



GAHC010240732017

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**THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Case No. : CRP/262/2017**

MRS. RANJANA BEZBARUAH and ANR.  
W/O. SRI KAMAL BEZBARUAH,

2: KAMAL BEZBARUAH

S/O. LT. DANDI BEZBARUAH  
BOTH ARE RESIDENTS OF BORJULI TEA ESTATE  
P.O. and P.S. RANGAPARA  
MOUZA BAHBARI  
DIST. SONITPUR  
ASSAM. PRESENTLY RESIDING AT VILLAGE and P.O. DIPOTA  
P.S. TEZPUR  
DIST. SONITPUR  
ASSAM

VERSUS

SMT. BANTI BHARALI  
W/O. SRI KUMUD BHARALI, R/O. VILL. MAZGAON, MOUZA BHAIRABPAD,  
P.S. TEZPUR, DIST. SONITPUR, ASSAM, PIN-784154.

**BEFORE**

**HON'BLE MR. JUSTICE KALYAN RAI SURANA**

For the petitioners	: Mr. S. Sahu, Advocate.
For State respondent	: Mr. T. Das, Advocate.
Date of hearing	: 25.01.2021
Date of judgment	: 29.01.2021

## **JUDGMENT AND ORDER**

**(CAV)**

Heard Mr. S. Sahu, learned counsel for the petitioners and Mr. T. Das, learned counsel for the respondent.

2) By filing this application under Article 227 of the Constitution of India, the petitioners have assailed the legality and validity of the order dated 21.07.2017, passed by the learned Civil Judge, Sonitpur, Tezpur in T.S. No. 22/2005.

3) The respondent is the plaintiff in T.S. No. 22/2015, which was filed for specific performance of contract for the sale of the suit property. The said suit was partly decreed vide judgment and decree dated 30.06.2008, thereby allowing refund of the consideration money of Rs.1,75,000/- (Rupees one lakh seventy five thousand only), but was denied specific performance of contract to obtain sale deed of the suit land. The aggrieved petitioners had preferred an appeal, which was registered as T.A. No. 2/2008. The said appeal was allowed vide judgment and decree dated 30.09.2011, passed by the learned District Judge, Tezpur, thereby setting aside the decree passed by the learned trial Court. The relevant part of the said order is extracted herein below:-

*“8. Therefore, the appellant is entitled the relief for specific performance of contract to get register Sale Deed of suit land and house as prayed for. Hence the Respondent is to do all needful to execute Sale Deed after receiving the balance consideration money. As the Appellant’s plea of payment of cash amount of Rs. 20,950/- is not proved she is to pay balance amount of consideration money of Rs. 50,000/-, preferably within a period of 30 days from the date of decree. If the Respondent do not execute the Sale Deed and register it or do not receive the balance amount of consideration money of Rs. 50,000/-, the Appellant may approach the Court to get execute the Sale Deed in her favour after depositing the*

*balance amount.”*

4) The respondent had filed an execution petition on 17.09.2012 to enforce the appellate decree, which was registered before the Court of Civil Judge, Sonitpur, Tezpur as T.Ex. Case No. 1/2012. Objecting to the execution, the petitioners had filed a petition under section 47 CPC, which was registered as Misc. (J) Case No. 28/2016, wherein it was averred that as per the appellate judgment, the petitioners were directed to do the needful to execute the sale deed after receiving the balance consideration money of Rs.50,000/- within thirty days from the date of decree, and if the petitioners do not execute the sale deed of registered deed or do not receive the balance amount of Rs.50,000/-, the respondent may approach the Court to get the sale deed registered after depositing the balance amount. The respondent filed a written objection to the said petition on 23.06.2016. executing Court, by order dated 28.02.2017, made reference to the provisions of section 28(1) of the Specific Relief Act, and by relying on the case of *Ramankutty Vs. Avara, AIR 1994 SC 1699*, deemed it appropriate to hear the said petition on original side as an interlocutory application and not in execution proceeding. Thereafter, upon hearing the learned counsel for the parties, by the impugned order dated 21.07.2017, concluded that the appellate Court had directed that the balance consideration of Rs.50,000/- should be 'preferably' paid within 30 days, which according to the learned trial Court, implied that the claim of the petitioners that the decree is conditional is incorrect and the word 'preferably' only asks the respondent to make payment within 30 days, if possible, however, the Court had determined no clear fixed period of deposit and by referring to the case of *Prem Jivan Vs. K.S. Venkata Raman & Anr., 2017 SCC OnLine SC 179*, the term 'preferably' was read as directional and not optional. However, by referring the ratio laid down in the case of *Chanda Vs. Rattni (2007) 14 SCC 26*, took a view that Court cannot ordinary annul the decree once passed by it and that the Court does not cease the power to extend time. Accordingly, it was held that the equity demands that substantial justice should be done and Court should not stretch technicality to such a level that it renders the justice system futile. The learned Court was also of the view that the respondent had obtained the decree after due process of law and may have not deposited the balance consideration under a wrong concept that the petitioners may file appeal.



