

DWARKA PRASAD SINGH & OTHERS

v.

HARIKANT PRASAD SINGH & OTHERS

November 29, 1972

[A. N. GROVER, K. K. MATHEW AND A. K. MUKHERJEA, JJ.]

Appeal—Supreme Court—Abatement—Death of one of respondents—Legal representatives not impleaded in time—Appeal whether abates as a whole—Considerations—Order 41 Rule 4 Code of Civil Procedure, applicability of.

G (defendant First Party) sold a house to the plaintiff in 1931 for a consideration of Rs. 99,995, out of which Rs. 23,000 were paid to G. Subsequently G sold the house to the defendants Second Party. The plaintiffs prayed in the suit for (1) a decree for specific performance in favour of the plaintiffs against defendants, and (2) in the alternative a decree against defendant First Party for a sum of Rs. 44,688 with interest. The trial Court held that the defendant First Party had broken the contract with the Plaintiffs and that defendants Second Party had failed to prove that they had paid the consideration money in good faith and without notice of the contract. In the result the trial court passed a decree for specific performance of contract of sale regarding the disputed property for a sum of Rs. 1,00,000, and the defendants were directed to execute and register a deed of sale for the sale in favour of the plaintiffs on payment of the balance of the price. The court further observed that if it had refused the main relief claimed by the plaintiffs it would have allowed the alternative plea. The appeal of the defendants Second Party in the High Court abated as a result of the non-impleadment of the legal representatives of one of the appellants who died. The defendants Second Party filed an appeal in this Court by special leave. During the pendency of the appeal G who was impleaded as respondent No. 3 died. The advocate of respondent No. 1 to the appeal filed an application for dismissal of the appeal for non-prosecution as the legal representatives of deceased respondent No. 3 had not been brought on record. The appellants then moved an application for substitution of the legal representatives of G deceased and subsequently moved another application for condonation of delay. The Court dismissed the application for substitution. It was urged on behalf of the respondents that the appeal had abated as a whole. The appellants on the other hand contended that (i) the appeal could continue against the remaining respondents as G was not a necessary party, and (ii) the decree of the trial court could be set aside on the basis of the provision in order 41 Rule 4 Code of Civil Procedure.

Dismissing the appeal,

HELD : (i) It is difficult to sustain the argument that the vendor is not a necessary party when, according to the view accepted by this Court, the conveyance has to be executed by him although the subsequent purchaser has also to join so as to pass on the title which resides in him, to the plaintiffs. If there are any special covenants and conditions agreed upon in the contract for sale between the original purchaser and the vendor those have to be incorporated in the sale between the original purchaser and the vendor although it is only the vendor who will enter into them and the subsequent purchaser will not join in those special covenants. But without the vendor joining in the execution of the sale deed special

- A covenants, if any, between him and the original purchaser cannot be incorporated in the sale deed.

- B The whole idea and the purpose underlying a decree for specific performance is that if a decree for such a relief is granted the person who has agreed to purchase the property, should be put in the same position which would have obtained in case the contracting parties, i.e., vendor and purchaser had, pursuant to the agreement, executed a deed of sale and completed it in every way. Therefore it is essential that the vendor must join in the execution of the sale deed. If that be so, it is not possible to comprehend how he is not a necessary party. At any rate, in the presence of the relief for a decree for refund of the amount paid by way of part consideration in the present case, the vendor would be a necessary party. No such relief could be granted in his absence nor could it be granted even if the appeal succeeded and the decree for specific performance was set aside. [1070 A]

- C *Gourishankar & Others v. Ibrahim Ali*, A.I.R. 1929 Nag. 298, *Kafiladdin & Others v. Samiraddin & Others*, A.I.R. 1936 Cal. 67, *Lala Durga Prasad & Another v. Lala Deep Chand & Others*, [1954] S.C.R. 360 and *R. C. Chandiook & Another v. Chuni Lal Sabharwal & Others*, [1971] 2 S.C.R. 573 referred to.

