

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

SECOND APPEAL NO. 273 OF 1987

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| 1. | Dhairyashil Anandrao Khatal | |
| 2. | Vilas Anandrao Khatal | |
| 3. | Mohanrao Anandrao Khatal | .. Appellants / orig.
Defendants No.2 to 4 |

versus

- | | | |
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| 1. | Sidram Ramchandra Mendke | |
| 2. | Veerbhadra Satappa Mendke
died per Legal Representatives:- | |
| 2-1 | Annarao Veerbhadrappa Mendke | |
| 2-2 | Bhima Veerbhadrappa Mendke | |
| 2-3 | Nagnath Veerbhadrappa Mendke | |
| 2-4 | Ramchandra Veerbhandrappa Mendke | |
| 2-5 | Suresh Veerbhandrappa Mendke | |
| 2-6 | Shamla d/o Veerbhandrappa Mendke
age 10 years | |
| 2-7 | Sangeeta d/o Veerbhandrappa Mendke,
age 8 years | Respondents/
Resp. No. 1 orig.
defendant no. 1
Respondent no.
2 is orig. pltff. |

[Respondents no. 2/6 and 2/7 are minor
and under guardianship of Respondent
no. 2-Annarao Veerbhandrappa Mendke]

Mr. Arun G. Dalal, Advocate for appellants
Appeal is dismissed against resp.no.1 under
Additional Registrar's order dated 07-04-1991
Mr. Vinesh C. Solshe, Advocate for respondents no. 2-1 to 2-5

CORAM : SUNIL P. DESHMUKH, J.
20TH NOVEMBER, 2015

ORAL JUDGMENT:

1. This second appeal is by original defendants no. 2 to 4 against concurrent decisions, one rendered by the trial court (Civil Judge, Junior Division, Tuljapur) in regular civil suit no. 54 of 1975 on 30-09-1981 and the other by appellate court (District Judge, Osmanabad) in regular civil appeal no. 205 of 1981 on 29-01-1987 respectively, granting specific performance of contract dated 24-06-1974 executed by respondent no.1-original defendant no 1 in favour of respondent no.2 - original plaintiff in respect of land ad-measuring 6 acres out of survey number 4-A situated at village Lohagaon, Taluka Tuljapur, District Osmanabad.

2. The second appeal has been admitted on the substantial question of law referred to in ground no. 2 in the memo of appeal which reads thus;

" 2. As to whether document Exhibit 87 dated 24th June, 1974 was an agreement of sale or a nominal agreement by way of security for loan amount advanced by the Plaintiff to his close relatives, Defendant No. 1. "

3. Case pleaded by the plaintiff is that, defendant no. 1 is the owner of land bearing survey number 4-A ad-measuring 14 acre and 5 guntha and that he agreed to sell 6 acres from the same to the plaintiff for a total consideration of ₹ 8,000/- and had accepted

earnest amount of ₹ 1000/- on 24-06-1974 - the date of execution of the agreement. Upon execution of agreement, he had been put in possession of suit land and further that in furtherance of the same, application had been moved by defendant no 1 for recording plaintiff's possession over suit land. Further amount of ₹ 1000/- had been agreed to be paid on *Paush Amavasya Shake* 1896 and the remaining amount of ₹ 6000/- was to be paid at the time of sale deed which the parties had agreed to be executed within a year. Parties were to bear registration expenses equally. Accordingly, ₹ 1000/- were paid to defendant no. 1 on 04-12-1974 for which plaintiff obtained receipt and was ready and willing to perform his part of the agreement. Before transaction with plaintiff, defendant no. 1 had entered into agreement for sale of suit land with Udhavsing Babusing Biseni and had obtained from him an amount of ₹ 1000/- on 09-06-1974, however, subsequently said amount was returned to Udhavsing Biseni and the transaction was cancelled. Despite request by the plaintiff, defendant no. 1 had exhibited reluctance and neglect in respect of execution of sale deed. Under the circumstances, a notice through advocate had been issued by plaintiff on 07-05-1975 to defendant no. 1 by registered post acknowledgment due, however, that was managed to be returned with endorsement that defendant no. 1 had not been present on the address given. Thereafter instantly on 12-07-1975, sale deed had been purportedly executed by defendant no. 1 in defendant no.2's favour in respect of suit land for which an ante

dated agreement is shown to have been executed by defendant no. 1 in favour of defendant no. 2 which is stated to be on 22-03-1974.

