

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.147 of 2009Judgment reserved on: 3-9-2020Judgment delivered on: 29-9-2020

Bhuneshwar, S/o Dujeram, aged about 25 years, R/o Village
Haidalkodi, Tahsil and District Rajnandgaon (C.G.)

(Defendant)
---- Appellant

Versus

1. Gamman Das, S/o Gambhi Das, aged about 35 years, R/o Village
Haidalkodi, Tahsil and District Rajnandgaon (C.G.)
(Plaintiff)

2. Devki Bai, W/o Man Sai (Since dead), Through Legal representatives:-

2(a) Mohan, S/o Mansai, aged about 35 years,

2(b) Chatur, S/o Mansai, aged about 30 years,

Both R/o Village Thakurbandha, Post Chirchari, P.S. Gendatola, Tahsil
and District Rajnandgaon (C.G.)

3. Sawana Bai, W/o Sarju (dead) through legal representative

(a) Hukumdas, S/o Sarjudas, R/o Mini Mata Nagar, Bhandara Road,
Pardi, Nagpur, Maharashtra.

4. State of Chhattisgarh, Through Collector, Rajnandgaon (C.G.)
(Defendants)
---- Respondents

For Appellant / Defendant No.3: -

Mr. Gyan Prakash Shukla, Advocate.

For Respondent No.1 / Legal Representative of the original Plaintiff: -

Mr. Rakesh Kumar Thakur, Advocate.

For Respondent No.4 / State: -

Dr. Veena Nair, Deputy Advocate General.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment (Th. Video Conferencing)

1. This second appeal preferred under Section 100 of the CPC by defendant No.3 / appellant herein (subsequent purchaser) has been admitted for final hearing on 14-8-2020 by formulating the following substantial questions of law: -

"1. Whether the first appellate Court was justified in holding that the suit, as framed and filed on 24/11/1997, was within the period of limitation prescribed under Article 54 of the Indian Limitation Act, 1963?

2. Whether the appeal, as framed and filed before the first appellate Court, had abated by the reason of the death of defendant No.1 Devki Bai on 07/11/2007?"

[For the sake of convenience, parties hereinafter will be referred as per their status shown and ranking given in the plaint before the trial Court.]

2. The dispute in the second appeal is confined to the property situated at Village Haidalkodo, Tahsil & Distt. Rajnandgaon, bearing Khasra No.308, area 9 decimal. Original plaintiff Ahilya Bai filed suit for specific performance of contract against original defendant No.1 Devki Bai stating inter alia that she has purchased the suit land from defendant No.1 on 15-1-1984 by making payment of cash consideration of ₹ 4,000/- and remaining amount has also been paid on 8-6-1984, but the sale deed was not executed and on 6-10-1997, defendant No.2 with the consent of defendant No.1 sold the suit property in favour of defendant No.3 which gave rise to the cause of action to her for filing instant suit, as the suit was filed ultimately on 24-11-1997 for specific performance of contract against the defendants including subsequent purchaser – defendant No.3 claiming a decree for specific performance of contract.

3. No written statement was filed by the defendants controverting the averments made in the plaint.
4. The trial Court upon appreciation of oral and documentary evidence available on record, dismissed the suit finding that though agreement has been entered into between the plaintiff and defendant No.1, but the plaintiff has not paid ₹ 1,000/- and she is not ready and willing to perform her part of contract and the suit is barred by limitation as such, the plaintiff is not entitled to decree for specific performance of contract. The plaintiff preferred first appeal before the first appellate Court on 16-9-2003. During the pendency of first appeal, plaintiff Ahilya Bai died on 10-11-2003 and her legal representative was brought on record on 2-5-2006. Thereafter, the original vendor / defendant No.1 Devki Bai also died during the pendency of first appeal, but her legal representatives were not brought on record, yet the first appellate Court proceeded to decide the appeal and ultimately, on 26-4-2008, the appeal was allowed and the plaintiff's suit for specific performance of contract was decreed against which this second appeal has been preferred only by defendant No.3 i.e. Bhuneshwar (subsequent purchaser) in which two substantial questions of law have been formulated which have been set out in the opening paragraph of this judgment for the sake of completeness.
5. Mr. Gyan Prakash Shukla, learned counsel appearing for the appellant herein / defendant No.3, would submit that in the first appeal preferred by the plaintiff, the legal representatives of defendant No.1 ought to have been brought on record as they were necessary party by virtue of Section 37 of the Indian Contract Act, 1872 read with Section 19(b) of the Specific Relief Act, 1963 and unless the legal representatives

were brought on record, no effective decree could have been passed by the first appellate Court granting decree for specific performance of contract in favour of the plaintiff and as such, the appeal had abated. He would rely upon the decision of the Supreme Court in the matter of Durga Prasad and another v. Deep Chand and others¹ and the decisions of the Calcutta High Court in the matters of Kafiladdin and others v. Samiraddin and others² and Chhotalal Hariram and another v. Dilip Kumar Chatterjee and others³ to buttress his submission. He would further submit that to enforce the agreement to sale dated 15-1-1984, the suit filed on 24-11-1997 was clearly hit by Article 54 of the Indian Limitation Act, 1963 and he would also rely upon the decision of the Supreme Court in the matter of Ramzan v. Smt. Hussaini⁴. As such, the appeal deserves to be allowed and judgment & decree of the first appellate Court be set aside.