Therefore, on consideration that the respondent had already paid 85% of the same consideration and was in occupation of the suit land since the year 2003, rejected the petition filed by the petitioners, and the respondent was directed to deposit the balance consideration within one month of the order and get the sale deed registered as per the decree.

5) Challenging the said impugned order, the learned counsel for the petitioners has cited to the following cases, viz., (i) *Prem Jivan (supra)*, (ii) *Ramankutty (supra)*, (iii) *Chanda (supra)*, (iv) *Radhey Shyam Vs. Harendra Pal Rathi, AIR 2015 All 180*. It is submitted that the respondent had not offered the balance sale consideration all after the decree and, as such, there was a violation of the judgment and decree passed by the learned first appellate Court, which disentitled the respondent to execution of the decree for specific performance of contract.

6) The learned counsel for the respondent has referred to the Annexure-1 document filed with the affidavit- in- opposition and it is submitted that on 17.08.2017, the respondent has deposited a sum of Rs.50,000/- before the learned executing Court. Hence, it is submitted that there was no infirmity in the well reasoned impugned order, which warrants no interference.

7) Considered the submissions made by the learned counsel for both sides and have considered the materials available on record. It is seen that the learned first appellate Court had passed its judgment and decree on 30.09.2011. The respondent had thereafter filed execution petition on 17.09.2012. The petitioners had filed petition under section 47 CPC on 22.04.2016, by which it was brought to the notice of the learned executing Court that balance consideration of Rs.50,000/- was not paid as per the appellate judgment. The petitioners had contested the said application by filing objection. The learned trial Court had taken up the said objection, registered as Misc. (J) Case No. 28/2016 in the original side and passed the impugned order dated 21.07.2017. By the impugned order, the learned trial Court had granted further thirty day's time to the petitioners to deposit the balance sale

consideration of Rs.50,000/- and get the sale deed executed as per the decree.

8) The provisions of section 28(1) of the Specific Relief Act, 1963 reads as follows:-

*“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.”*

9) Thus, it is seen that the requirement of law is that a party suffering the decree of specific performance of contract to have a sale deed executed and registered for his/her property to apply to rescind the contract in the event the purchaser does not pay, within time or extended time, the purchase money or other sum which the Court had ordered him to pay.

10) In the present case in hand, it is clear from the judgment rendered by the first appellate Court that there was a direction to the petitioners were to do all needful to execute the sale deed after receiving the balance money. The respondent was specifically to pay the balance consideration amount of Rs.50,000/- preferably within a period of thirty days. It was further provided that if the respondent does not execute the sale deed and register it or does not receive the balance amount of consideration money of Rs.50,000/-, the respondent may approach the Court to get the sale deed executed in her favour after depositing the balance consideration. Moreover, the learned trial Court, while considering the

petition by treating it as a petition under section 28(1) of Specific Relief Act, 1963 had one again granted extension of time by further thirty days time from the date of the order to deposit the balance sale consideration of Rs.50,000/-. However, it is not disputed that the balance sale consideration of Rs.50,000/- was not deposited until 17.08.2017, i.e. beyond the time allowed by the learned trial Court.

