Bhujangrao Ganpati's case (supra), and the same being on the point in issue.

19. Once it is held that the decree which was passed in the suit was a preliminary decree, the contention that suit stood dismissed on failure to deposit the amount within 30 days, has to be rejected. The question of producing the evidence in support of the application wherein it was stated that the petitioner

was ill, would have arisen in case the said fact was disputed by the respondents. The record does not disclose any such dispute having been raised by the respondents while considering the said application by the trial Court.

20. The learned Advocate for the respondents, however, is justified in contending that the extension of time specified under the decree could be appropriately granted by the Court which passed the decree and not by this Court in revisional jurisdiction. Certainly, therefore, it is necessary to set aside the impugned order and to remand the matter to the that Court within the direction to pass an appropriate order in that regard.

21. Hence, the petitioner succeeds. The impugned order dated 8th August 2001 is hereby set aside. The matter is remanded to the trial Court to hear the parties and pass an appropriate order in relation to request of the petitioner for extension of time to deposit the amount. The trial Court while deciding the said application has to consider the provisions of law contained u/s 28 of the Specific Relief Act as well as the observations made hereinabove and the decisions referred to above. The petition is accordingly disposed of with the above directions with no order as to costs.