- D (ii) There was a joint decree in favour of both sets of defendants for the receipt of Rs. 77,000. If the decree for specific performance was set aside that part of the decree would also have to go. It was not possible to understand how that could be done in the absence of the legal representatives of the deceased G. Moreover, the plaintiffs had claimed against G, in the alternative, a decree for substantial amount consisting of the part consideration paid and certain other amounts. If G had been alive or if his legal representatives had been impleaded in time the court could, while setting aside the decree for specific performance, grant the alternative prayer which was only made against G. This could not be done now. In these circumstances Order 4, Rule 4 of the Code of Civil Procedure could not be of any avail to the appellants. The abatement of the appeal, so far as G was concerned, would prove fatal to the entire appeal as either inconsistent and contradictory decrees would have to be passed or proper reliefs could not be granted in the absence of a necessary party against that party or his legal representatives. [1072 B]

- F *Rameshwar Prasad & Others v. M/s Shyam Beharilal Jagannath & Others*, [1964] 3 S.C.R. 549, *Panjab v. Nathu Ram*, [1962] 2 S.C.R. 636 and *Pundit Siri Chand & Others v. M/s Jagdish Parshad Kishin Chand & Others*, [1966] 3 S.C.R. 451 referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2203 of 1969.

- G Appeal by special leave from the judgment and order dated April 8, 1958 of the Patna High Court in Appeal from Original Decree No. 17 of 1948.

S. T. Desai, and *R. C. Prasad*, for the appellants.

- H *L. N. Sinha*, Solicitor-General of India, *D. P. Singh Madhu Sudan Singh* and *S. C. Agarwal*, for respondent No. 1.

V. J. Francis, for respondent No. 2.

The Judgment of the Court was delivered by

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GROVER, J. This is an appeal by special leave from a judgment of the Patna High Court in a suit for specific performance of a contract for sale of certain properties described in Schedule 1 of the plaint.

The facts to the extent they are material may be stated. The suit which was filed by Babu Thakur Prasad Singh & others in 1943 was on the basis of a contract for sale made in 1931 by Saroda Charan Guha (deceased)—defendants First Party in the suit and Babu Ambika Prasad Singh and others—defendants second party to whom defendant first party had actually sold the properties in dispute. It was alleged, *inter alia*, in the plaint that the total sale consideration was Rs. 99,995/-. Out of that sum, Rs. 23,000/- had already been paid to defendant first party. It was further stated that defendant second party in spite of full knowledge of the agreement between the plaintiffs and the defendant first party purchased the suit properties for Rs. 1,63,400/- by means of a deed of sale dated December 11, 1942. Among the reliefs which were prayed for were for a decree for specific performance being passed in favour of the plaintiffs against the defendants on payment of a sum of Rs. 55,306.25 paise or such other amount as the court might determine and if, for any reason, such a decree be not granted a decree for a sum of Rs. 44,688/- with interest at 6% from the date of the suit till the date of the realisation be passed against defendant first party.

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A written statement was filed on behalf of the defendants first party. Therein he admitted receipt of a sum of Rs. 15,000/- only by way of payment as earnest money or part consideration. The defence of defendants second party was that being *bona fide* purchaser for value and having paid full consideration in good faith and without notice of the alleged contract of sale set up by the plaintiffs the suit was liable to be dismissed. The trial court decided the suit by a judgment dated October 10, 1947. Out of the issues framed on the pleadings of the parties the following need be mentioned :

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"5. Are the plaintiffs guilty of breach of any of the terms embodied in the agreement.

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6. Are defendants second party *bona fide* purchasers for consideration without notice ?

7. Are the plaintiffs entitled to get a refund of the amount alleged by them to have been paid to defendant first party or of any other amount ?"