11) Therefore, the only question which arises in this case is whether the learned trial Court had committed jurisdictional error in rejecting the petition under section 28(1) of Specific Relief Act, 1963 by virtue of the impugned order?

12) The learned trial Court had invoked the doctrine of equity and it was held that the equity demands that substantial justice should be done and Court should not stretch technicality to such a level that it renders the justice system futile. The learned Court was also of the view that the respondent had obtained the decree after due process of law and may have not deposited the balance consideration under a wrong concept that the petitioners may file appeal.

13) It is seen that except for mentioning in objection filed in Misc. (J) Case No. 28/2016 and in paragraph 7 of the affidavit- in- opposition that on 11.04.2012 and 03.08.2012, the respondent had sent letters to the petitioners which were duly received by them, there is no averment either in the execution petition or in the affidavit- in- opposition that the respondent had asked the petitioners to collect the balance sale consideration. The respondent had taken a plea that she was expecting the petitioners to prefer a second appeal before this Court. However, the said plea appears to have no meaning because of the fact that the period of filing second appeal is 90 days from the date of appellate judgment. The first appellate judgment was passed on 30.09.2011, and the respondent had filed the execution petition on 17.07.2012, well beyond the prescribed period of limitation to file an appeal. Thus, the respondent ought not to have waited from 30.09.2011 till 17.08.2017 to deposit the balance sale consideration merely expecting that the petitioners would file an

appeal. There is no material on record to show that on any date prior to 17.08.2017, the respondent had ever prayer for any extension of time to deposit balance consideration money of Rs.50,000/- in Court. Moreover, it is seen that in column no. 10 of the execution petition, the respondent had projected before the learned executing Court that "*an amount of Rs.50,000/- to be paid by the decree holder to the judgment debtor at the time of registration of the sale deed.*" The said statement showed that the respondent did not intend to deposit the balance sale consideration unless the petitioners register the sale deed in favour of the respondent, which was never the intent of the learned first appellate Court.

14) The learned trial Court had also invoked the doctrine of equity. In this regard, there is no material on record by which the Court can presume that equity is only a one sided affair and that it tilted in favour of the respondent despite the fact that the respondent had not deposited the balance sale consideration of Rs.50,000/- as per the terms of the judgment passed by the learned appellate Court, i.e. preferably within thirty days. The learned trial Court had referred to the ratio laid down in the case of *Prem Jivan (supra)*, and held that the term 'preferably' was to be read as directional and not optional. Now it is to be seen that when the learned trial Court had treated the direction of paying Rs.50,000/- preferably within thirty days to be directory and not optional, whether the said learned Court had committed jurisdictional error in not only granting extension of time of further thirty days to the respondent to get the sale deed executed, but also rejected the prayer made under section 28(1) of the Specific Relief Act. In this regard, it is seen that the learned trial Court only considered the case of the respondent that she had made her claim in suit filed in the year 2005, which was decreed on 30.09.2011, but failed to consider that despite the "directory" nature of judgment dated 30.09.2011 to make payment of balance sale consideration within thirty days, the respondent did not comply with the said direction even after thirty days of passing the impugned order.

15) In the case of *Rina Bora Vs. Sangeeta Chowdhury & Ors., (2019) 5 GLR 607*, this Court had examined the provisions of section 28(1) of the Specific Relief Act, 1963 in light of the provisions of Order XX Rule, 12A of the CPC, and it was held that the provisions of

Order XX, Rule 12A mandates that in the decree for specific performance of sale ordering payment of purchase money by the purchaser, a specific period for payment must be made. It was further held that non-mentioning of a specific time period to complete the part of the plaintiff- purchaser for specific performance of contract shall hit the provision stipulated under section 28 of the Specific Relief Act. In the present case in hand, the learned first appellate Court had granted thirty days time to the respondent to make payment of balance sale consideration, which was not complied with. Therefore, it is seen that although the learned trial Court had held that such direction to deposit balance sale consideration was directory, but it failed to appreciate the provisions of Order XX Rule 12A of the CPC, which leaves no scope for any doubt that mandates that in the decree for specific performance of sale ordering payment of purchase money by the purchaser, a specific period for payment must be made. The learned trial Court also failed to appreciate that during the pendency of the application made under section 28(1) of the Specific Relief Act, 1963 no steps were taken by the respondent seeking extension and/or enlargement of time to deposit balance sale consideration. Thus it appears that while deciding the matter, the learned trial Court was oblivious of the provisions of Order XX, Rule 12A of the CPC.