4. The plaintiff has contended that the sale deed executed by defendant no. 1 in favour of defendant no. 2 is without possession and the same is not binding on the plaintiff. Defendants No. 3 and 4 are brothers of defendant no.2 and they jointly started harassing plaintiff and purported to obstruct and meddle with plaintiff's possession over suit land and as such, suit had been instituted seeking specific performance of contract for sale dated 24-06-1974 and injunction against the defendants.

5. Defendants no. 1 to 3 had appeared in the suit and filed joint written statement at Exhibit-21. They had denied that defendant no. 1 had ever agreed to sell suit land to the plaintiff. It is contended by them that money had been obtained from plaintiff by defendant no. 1 for engagement of his daughter while plaintiff had been accompanying defendant no.1 for said purpose to Solapur and defendant no. 1 being in need of money, he had signed the document by way of security in favour of the plaintiff which was styled as agreement for sale but sale of land thereunder had never been contemplated. They have denied payment by plaintiff to defendant no.1. Denying that plaintiff had ever been put in possession of suit land, defendants had contended that, in fact, defendants no. 2 to 4 were in possession of the suit land pursuant to agreement for sale in their favour by defendant no.1. It is,

however, admitted that agreement for sale had been executed by defendant no. 1 in favour of Udhasing Babusing Biseni but with denial of that it was ever intended to be acted upon. According to the defendants, by practising deceit, custody of agreement in favour of Udhasing had been obtained by plaintiff. Defendant No. 3 in his capacity as post master had caused endorsement on registered packet sent to defendant no. 1 by plaintiff, but it was mere co-incidence and there had been no ill-intention under the same. They have denied the agreement for sale in their favour dated 22-03-1974 to be ante dated. The suit had further been resisted on the ground that the suit land had been mortgaged to bank and as such, defendant no. 1 had no right to execute agreement for sale in favour of the plaintiff.

6. With reference to aforesaid pleadings, issues had been framed by trial court and it was held that plaintiff has proved execution of agreement for sale in his favour, the amount pursuant to the agreement had been paid by him to defendant no.1 and that defendant no.1 had contravened the terms of agreement. Trial court had found that the plaintiff was ready and willing to perform his part of the contract and as such had been entitled to specific performance of the agreement. The trial court also found plaintiff's possession over the suit property on the date of the suit and under the circumstances, had granted injunction. In view of the same, alternate plea with regard to refund of the amount as also for damages had not been considered.

7. As regards the document - agreement for sale in favour of defendant no. 2, it was held by the trial court that the same had been ante dated and sale deed in his favour dated 12-05-1975 not to be valid and thus not binding on the plaintiff. Trial court had negatived resistance by defendants that since the land had been mortgaged to the bank such mortgage would put restraint on alienation of the land in plaintiff's favour. Accordingly, trial court decreed the suit, directed defendants no. 1 and 2 to execute sale deed of suit property in favour of plaintiff.

8. Matter was carried in appeal by defendants no. 2 to 4, bearing regular civil appeal no. 205 of 1981. Along side, it appears, defendant no. 1 had also filed cross objection in the appeal. Regular civil appeal as well as cross objection were dismissed on 29-01-1987, recording findings that the plaintiff had proved that the suit land had been agreed to be sold to him by defendant no. 1 for total consideration of ₹ 8000/- and that defendant no. 1 had received from plaintiff earnest amount of ₹ 1000/- as also further amount of ₹ 1000/- which was paid on 04-12-1974. The appellate court also endorsed finding by trial court on possession being of the plaintiff pursuant to agreement for sale dated 24-06-1974. The appellate court had negatived plea of defendant no. 1 that the document (agreement of sale) in plaintiff's favour had been executed under a pressing need of money for incurring expenses over engagement ceremony of his daughter at Solapur. Execution of

agreement for sale in favour of defendant no. 2 by defendant no. 1 on 22-03-1974 and securing earnest amount of Rs.4,500/- thereunder, has been held to have not been established, upon appreciation of evidence. Appellate court also found the claim of defendant no. 2 about him having been put in possession pursuant to the agreement for sale in his favour, to be incorrect. The appellate court, as such, concurred with the findings of facts recorded by the trial court and dismissed the appeal and also the cross objection by defendant no.1 as stated hereinabove.