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It was found on issue No. 5 that the plaintiffs were not guilty of breach of the terms embodied in the agreement of sale and that it

- A was defendant first party who had "played false with the plaintiffs and sold the disputed property along with others to defendants second party in December 1942. The entire liability for the breach of plaintiff's contract lies upon Mr. Guha and not on the plaintiffs. The three issues are answered accordingly". On issue No. 6 the trial court held that defendant second party had failed to prove that they had paid the consideration money in good faith and without notice of the contract of 1931. On issue No. 7 the court observed that it was unnecessary to consider in detail the alternative relief prayed for. It proceeded to say :

- C "I may, however, incidentally mention in passing that if I would have refused to decree the main relief of the plaintiffs there would have been no difficulty in my way in passing decree for the alternative claim against defendant first party on account of whose conduct the completion of the sale deed in favour of the plaintiffs has been made impossible".

- D Finally a decree for specific performance was granted in these terms :

- E "The plaintiffs shall get a decree for specific performance of contract of sale regarding the disputed property for a consideration of Rs. 1,00,000. The defendants are directed to execute and register a deed of sale for the same in favour of the plaintiffs on payment of Rs. 77,000 by the latter to the former and also put the latter in possession of the same".

- F Three appeals were preferred to the High Court against the judgment and decree of the trial court. One was by the defendant first party, the other by the plaintiffs and the third by defendants second party. It appears that neither the plaintiffs nor defendants first party prosecuted their appeals which were dismissed on the ground of non-prosecution. In the appeal filed by defendants second party one of the appellants Ambica Prasad Singh died in June 1956. On September 17, 1956 an application was filed by the other appellants for substitution of the legal representatives of the deceased in his place. The High Court, after having an inquiry on the questions in dispute with regard to the date of death of Ambica Prasad Singh and other matters, declined to condone the delay. On September 27, 1957 an order was made recording the fact that the appeal had abated so far as the appellant Ambica Prasad Singh was concerned. On April 8, 1958 the High Court held that the whole appeal failed as having become incompetent because of the said abatement. The appeal was consequently dismissed.

The appeal which was brought to this Court was filed by defendant second party consisting of defendants 3 to 8 in the original suit. Special leave was granted on February 18, 1959. During the pendency of that appeal in this Court Saroda Charan Guha original first party defendant who was impleaded as respondent No. 3 in the appeal to this Court died. It was only on February 23, 1972 that an application was made by the counsel for the appellants for substitution of the legal representatives of Saroda Charan Guha deceased (C.M.P. 1501/72). Previous to this an application dated February 13, 1972 had already been moved by the advocate for respondent No. 1 for dismissal of the appeal for non-prosecution as the legal representatives of deceased respondent No. 3 had not been brought on the record; (C.M.P. 810/72). On April 24, 1972 another application was filed by counsel for the appellants for condonation of delay, if any, in filing the application for substitution of the legal representatives of deceased Saroda Charan Guha; (C.M.P. 3091/72). After hearing counsel at length we made an order on November 17, 1972 dismissing the application for substitution.

The only question which has to be determined is whether the appeal can be heard and disposed of in the absence of legal representatives of the deceased Saroda Charan Guha with regard to whom the decree as passed by the trial court became final. The learned Solicitor-General who appears for the contesting respondent has maintained that the decree which was passed by the trial court was a joint decree against the defendant first party and defendant second party. It was further a decree which was also in favour of the defendants to the extent that they were to be paid a sum of Rs. 77,000/- by the plaintiffs and that payment was to be made jointly to them. In other words the decree being for specific performance of a contract was of a special nature and it was essentially joint so far as all the defendants were concerned. Moreover defendant first party who was the vendor was a necessary party because the plaintiffs asked for a relief in the alternative which has already been mentioned, that if the court on equitable grounds did not grant a decree for specific performance a decree be passed against defendant first party in the sum of Rs. 44,688.75 paise. The trial court found that a sum of Rs. 23,000/- had been paid by the plaintiffs to Guha defendants first party. It was further observed by the trial court that if the main relief had been declined it would have granted a decree for the alternative claim against defendant first party. It followed from this that if the High Court or this Court was going to allow the appeal filed by defendants second party and set aside the decree for specific performance it would no longer be possible in the absence of legal representatives of deceased

- A Guha to either set aside that part of the joint decree which is in his favour but also the plaintiffs would be disabled from being granted any relief in the alternative for the amount paid by way of part consideration to the vendor Guha deceased. In these circumstances, it is contended, the present appeal must be held to have become incompetent and it must fail on that ground.