16) The learned trial Court had relied on the ratio laid down in the case of *Chanda (supra)*, to hold that the Court was not seized of its discretionary power to extend time. However, it is seen that the learned trial Court had not applied its judicial mind by attempting to understand the facts on which the case was decided. In the said case the facts are similarly situated. In the cited case, the plaintiff did not deposit the sale price within two months from the date of decree. The decree was passed on 01.05.1992 and on 08.09.1998, the respondent- judgment debtor moved a petition under section 28(1) CPC to get the agreement for sale rescinded. The said prayer was allowed by the learned Court below on the ground that that sale consideration was not deposited. Revision under section 115 CPC was preferred before the High Court, which was dismissed. The order was assailed before the Supreme Court of India and the said appeal was dismissed. Therefore, the order of rescinding of the agreement for sale, as passed by the learned trial Court, was upheld. At paragraph 10 of the said judgment, it was specifically held that "... *The only stand taken was that there*



*was no direction to pay within a particular time. This plea is clearly unsustainable and untenable and has been rightly rejected."*

17) Therefore, in light of the discussions above, and considering the ratio laid down in the case of *Rina Bora (supra)* and *Chanda (supra)*, the Court is constrained to hold that the non- deposit of balance consideration money within thirty days from 30.09.2011, the date of judgment passed by the learned trial Court is hit by the provisions of section 28(1) of the Specific Relief Act. The typed copy of order dated 17.08.2017 (Annexure-1 of the affidavit- in- opposition) leaves no room for doubt that the respondent had deposited a sum of Rs.50,000/- on 17.06.2018, long after the time allowed by first appellate judgment had expired and also long after extended time as granted by impugned order dated 21.07.2017 had expired. Thus, the learned trial Court is found to have committed jurisdictional error in passing the order dated 21.07.2017, impugned herein. Accordingly, the Court has no hesitation to set aside the order dated 21.07.2017 impugned herein.

18) Having noticed that the present litigation is continuing for about 16 years from the year 2005, as such, if the matter is remanded for a fresh hearing, there will be further delay, as such, it is deemed appropriate that this Court passes orders as envisaged under section 28 of the Specific Relief Act, 1963. Consequently, the unilateral agreement for sale dated 11.10.2002, executed by the petitioner no.1 in favour of the respondent hereby stands rescinded.

19) Consequent to the rescinding of the said agreement for sale dated 11.10.2002, the petitioners are jointly and severally directed to deposit before the learned trial Court, the part sale consideration amount of Rs.1,75,000/- received by the petitioner no.1 with interest thereon @ 6% (six percent) on and from the date of filing of the suit till the date of actual deposit. Such deposit shall be made within a period of one month from the date of this order. In the event there is any delay in making such deposit, the petitioners- defendants shall be liable to pay interest @ 9% on the defaulted amount on and from the



date of this order till such sum is deposited in full. The respondent shall be at liberty to withdraw such deposit from the learned trial Court.

20) In terms of the mandate of section 28(2)(a) of the Specific Relief Act, 1963, the Court is inclined to direct the respondent, if she has obtained possession of the suit property under the agreement for sale dated 11.10.2002, to restore such possession to the petitioners within the outer period of six months on and from the date when the petitioners deposit the part sale consideration amount of Rs.1,75,000/- in favour of the respondent with intimation to her counsel on record. Under the facts and circumstances of the case, there shall be no order against the respondent for payment of rent or profits as envisaged in section 28(2)(b) of the said Act or for cost as envisaged under section 28(5) of the said Act.

21) To the extent as indicated herein above, this application stands allowed. The appellate decree so drawn up by the learned first appellate Court would stand modified to the extent as indicated herein before.

**JUDGE**

**Comparing Assistant**