

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**Judgment reserved on 30-1-2019**

**Judgment delivered on 28-02-2019**

**First Appeal No. 423 of 1995**

1. Arvind s/o Sitaram Mishra, aged about 21 years, r/o Pathrapali (Duldula) Tahsil Kunkuri district Raigarh (MP now CG).
2. Raj Kishore s/o Shyamsunder Prasad Sinha, aged 28 years occupation cultivation, r/o village Pathrapali Tahsil Kunkuri district Raigarh (MP) now CG.

**---- Appellants**

**Versus**

1. Sumitra Devi w/o Gokul Sao, aged about 57 years, Pathratoli, District-Raigarh. (deleted)
  2. Rameshwar Singh s/o not known aged about 37 years.(deleted)
  3. Vijay Kumar, s/o not known aged about 35 years.
  4. Shyamkishore, s/o not known aged about 40 years.
  5. Chandruram, s/o not known aged 37 years, resident of Sarhapani.
  6. Muneshwar Ram s/o Panduram aged about 42 years.
  7. Bhagwatram, s/o Ubbiram, aged about 32 years.
  8. Rameshwarram, s/o Panduram, aged about 32 years.
  9. Maniram s/o not known, aged about 42 years.
  10. Budhdev Singh, s/o Mundiya Singh, aged about 37 years.
  11. Kajoruram s/o Marharam, aged about 42 years.
  12. Bidhyadhar Ram, s/o Renuram aged about 39 years.
  13. Ramnaram, s/o not known aged about 45 years.
- All resident of Pathrapali Tahsil Kunkuri District

Raigarh (MP) now CG).

14. Maghanram, s/o not known aged about 43 years.
15. Kushalram, s/o not known, aged 45 years.
16. Jadumani, s/o not known aged about 37 years.
17. Dinuram, s/o not known, aged about – 37 years.  
All resident of Manjhatoli, P.O. Pathratoli, tahsil  
Kunkuri, District- Raigarh (MP) Now CG
18. Kirtanram, s/o not known, aged about 37 years.
19. Tirathram, s/o not known, aged 39 years.
20. Lochanram, s/o not known, aged about 35 years,  
All resident of village Bamhani, P.O. Pathratoli, tahsil  
Kunkuri, District- Raigarh (MP) Now CG
21. Ghuranram, s/o not known aged about 41 years.
22. Shaniram, s/o not known, aged about 37 years.  
Resident of Bodakachhar, P.O. Pathratoli, Tahsil-  
Kunkuri, District- Raigarh (MP) now CG
23. Chandru Sa, S/o Kalicharan aged about 37 years, r/o  
Pathratoli, District- Raigarh (MP) now CG
24. Shyam Shanker Prasad, s/o – Bherav Sahu, aged  
about – 47 years, resident of Kersae.
25. State of Madhya Pradesh (now CG) through Collector,  
Raigarh.

**---- Respondents**

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|-----------------|---|----------------------------------------------------------------------|
| For appellants  | : | Mr.U.N. Awasthy, Sr. Advocate with<br>Mr. M.K. Sinha, Advocate.      |
| For respondents | : | Mr. G.S. Agrawal, Sr. Advocate with<br>Mr. Sanjay Agrawal, Advocate. |
| For State       | : | Mr. Ravish Verma, Govt. Advocate.                                    |

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**SB: Hon'ble Shri Justice Ram Prasanna Sharma**

**CAV JUDGMENT**

1. This appeal is preferred under Section 96 of the Code of Civil Procedure, 1908 against the judgment/decreed dated 28-9-1995 passed by the Additional District Judge, Jashpurnagar, District Raigarh in Civil Suit No. 2A/88 wherein the said court dismissed the suit filed by the appellants/plaintiffs for specific performance of the contract dated 1-7-1987 for land measuring 9.56 acres mentioned in Schedule-A of the plaint situated at village Pathratoli, Patwarni Halka No. 16, Revenue Circle Kunkuri, Tahsil Kunkuri, Dist. Raigarh now Jashpur (CG).
2. Deceased Gokula Sao was owner of the suit land and he entered into an agreement to sale the said land in favour of the appellants/plaintiffs for a sum of Rs.60,000/-. Rs. 40,000/- was paid to Gokul Sao on 1-7-1987 and it was agreed that sale deed will be executed after payment of balance consideration of Rs.20,000/-. It is alleged by the appellants that Gokula Sao delivered the possession of the land on 1-7-1987 itself, out of balance consideration of Rs.20,000/-, amount of Rs.15,000/- was paid to Gokula Sao on 28-8-1987. The said Gokula Sao executed the receipt. The appellants were already willing to make payment of the balance consideration of Rs.5000/-, but due to ill-health of

said Gokula Sao, sale deed could not be executed. Gokula Sao died at village Pathratoli on 10-9-1987. He was issue-less and his wife Sumitra Devi left the village and her whereabouts were not known since 1987. The appellants filed a suit for specific performance of the agreement dated 1-7-1987. Respondents obstructed and tried to interfere in the appellants' possession over the suit land after death of Gokula Sao. Respondent No.24/defendant namely Shyam Shankar Prasad filed a counter-claim on the basis of will dated 20-3-86 and prayed for declaration that he is entitled to receive sale proceeds of the auction of the usurpt of the suit land which was auctioned by the Tahsildar, Kunkuri. The name of the said respondent was mutated on 31-3-1990 during pendency of the suit and during pendency of the proceeding under Section 145 of the Code of Criminal Procedure. At present the suit land is under attachment under Section 146(1) of the Cr.P.C., 1973.