9. Mr. Arun G. Dalal, counsel for appellants, has advanced various submissions, contending that the document on which the whole suit has been based, namely, agreement of sale dated 24-06-1974 cannot be said to have been duly proved, primarily for reason that it had been entered into in circumstances as have been referred to in the defence of the defendants and further that there is no corroborative evidence available in respect of execution of the same. Having regard to relationship between defendant no.1 and the plaintiff, as a matter of fact, the courts ought to have held the document in favour of the plaintiff having been executed in grave urgency. He submits that having regard to the tenor of pleadings, while the parties appear to have executed the document in dispute at Solapur, the courts have strangely considered that possession of suit land had been delivered to the plaintiff which, according to Mr Dalal, is not plausible. It is being submitted by the learned counsel, it cannot be said that the document had been executed by free will

of defendant no.1 and thus basic requirement for agreement to be enforceable in law under the Indian Contract Act cannot be said to have been met with. He further submits that the defendants have denied receipt by defendant no. 1, of amount of ₹ 1000/- from the plaintiff in December, 1974 and acknowledgment therefor, as also alleged application by defendant no. 1 to *talathi* for recording transaction of agreement for sale and actions in pursuance thereof. Mr. Dalal expresses surprise over how custody of application which is supposed to be in the record of revenue office has been secured by the plaintiff. He submits, *talathi* has not been examined and as such, no credence can be given to the evidence of the plaintiff in that respect. He submits that the scribe of the agreement for sale in favour of the plaintiff is at loggerheads with defendant no. 1 and as such, his evidence with regard to receipt of payment ought not to have been relied on.

10. He submits that the courts below have not given due consideration to the fact that document dated 22-03-1974 in favour of defendant no. 2 is legal and has been duly proved, for, the witness as well as the scribe of the same have been examined and they have deposed according to the facts and said evidence could not be rebutted by plaintiff.

11. Mr. Dalal, further goes on to submit that, in any case, specific performance of agreement for sale dated 24-06-1974 in favour of the plaintiff cannot be said to be enforceable against defendant no.

2 who is a bonafide purchaser of the property for value without notice of agreement in favour of the plaintiff.

12. He places reliance on section 19(b) of the Specific Relief Act, 1963, submitting that the amount had been paid by defendant no. 2 to defendant no. 1 in good faith with no notice of earlier agreement in favour of plaintiff. He, therefore, contends that his case falls within the exception under clause (b) of section 19 of the Specific Relief Act and as such courts ought not to have exercised discretion in favour of plaintiff.

13. For certain aspects involved in the matter, Mr. Dalal has relied on citations by other high courts, such as, *Bhaiyalal v. Ram Din*, reported in *AIR 1989 Allahabad 130* to contend that failure to examine scribe of the document would disentitle the plaintiff from seeking a decree of performance of contract. He also submits that readiness and willingness has not been proved by the plaintiff. For said purpose, he places reliance on the case *Ramsingh v. Babulal*, reported in *AIR 1954 Bhopal 3 (vol. 41, C.N. 2)*.

14. The learned counsel for the appellants has also relied on *Pushpa Bai v. Dr; Williams, AIR 2001 Madras 447*, in order to impress upon that since the plaintiff – respondent no. 2 herein has not signed the agreement for sale, it cannot be said that the agreement is enforceable at law.

15. The learned counsel further purports to take support of *Zorawar Singh and another v. Sarwan Singh, AIR 2002 SC 1711* wherein, it appears, court found that the agreement to sell was executed between vendor and third party purchasers much prior in point of time to alleged sale agreement between plaintiff and the vendor and that there was no record or entry of the alleged application made by plaintiff which was returned to him, in the office of Sub Registrar.

16. Lastly, Mr. Dalal places reliance on decision by the apex court in the case of *Parakunnnan Veetill Joseph's son Mathew v. Nedumbara Kuruvila's son and others*, reported in *AIR 1987 SC 2378*, to submit that having regard to the circumstances under which the agreement for sale had been executed in favour of the plaintiff, said authority would apply to present case, for, the supreme court has considered that a document cannot be used as an instrument of oppression to have unfair advantage to plaintiff.

17. He, as such submits that matter requires consideration on merits and should not be dismissed on technicalities – upon the objection likely to come up from respondent no.2-plaintiff.

18. Mr. Vinesh C. Solshe, learned counsel appearing on behalf of respondents no. 2-1 to 2-5 while repelling the contentions of appellants points out that the defence by defendant no. 2 of

bonafide purchaser for value without notice or for that matter pursuant to section 19(b) of the Specific Relief Act had not been raised at all and therefore it should not be considered nor any substantial question of law had been framed on that ground. He contends that appellants have no case on merits at all and firmly puts forward the submission that merits of the second appeal cannot be entered into at all, for, according to him, the second appeal stands abated as a whole with its' dismissal against respondent no.1.

19. Mr. Solshe points out that respondent no.2-plaintiff had filed suit for specific performance against defendants no. 1 and 2 jointly in respect of agreement of sale in his favour. The plaintiff had also claimed refund of the amount in case the court would find it difficult to grant specific performance of the agreement of sale.

20. He states that the defendants have filed joint written statement denying the agreement for sale in plaintiff's favour and asserting execution of document in favour of defendants no. 2 to 4. The evidence has also been led jointly by the defendants.

21. He submits, the suit of the plaintiff for specific performance against defendants no. 1 and 2 had been decreed. The decree is joint and not severable. Appellate court has maintained the decree as it is. He submits that it was a joint decree passed against respondents no. 1 and 2 and that defendants have also treated it the same way.

22. He submits that joint decree had become final against defendant no. 1 with second appeal having been dismissed against him. In such an event, if the second appeal is allowed, it would give rise to conflicting and contradictory decrees and the position would emerge which would be inconsistent with the law as has been expounded by the supreme court on several occasions. He submits that defendants no. 1 and 2 have been directed to execute sale deed in favour of the plaintiff. It is not a severable decree. He, as such, submits that appeal abates as a whole and cannot be proceeded with on merits.

23. Mr. Solshe, in support of his submissions, places reliance on decision in *Dwarka Prasad Singh and others vs. Harikant Prasad Singh and others*, reported in *AIR 1973 SC 655* and contends that the facts involved in the citation are identical with those in present matter. Suit in the cited case also was for specific performance against vendor and subsequent purchaser. The plaintiff in that case, as in the present one, had sought alternate relief of refund of certain amount paid towards part of consideration. The suit was decreed granting specific performance. The defendant-purchaser filed appeal before supreme court against the decree by high court. Upon death of vendor during pendency of the appeal, his legal heirs were not brought on record. Under the circumstances, the supreme court had considered that rule 4 of Order XLI of the Code of Civil Procedure, 1908 had no application and the abatement of appeal

against the vendor was fatal to the entire appeal as either inconsistent and contradictory decrees will have to be passed or proper relief could not be granted in his or his legal representative's absence.

24. It appears, during pendency of present second appeal, certain developments had taken place. After admission of the second appeal in February, 1988, respondent no.1-defendant no. 1 had not been served for quite a long time and around 1993, the second appeal stood abated as against respondent no.1. An application thereafter came to be filed bearing civil application no. 3849 of 2004 whereunder legal heirs of respondent no.1-defendant no. 1 were sought to be brought on record. It appears that simultaneously, civil application no. 3863 of 2004 had also been filed praying for setting aside dismissal of appeal against respondent no.1-defendant no.1. Both the applications were disposed by separate orders on 19-08-2004.

25. While passing order on civil application no. 3849 of 2004, this court observed that civil application no. 3863 of 2004 praying for setting aside order of dismissal of appeal against respondent no. 1 is rejected and in view of the same, civil application no. 3849 of 2004 had been held to be not surviving and had been disposed of accordingly.

26. This high court had rejected civil application no.3863 of 2004, observing that the matter had been dismissed on 07-09-1999 under

the orders of the Registrar, as despite receipt of report of the bailiff in August, 1993, about non service on respondent no.1-defendant no. 1 since he was stated to be not residing on the given address, no requisite steps for service on him had ever been taken and as such the second appeal stood dismissed as against respondent no.1-defendant no. 1.

27. The court had taken into account that there was no plausible explanation put forth for not taking steps for service upon respondent no.1 during the period August, 1993 to April, 1999 and had considered that there is no acceptable justification for setting aside order of dismissal of appeal against respondent no.1. Explanation given, had not impressed the court having regard to unaccounted enormous delay in making the application and having regard also to the manner in which the matter was conducted, the court was disinclined to accede to the request and as such, rejected said application. In the circumstances, the second appeal stood dismissed against defendant no.1-respondent no.1. It appears that despite aforesaid orders were passed by the court way back in 2004, no further action had been taken.