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Counsel for the appellants has relied on two points in support of the argument that the appeal cannot fail because of the non-impleadment of the legal representatives of Guha deceased. The first is that he was not a necessary party being the vendor and the second is that the case would be covered by the provisions of O.41, R.4 of the Civil Procedure Code. There appears to be some divergence between the High Courts on the question whether in a suit for specific performance against a purchaser with notice of a prior agreement of sale the vendor is a necessary party or not. In other words the conflict has arisen on the question whether the decree in a suit for specific performance when the property in dispute has been sold to a third party should be to only direct the subsequent purchaser to execute a conveyance or whether the subsequent purchaser and the vendor should both execute a conveyance in favour of the plaintiff : See *Gourishankar & Others v. Ibrahim Ali*⁽¹⁾ and *Kafiladdin & Others v. Samiraddin & Others*⁽²⁾. This Court has, however, held in *Lala Durga Prasad & Another v. Lala Deep Chand & Others*⁽³⁾ that in a suit instituted by a purchaser against the vendor and a subsequent purchaser for specific performance of the contract of sale the proper form of the decree is to direct specific performance of the contract between the vendor and the plaintiff and further direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. This was the course followed by the Calcutta High Court in the above case and it appears that the English practice was the same. Thus according to this decision, the conveyance has to be executed by the vendor in favour of the plaintiff who seeks specific performance of the contract in his favour and the subsequent transferee has to join in the conveyance only to pass his title which resides in him. It has been made quite clear that he does not join in any special covenants made between the plaintiff and his vendor. All that he does is to pass on his title to the plaintiff. In a recent decision of this Court in *R. C. Chandiok & Another v. Chuni Lal Sabharwal & Others*⁽⁴⁾ while passing a decree for specific performance of a contract a direction was made that the decree should be in the same form as in *Lala Durga Prasad's*⁽³⁾.

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(1) A.I.R. 1929 Nag. 298.

(3) [1954] S.C.R. 360.

(2) A.I.R. 1931 Cal. 67.

(4) [1971] 2. S.C.R. 573.

case. It is thus difficult to sustain the argument that the vendor is not a necessary party when, according to the view accepted by this Court, the conveyance has to be executed by him although the subsequent purchaser has also to join so as to pass on the title which resides in him to the plaintiff. It must be remembered that if there are any special covenants and conditions agreed upon in the contract for sale between the original purchaser and the vendor those have to be incorporated in the sale deed although it is only the vendor who will enter into them and the subsequent purchaser will not join in those special covenants. But without the vendor joining in the execution of the sale deed special covenants, if any, between him and the original purchaser cannot be incorporated in the sale deed. The whole idea and the purpose underlying a decree for specific performance is that if a decree for such a relief is granted the person who has agreed to purchase the property should be put in the same position which would have obtained in case the contracting parties, i.e. vendor and the purchaser had, pursuant to the agreement, executed a deed of sale and completed it in every way. Therefore, it is essential that the vendor must join in the execution of the sale deed. If that be so, it is not possible to comprehend how he is not a necessary party. At any rate, in the presence of the relief for a decree for refund of the amount paid by way of part consideration the vendor would be a necessary party. No such relief could be granted in his absence nor can it be granted now even if the appeal succeeds and the decree for specific performance is set aside.