3. The trial Court after hearing both sides recorded a finding that the document Exhibits.P/1 and P/2 are not documents of agreement to sale, but it appears that documents which are in nature of sale is unregistered and possession of the appellants is also not established. The trial Court further opined that the sale deed in favour of the appellants cannot be executed because the property is transferred to respondent No.24 namely Shyam

Shankar Prasad on the basis of a will executed by Gokula Sao and he is now owner of the property. The trial Court while dismissing the suit of the land declared that Shyam Shankar Prasad / respondent No. 24 is owner of the property in question on the basis of will and declared his title over the property.

4. Learned counsel for the appellants would submit as under;

- I) Though Gokula Sao died issue-less and his wife Sumitra Devi also died, but balance amount of agreement will be paid to the State Government as per provisions of Section 29 of the Hindu Succession Act, 1956 (for short, the Act, 1956”).
- ii) The agreement was entered in the year 1987 and as per Section 17(1)(a) of the Registration Act, 1908, (for short, “the Act, 1908”) registration of agreement was not required at the time of agreement. It is required only after amendment in the year 2001 and enforced on or after 24-9-2001.
- lii) As per revenue record, possession of the property is shown of appellants though it is mentioned that it is illegal possession but said

opinion in the revenue record is irrelevant.

- iv) Counter claim on the basis of will by respondent No.24 could not have been entertained in the suit for specific performance of the contract as per Order 8 Rule 6-A of the C.P.C.
- v) Will has not been proved as per Section 63 of the Indian Succession Act, 1925 (for short, “the Act, 1925”) . The will was conditional and as per Section 128 of the Act, 1925 condition of the will was not fulfilled, therefore, will cannot be acted upon, therefore, legacy is not entitled for property mentioned in the will.
- vi) As the appellants are in possession in part performance of the contract, their possession is protected under Section 53-A of the Transfer of Property Act, 1882 (for short, “the Act, 1882:).

He relied upon the decision of Hon'ble Supreme Court in the matter of **Rambhau Namdeo Gajre vs. Narayan Bapujio Dhotra,**

**reported in AIR 2004 SC 4342**

5 On the other hand, learned counsel for the respondent No.24 submits as under:

- I) Alleged document of agreement to sale Ex.P/1 is inadmissible in view of Section 35 of the Indian Stamp Act, 1899 (for short, “the Act, 1899”) because same is not duly stamped. The said agreement is fictitious in nature.
- ii) Appeal is not maintainable because executant of alleged agreement died issue-less and his wife namely Sumitra Devi also died before filing of this appeal and legal representatives were not brought on record, therefore, appeal ought not to have been proceeded with. Respondent No.1 Sumitra Devi already died during pendency of civil suit before the trial Court which is clear from the order sheet dated 16-1-1993 of the trial Court and name of Sumitra Devi was ordered to be deleted even though she is made party as

respondent No.1 in the present appeal which amounts to hearing of the appeal against the death person which is clearly impermissible in law.

- iii) No application was filed before the trial Court to exclude the counter claim as per the provisions of Order 8 Rule 6(A) of the CPC.
- iv) As per plaint averment, Matadin and Ramkishore have purchased the property and but in the statement of Sitaram, he deposed that only he purchased the property and he paid the amount to the tune of Rs.40,000/- (para 1 of deposition of Sitaram (PW/1)).
- v) Probate is necessary for a will only when will is executed within territory which is mentioned in Section 57-A & 57-B of the Act 1925. In the present case will is not executed within those territories, therefore, probate is not required before acting on

will.

6. I have heard learned counsel for the parties and perused the record of the trial court in which judgment /decree is passed.

7. The first question for consideration of this court is whether document (Ex.P/1) is admissible in evidence. As per provisions of the Indian Stamp Act, 1899, stamp is levied for agreement of sale, but document (Ex.P/1) is not duly stamped as per provisions of the said Act. If document is not duly stamped, there is provision of Section 33 of the Act, 1899 for impounding of the same, but in the present case, document was not impounded as per said provision, therefore, the document is inadmissible as per Section 35 of the Act, 1899.