28. On 18-07-2008, second appeal stood dismissed in default under Order XLI, rule 17 of the Code of Civil Procedure, 1908 and had been subsequently even restored on 14-11-2008. For quite a few intervening dates, the matter had not been attended. On 06-05-2009, the second appeal had been adjourned to 10-06-2009

on which date it was further adjourned for one week subject to payment of costs of ₹ 1000. Thereafter, though on 17-06-2009, the matter appeared on the board, costs as directed on earlier occasion were not paid and as such, the second appeal had again been dismissed on 17-06-2009.

29. It appears, upon dismissal of second appeal on 17-06-2009, civil application no. 13445 of 2009 was filed seeking restoration of the second appeal. However, that application as well went unattended and was thus rejected on 29-01-2010. Further civil application bearing no. 5183 of 2014 had been filed to recall order dated 29-01-2010. It is thereupon, the court by order dated 13-04-2015 had granted civil application no. 5183 of 2014 subject to payment of ₹ 5000/- (inclusive of costs of ₹ 1000/- earlier directed) and recalled order dated 17-06-2009 dismissing second appeal for want of prosecution. It appears, costs as had been imposed under order dated 13-04-2015 have been paid and second appeal has been restored and thus is being taken up for hearing.

30. Mr. Dalal contends, purporting to place reliance on various judgments, having regard to the facts and circumstances of the case, a decree against defendants cannot be said to be a joint decree and is severable as far as defendants are concerned. He submits, if decree is reversed on merits, it would not be a case which would lead to any inconsistency or any contrary decision.

31. Learned counsel refers to decision of the apex court in the matter of *S. Amarjit Singh Kalra and others vs. Smt. Pramod Gupta*, reported in *AIR 2003 SC 2588 (1)*. He submits that defendant no.2 has independent right to the property and to execution of sale deed in respect of the same. However, the case relied on, is in respect of the parties joining together in single litigation to vindicate their rights in the land acquisition proceedings. The case concerns claims in assertion of individual rights which were dealt with together by the court under the Land Acquisition Act. In the context of that, the apex court had considered that a decree passed by the court would be joint and several or separate vis-a-vis individuals or their claims and as such, abatement of appeal in high court against one or the other appellants would not result in abatement of appeal in entirety or render it liable to be dismissed as not duly or properly constituted or not possible to be proceeded with. The facts involved in the case relied on do not appear to come anywhere closer to the facts in the present case.

32. Learned counsel further placed reliance on decision in *Budh Ram and ors. v. Bansi and ors.*, 2010 AIR SCW 5071 and particularly on head note (B) thereof, wherein it has been observed that where each one of the parties has an independent and distinct right of his own, non inter-dependent upon one or the other nor the parties have conflicting interest inter se, the appeal may abate only

qua the deceased defendant-respondent. It has to be noted here that in the same, it has further been held that in case there is a possibility that the court may pass a decree contradictory to the decree in favour of the deceased party, the appeal would abate in toto for the simple reason that the appeal is a continuation of suit and the law does not permit two contradictory decrees on the same subject-matter in the same suit and that vice of contradictory or inconsistent decree is the relevant test. That appears to be the case in appeal against a declaration that the plaintiff-appellant therein was co-owner of the property along with the respondents-defendants and in joint possession thereof. One of the defendants was proforma defendant-respondent. He died and his legal heirs were not brought on record in appeal and thus the appeal was held to have been abated in toto. I do not see that in any way this citation carries forward the purpose for which it has been cited by learned counsel for the appellants.

33. Mr. Dalal, learned counsel appearing for the appellants-original defendants no. 2 to 4 had been quite passionate in his submission that for technical error, litigant can hardly be faulted with and having regard to the circumstances, the lapses deserve lenient and sympathetic consideration and therefore prayed for appreciation of the matter on merits.

34. In the case of *Dwarka Prasad Singh vs. Harikant Prasad Singh*, AIR 1973 SC 655 (supra) cited on behalf of respondents no.