The second limb of argument of the appellants is based on Order 41, Rule 5, Civil Procedure Code. According to that rule where there are more plaintiffs or more defendants than one in a suit and the decree appealed from proceeds on any ground common to all the plaintiffs or all the defendants any one of the plaintiffs or the defendants may appeal from the whole decree and thereupon the appellate court may reverse, or vary the decree in favour of all the plaintiffs or defendants, as the case may be. As the appeal had been filed by defendants second party, it has been contended, that it remained complete and competent in spite of the death of Guha, defendant first party, for the reason that the decree proceeded on a ground common to all the defendants. It appears that there was conflict of judicial opinion on the question whether the said rule could be invoked when one of the several appellants had died and his legal representatives had not been brought on the record with the result that the appeal had abated against him. But this matter stood concluded by the decision of this Court in *Rameshwar Prasad &*

- A** *Others v. M/s Shyam Beharilal Jagannath & Others*⁽¹⁾. In that case the appeal had been filed in the High Court not by any one or some of the plaintiffs against the whole decree but had been filed by all the plaintiffs jointly. One of the appellants died and his legal representatives were not impleaded. It was laid down by this Court that Order 41, Rule 4 could not be invoked because the appellate court had no power to proceed with the appeal and to reverse and vary the decree in favour of all the plaintiffs or defendants under that rule because if all the plaintiffs or defendants had appealed from the decree and any one of them had died the appeal had abated so far as he was concerned under Order 22, Rule 3. The appeal of the surviving appellant could also not be heard because of the rule laid down in the *State of Punjab v. Nathu Ram*⁽²⁾. According to that rule the abatement of an appeal means not only that the decree between the appellant and the deceased respondent becomes final but also, as a necessary corollary, the appellate court cannot in any way modify that decree directly or indirectly. The decision in *Nathu Ram's* case (supra) was referred to in *Pandit Siri Chand & Others v. M/s Jagdish Parshad Kishan Chand & Others*⁽³⁾ where the decision was somewhat similar to *Rameshwar Prasad's* case (supra). It was also emphasised that in a situation where two inconsistent orders or decrees would result the rule in *Nathu Ram's* case would be applicable. It may be mentioned that in that case an award had been made for payment of compensation in favour of two brothers L. & N. The State appealed against the award to the High Court. During the pendency of the appeal respondent L died and no application was made for bringing on record his legal representatives within the requisite period of limitation. The question was that since the appeal had abated against L what was its effect in appeal against N. It was observed that the consideration which would weigh with the court in deciding whether the entire appeal had abated or not would be whether the appeal between the appellants and the respondents other than the deceased respondent could be said to be properly constituted or could be said to have all the necessary parties for the decision of the controversy before the court. Another main test was whether the success of the appeal would lead to a decision which would be in conflict with the decision between the appellant and the deceased respondent. Thus the court will have to pass a decree contradictory to the one which had already become final with respect to the same subject matter between the appellant and the deceased respondent. It is arguable that the present case is distinguishable from the decisions in *Rameshwar Prasad* and *Pt. Siri Chand* (supra). Here the appellate court could, under Order 41, Rule 4 of the Civil Procedure Code.

(1) [1964] 3 S.C.R. 549.

(2) [1962] 2 S.C.R. 636.

(3) [1966] 3 S.C.R. 451.

reverse the decree for specific performance since the defendants second party filed the appeal and Guha, the vendor who died, had not joined in the appeal. The decree for specific performance proceeded on a ground common to both sets of defendants. It could, therefore, be set aside in terms of the above provision. But there is a joint decree in favour of both sets of defendants for the receipt of Rs. 77,000/-. If the decree for specific performance is set aside that part of the decree will also have to go. It is not possible to understand how that can be done in the absence of the legal representatives of the deceased, Guha. Moreover, the plaintiffs had claimed against Guha, in the alternative, a decree for substantial amount consisting of the part consideration paid and certain other amounts. If Guha had been alive or if his legal representatives had been impleaded in time the court could, while setting aside the decree for specific performance, grant the alternative prayer which was only made against Guha. This cannot be done now. In these circumstances we are of the view that Order 41, Rule 4 of the Code of Civil Procedure cannot be of any avail to the appellants. The abatement of the appeal, so far as Guha was concerned, will prove fatal to the entire appeal as either inconsistent and contradictory decrees will have to be passed or proper reliefs cannot be granted in the absence of a necessary party against that party or his legal representatives.

The appeal is dismissed but there will be no order as to costs.

G.C.

Appeal dismissed.