6. Mr. Rakesh Kumar Thakur, learned counsel appearing for respondent No.1 herein / legal representative of the original plaintiff, would submit that the subsequent purchaser / defendant No.3 was already on record and inadvertently, the legal representative(s) of Ahilya Bai could not be brought on record in the first appeal and that would not make any difference in view of the decision of the Supreme Court in the matter of Mohammad Arif v. Allah Rabbul Alamin and others⁵ and the decision of a coordinate Bench of this Court in the matter of Sheela Wakanker

1 AIR 1954 SC 75

2 AIR 1931 Calcutta 67

3 AIR 1976 Calcutta 337

4 AIR 1990 SC 529

5 AIR 1982 SC 948 (1)

and others v. Meena Kumari Sharma and another⁶. He would further submit that the suit as framed and filed was within the period of limitation, as when defendant No.2 with the consent of defendant No.1 sold the suit property in favour of defendant No.3 on 6-10-1997, the suit was immediately filed on 24-11-1997, as such, the suit was within the period of limitation and therefore the second appeal deserves to be dismissed with costs.

7. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
8. For the sake of convenience, substantial question of law No.2 is taken first for consideration.
9. In order to answer the question of law, it would be appropriate to notice Section 37 of the Indian Contract Act, 1872 which finds place in Chapter IV relating to performance of contract (contracts which must be performed) and which provides as under: -

“37. Obligation of parties to contract.—The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.”

10. Section 37 of the Indian Contract Act, 1872 covers also the cases of partial performance and it obliges the party to contract to perform what has been actually stipulated in the contract to be performed. At this

stage, it would also be appropriate to notice Section 19(a)(b) of the Specific Relief Act, 1963 which states as under: -

“19. Relief against parties and persons claiming under them by subsequent title.—Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against—

(a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

xxx xxx xxx”

11. This Section recognises and follows the general rule that stranger to the contract is not the proper defendant in a suit for specific performance unless he falls within clauses (b) to (e) which gives exception to this rule. This provision is exhaustive on the point as to who are the parties against whom a contract for specific performance may be enforced.

12. Section 27 of the Specific Relief Act, 1877 which is *pari materia* to Section 19(b) of the Specific Relief Act, 1963 was considered by the Supreme Court in Durga Prasad (supra) and their Lordships of the Supreme Court considered the issue as to the proper form of decree in a suit for specific performance by prior purchaser against his vender and subsequent purchaser. It was held that the proper form of decree is to direct specific performance of the contract between the vendor and the prior transferee and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the prior transferee. It was held in paragraph 42 as under: -

“(42) In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in – ‘Kafiladdin v. Samiraddin’, A.I.R. 1931 Cal 67 (C) and appears to be the English practice. See Fry on Specific Performance, 6th Edn. page 90, paragraph 207 ; also – ‘Potter v. Sanders’, (1846) 67 ER 1057 (D). We direct accordingly.”

13. The principle of law laid down in Durga Prasad (supra) was subsequently followed by the Supreme Court in the matter of Soni Lalji Jetha (deceased) through his L.Rs v. Soni Kalidas Devchand and others⁷.

14. The Calcutta High Court in Chhotalal Hariram (supra) following the principle of law laid down in Durga Prasad (supra) has clearly held that in a suit for specific performance of a contract of sale filed against the principal vendor and the subsequent transferees from him, the subsequent transferees are necessary party to the suit and if the legal representatives of the principal defendant-vendor are not brought on record, the suit abates.

15. In the matter of Dwarka Prasad Singh and others v. Harikant Prasad Singh and others⁸, their Lordships of the Supreme Court held that in a suit for specific performance against a purchaser with notice of a prior agreement of sale, the vendor is a necessary party. It was further held that in a suit for specific performance against vendor and subsequent purchaser, upon death of vendor during pendency of appeal, if legal representatives of the principal vendor were not brought on record

⁷ AIR 1967 SC 978

⁸ AIR 1973 SC 655

which has the effect of abating the appeal against vendor, it 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. Paragraph 7 of the report reads as follows: -

"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. Shyam Beharilal Jagannath*, (1964) 3 SCR 459 = (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 639 = (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 (supra) was referred to in Pandit Siri Chand v. M/s Jagdish Parshad Kishin Chand, (1966) 3 SCR 451 = (AIR 1966 SC 1427) 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 (supra) 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.”