2-1 to 2-5, factual position appears to be that, on the basis of contract for sale of 1931 by one *Saroda Charan Guha* (deceased) defendant-first party, *Babu Thakur Prasad Singh* and others had instituted a suit in 1943 for specific performance wherein *Babu Ambika Prasad* and others were the defendants-second party in whose favour defendant no. 1 *Saroda Charan Guha* had sold the property in the suit. It was alleged that the second defendant had purchased the property in spite of knowledge of the agreement between the plaintiffs and the defendant-first party. It was alternatively prayed in the same that, if such a decree is not granted, the decree for refund of amount with interest from the date of suit be passed against the first defendant. The suit was opposed by the first defendant. The second party had taken a defence of bonafide purchaser for value and payment of consideration in good faith. Said suit was decreed. Three appeals were preferred before high court against the judgment and decree of the trial court, one by defendants-first party, the other by the plaintiffs and the third by defendants-second party. However, appeal by the plaintiffs as well as appeal by the defendants-first party were dismissed for want of prosecution. Appeal by the defendants-second party was proceeded with. The high court had dismissed the appeal by defendants-second party as having been abated since legal heirs of deceased appellant *Ambika Prasad Singh* had not been brought before the court. When further appeal

was carried to the supreme court by defendants-second party consisting of defendants no. 3 to 8, during pendency of said appeal, *Saroda Charan Guha* - original defendant-first party died and an application by appellants was moved for substitution of legal representatives of said *Saroda Charan Guha*. However, before that, an application had been moved by respondent no. 1 for dismissal of appeal for non prosecution as legal representatives of deceased respondent no. 3 - *Saroda Charan Guha* had not been brought on record. An application for condonation of delay had also been filed. It appears, after hearing learned counsel for the parties, application for substitution of legal representatives of deceased *Saroda Charan Guha* - original defendant-first party had been dismissed and thereafter the matter had been proceeded with. Under the circumstances only question addressed to by the supreme court was as to whether the appeal could be heard and decided in the absence of legal heirs of deceased *Saroda Charan Guha* against whom decree had become final. It appears that what weighed with the apex court has been recorded in paragraphs no. 6 and 7 of the judgment. Said observations are apt for present case, which read thus:

" 6. 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*, AIR 1929 Nag 298 and [*Kafiladdin v. Samiraddin*](#), AIR 1931 Cal 67. This Court has, however, held in [*Lala Durga Prasad v. Lala Deep Chand*](#), 1954 SCR 360=(AIR 1954 SC 75) 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 v. Chunni Lal Sabharwal, (1971) 2 SCR 573=(AIR 1971 SC 1238) 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 case*, 1954 SCR 360=(AIR 1954 SC 75). 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.

7. *The second limb of argument of the appellants is based on Order 41, Rule 5 (4 ?), 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 v. M/s Shyam Beharilal Jagannath](#), (1964) 3 SCR 549=(AIR 1963 SC 1901). 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](#), (1962) 2 SCR 636= (AIR 1962 SC 89). 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 (AIR 1962 SC 89) (supra) was referred to in [Pandit Siri Chand v. M/s Jagdish Parshad Kishan Chand](#), (1966) 3 SCR 451= (AIR 1966 SC 1427) where the decision was somewhat similar to Rameshwar Prasad's case (1964) 3 SCR 549=(AIR 1963 SC 1901) (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 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. "

35. The supreme court has explained rationale underlying the necessity of the vendor to be a party to the suits for specific performance and has also taken into account contingency in the case of reversal of a decision of a court where relief for decree for refund of earnest amount paid to the vendor in his absence could be granted and has answered the same in the negative. The supreme court has further considered that the purpose underlying a decree for specific performance is that if a decree is granted, the person who has agreed to purchase shall be put in the same position which would have obtained in case the contracting parties had executed sale and completed it in every way and in the cases of special covenants, it is only the vendor who enters into the same and subsequent purchaser would not join in those special covenants.

36. Emerging position in the present matter is almost identically similar to the one involved in *Dwarka Prasad Singh vs Harikant Prasad Singh*, AIR 1973 SC 655 (supra) and others. Consequently, request of learned counsel for respondent no.2-plaintiff herein not to enter into merits of the case appears to be proper.

37. Having regard to factual position referred to in paragraphs no. 24 to 29 persisted during pendency of the second appeal which is undisputed, I do not think that the second appeal is amenable for consideration on merits as the same stands abated as a whole with dismissal of it against respondent no.1 – defendant no. 1 and the same, as such, is not considered on merits. Various contentions advanced on merits opposing the submissions of learned counsel of appellant under the circumstances have not been gone into.

38. Second appeal stands dismissed.

SUNIL P. DESHMUKH, J.

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