8. The second question for consideration of this court is whether the agreement can be performed in absence of legal representatives. Admittedly, Gokula Sao died before filing of the suit. Sumitra Devi who is alleged to be wife of the said Gokula Sao was made party before the trial Court as legal representative of Gokula Sao, but she never appeared before the trial Court and as per order sheet dated 16-1-1993 of the trial Court it is stated that said Sumitra Devi died. She was again made party before this court as respondent No.4 and again her name is deleted by this court vide order dated 19-2-1999. From the order sheet of the trial Court it appears that no one was brought on record as legal

representative of Gokula Sao. As nobody is representing as legal representative of late Gokula Sao before the trial court, the case was conducted without impleading legal representative which is not permissible.

9. In the matter of **Jaladi Suguna through LRs vs. Satya Sai Central Trust and others**, reported in AIR 2008 SC 2866, Hon'ble the Supreme Court has observed in para 11 which may be read as under:

“11. The provisions of Rules 4 and 5 of Order 22 are mandatory. When a respondent in an appeal dies, the Court cannot simply say that it will hear all rival claimants to the estate of the deceased respondent and proceed to dispose of the appeal. Nor can it implead all persons claiming to be legal representatives, as parties to the appeal without deciding who will represent the estate of the deceased, and proceed to hear the appeal on merits. The court cannot also postpone the decision as to who is the legal representative of the deceased respondent, for being decided along with the appeal on merits. The Code clearly provides that where a question arises as to whether any person is or is not the legal representative of a deceased respondent, such question shall be determined by the court. The Code

also provides that where one of the respondents dies and the right to sue does not survive against the surviving respondents, the court shall, on an application made in that behalf, cause the legal representatives of the deceased respondent to be made parties, and then proceed with the case. Though Rule 5 does not specifically provide that determination of legal representative should precede the hearing of the appeal on merits, Rule 4 read with Rule 11 make it clear that the appeal can be heard only after the legal representatives are brought on record”.

10. As no one is brought on record as legal representative of Gokula Sao, the suit ought not to have been proceeded with. No legal representative was brought before this court, therefore, point is as to who will perform the remaining part of contract. As per Section 37 of the Indian Contract Act, 1872, the parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or or it can be performed by representatives of the promisors in case of the death of such promisor before performance, unless a contrary intention appears from the contract. In the present case, the promisor namely Gokula Sao died before performance and there is no representative on record who can perform the remaining part of the contract, therefore, the agreement is now unenforceable.

11. It is contended on behalf of the appellants that the remaining amount of agreement can be paid to the State Government and the State Government can perform remaining part of contract as per Section 29 of the 1956.

12. Section 29 of the Act, 1956 is not embodied for performance of any contract, but it says that **devolving property is an intestate if no heir qualified to succeed**. In the present case, said Gokula Sao executed a will in favour of respondent No.24 as per finding of the trial Court, therefore, it is not a case where Section 29 of the Act, 1956 will apply. Therefore, argument advanced on behalf of the appellants is not sustainable.

13. From the above discussion, it is clear that no representative was brought on record before the trial Court and no representative is brought before this Court, therefore, the said agreement is now not executable.

14. Learned counsel for the appellants would further submit that the appellants are in possession of the land as per doctrine of part performance under Section 53-A of the Act, 1882, therefore, their possession should be protected.

15. In view of this court, possession obtained under Section 53- of the Act, 1882 is not as title but it can be retained only when sale deed can be executed on the basis of contract. If sale deed cannot be executed in his favour and the property is transferred to

someone else either testamentary or by non-testamentary, succession the possessor under agreement is not entitled to protect possession, therefore, argument on this count is not sustainable.

16. From the evidence of DW/1 Shyam Shankar Prasad, Edward Bada (DW/5) and Anuplal (DW/6), it is established that will (Ex.D/1) was executed in favour of Shyam Shankar Prasad (DW/1). As two attesting witnesses were present at the time of will executed by Gokula Sao in favour of said Shyam Shankar Prasad, it is established that will was executed in his favour. As the will is executed outside territory which is mentioned in Sections 57-A and 57-B of the Act, 1925, therefore, will can be acted upon. Counter-claim on the basis of will was not excluded, therefore, decree passed by the trial Court on the basis of will in favour of Shyam Shankar Prasad (DW/1) cannot be interfered with because appellants are not parties to the will. On this count their argument regarding will is not acceptable. Case law cited by learned counsel for the appellants is distinguishable from the facts of the present case and it is of no help to them.

17) As a fallout and consequence of the aforesaid discussion, the appeal is held to be devoid of merit and same is liable to be dismissed. Accordingly, decree is passed in favour of respondents and against the appellants as under:

- (i) The appeal is dismissed with cost.
- (ii) Appellants to bear the cost of respondents through out.
- (iii) Pleader's fee., if certified, be calculated as per Schedule or as per certificate whichever is less.
- (iv) A decree be drawn up accordingly.

Sd/-

**(Ram Prasanna Sharma)**  
JUDGE

Raju