16. Similarly, the Patna High Court in the matter of Smt. Manni Devi v. Ramayan Singh⁹, following the decision of the Supreme Court in Dwarka Prasad Singh (supra), held that in a suit for specific performance of contract against the principal defendant / vendor, substitution of his legal representatives is required and if it is not substituted, then appeal would abate and observed in paragraph 9 as under: -

“9. For the purpose of consideration of the second question the first thing required to be looked into is whether upon the death of the vendor the substitution of his legal representative is at all required. The other concerned question would be if a legal representative is required to be substituted and such a legal representative is not substituted whether the case can proceed against the purchaser if he is a party to the suit. It appears that specific performance of contract is not wholly personal. The obligation vests in the legal representatives of the vendor under Section 37 of the Contract Act; the contract in question not being entirely personal. Therefore, I am of the opinion that the legal representative of the vendor is required to be substituted in a

suit for specific performance of contract. So far as the question whether the suit can proceed against the purchaser if such a substitution has not been made or disallowed, even though Section 40 of the Transfer of Property Act read with Section 19 of the Specific Relief Act permits the enforceability of the contract against the transferee but the said transferee is not the person to complete the contract since he was not the person, who had entered into contract. He is in the nature of a trustee of a thing and, therefore only a necessary party to the suit as held by the Supreme Court in the case of Dwarka Prasad Singh v. Harikant Prasad Singh AIR 1973 SC 655. This matter came to be considered by a Division Bench of the Calcutta High Court in the case of Chhotalal Hariram v. Dilip Kumar Chatterjee AIR 1976 Cal 337 and their Lordships observed.

"The primary obligation to perform the contract, therefore, always remains on the vendor and on his death on his legal representatives. Hence, there is no escape from the position that on the death of the principal-defendant vendor, it was necessary that his legal representatives must be brought on the record in his place and the right to sue could not have survived against the subsequent transferees alone. That not having been done, the suit must be taken to have abated against the said principal defendant."

Their Lordships further considered the question that the suit cannot proceed against the transferee alone, because the interest is not severable and the transferee has to join in the conveyance to be executed by the vendor on specific performance of contract and the transferees are not to perform the contract on their own nor are they to execute any conveyance independently of the original vendor. I am in complete agreement with the law laid down in Chhotalal's case (AIR 1976 Cal 337) (supra). I hold that a suit for specific performance of contract is not maintainable in absence of the vendor or his legal representative being party to the suit. The suit is not saved by transferee alone being a party even though he is also a necessary party to the suit."

17. Reverting to the facts of the case in the light of the aforesaid statutory scheme flowing from Section 37 of the Indian Contract Act, 1872

read with Section 19(b) of the Specific Relief Act, 1963, it is quite vivid that relief of specific performance of contract is not wholly personal and obligation vests in the legal representatives of the vendor-principal defendant in execution of contract and therefore legal representatives of the vendor-principal defendant are required to be substituted in a suit claiming specific performance of contract or appeal preferred, as the case may be; otherwise, suit or appeal cannot proceed and would abate. In the light of the aforesaid legal position, if the facts of the instant case are considered, it is quite vivid that in the instant case, after the first appeal was filed by the plaintiff on 16-9-2003, the principal defendant No.1 / vendor Devki Bai died on 7-11-2007, but her legal representatives were not brought on record and ultimately, judgment & decree for specific performance of contract was passed in favour of the plaintiff and against defendant No.1 in absence of the legal representatives of the principal defendant No.1 on 26-4-2008 which has been sought to be impugned in this second appeal. By virtue of Section 37 of the Indian Contract Act, 1872 read with Section 19(b) of the Specific Relief Act, 1963, legal representatives of Devki Bai were necessary party in the appeal and in absence of legal representatives of Devki Bai, the appeal preferred by the plaintiff had abated as not holding so would amount to passing two contradictory decrees as held by their Lordships of the Supreme Court in Durga Prasad (supra). Consequently, it is held that on account of non-substitution of legal representatives of the principal defendant No.1 Devki Bai, first appeal had abated and judgment & decree of the trial

Court dismissing the suit has become final, and accordingly, it is held so. Substantial question of law No.2 is answered accordingly.

18. In view of the aforesaid answer to substantial question of law No.2 holding the first appeal as abated and the decree of the trial Court dismissing the suit has become final, I deem it inexpedient to answer substantial question of law No.1 as to whether the suit of the plaintiff was within limitation or beyond limitation.

19. In the result, judgment & decree of the first appellate Court are set aside and that of the trial Court are restored by granting the second appeal leaving the parties to bear their own cost(s).

20. Appellate decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge