

Sri Jamini Das and anr. Vs. Sri Hirendra Kumar Sukla and ors.

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Court : Kolkata

Decided On : Apr-24-2008

Judge : Bhaskar Bhattacharya and ;Rudrendra Nath Banerjee, JJ.

Acts : Code of Civil Procedure (CPC) - Sections 105 and 115 - Order 22, Rule 4(4)

Appeal No. : F.A. No. 291 of 2002

Appellant : Sri Jamini Das and anr.

Respondent : Sri Hirendra Kumar Sukla and ors.

Advocate for Def. : None

Advocate for Pet/Ap. : Bidyut Kumar Banerjee, ;Shila Sarkar and ;Iswar Chandra Sharma, Advs.

Judgement :

Bhaskar Bhattacharya, J.

1. This first appeal is at the instance of the plaintiffs in a suit for specific performance of contract and is directed against the judgment and decree dated 7th February, 1995 passed by the Assistant District Judge, Tenth Court, Alipore, District - 24-Parganas (South), in Title Suit No. 73 of 1989 by which the said Court dismissed the said suit.

2. The case made out by the appellants may be summed up thus:

(a) One Gopendra Prasad Sukul, since deceased, the predecessor-in-interest of the defendant Nos. 1 to 5 was the absolute owner of Premises No. 25, Panditia Terrace, Calcutta-700 029 who entered into an agreement for sale with the plaintiff No. 1 for sale of the ground floor self-contained flat measuring 1,800 sq. ft. at the price of Rs. 70,000/- after taking an advance of Rs. 10,000/-.

(b) The said Gopendra Prasad Sukul died on 14th October, 1984 leaving him the defendant No. 5 and one Surendra Sukul, his two sons, as his sole heirs and legal representatives. The said Surendra Sukul subsequently died leaving the defendant Nos. 1 to 4, 6 and 7 as his legal heirs and representatives. Thus, after the death of Gopendra Prasad Sukul the property devolved upon the defendant Nos. 1 to 7.

(c) Although the plaintiff No. 1 was all along ready and willing to perform his part of the contract and requested the heirs of late Gopendra Prasad Sukul to complete the transaction, those persons transferred the property in favour of the defendant No. 8 notwithstanding the existence of earlier agreement for sale with the plaintiff No. 1. The plaintiff No. 1 assigned his right in favour of the plaintiff No. 2 as nominee to complete the transaction.

(d) The plaintiffs, therefore, filed the suit for specific performance of contract against the defendant Nos. 1 to 8.

(e) During the pendency of the suit, the defendant No. 5 died but such fact was not known to the plaintiffs, as a result, no application for substitution was filed on the death of the defendant No. 5. After coming to know that the defendant No. 5 had died, the plaintiffs filed an application under Order XXII Rule 4(4) of the Code of Civil Procedure thereby praying for dispensing with the necessity of substitution of the legal heirs and representatives of the defendant No. 5 in the suit.

(f) The learned Trial Judge, however, rejected such prayer on the ground that after the actual abatement had taken place on the death of the defendant No. 5, the discretion conferred upon the Court under Order XXII Rule 4(4) could not be exercised and accordingly, dismissed such application.

(g) Being dissatisfied, the plaintiffs filed a revisional application before this Court and the then Hon'ble Chief Justice, sitting in revision affirmed the order passed by the learned Trial Judge.

(h) Subsequently, the learned Trial Judge not only held that on the death of the defendant No. 5 the entire suit had abated but also dismissed the suit on merit.

3. Being dissatisfied, the plaintiffs have come up with the present appeal. After hearing Mr. Banerjee, the learned senior advocate appearing on behalf of the appellants and after going through the materials on record, we first propose to consider the question whether the learned Trial Judge was justified in recording the abatement of the entire suit.

4. In our view, the order passed by the learned Trial Judge refusing to exercise discretion in terms of Order XXII Rule 4(4) of the Code having been affirmed by this Court in a revisional jurisdiction under Section 115 of the Code of Civil Procedure, the said order had attained finality. There is no dispute that the plaintiffs even did not file any application setting aside the abatement.

5. It is now a settled law, as pointed out by the Apex Court in the case of Durga Prasad and Anr. v. Deep Chand and Ors. reported in : [1954]1SCR360 , that in a suit for specific performance of contract if the original contracting party, before the institution of the suit, transfers the property to a third party, both the original contracting party and the transferee should be made parties to the suit for specific performance of contract because, for passing of effective title in favour of the plaintiff by a decree for specific performance of contract, the presence of both the original owner and the subsequent purchaser is necessary.

6. In this case, in tune with the said decision, the defendant Nos. 1 to 7, the heirs of the original contracting party and the defendant No. 8, the subsequent transferee, were made parties to the suit as all of them were necessary parties. The moment, the defendant No. 5, one of the necessary parties, dies and the suit abates so far the said defendant is concerned, the entire suit will automatically abate, inasmuch as, the suit for specific performance of contract is bound to fail for want of the heirs of the deceased defendant No. 5 and even if any decree is

passed against the surviving defendants, the same would not be executable against the heirs of the deceased defendant.

7. The tests to determine whether a suit abates as a whole in case of abatement against one of the defendants have been described in diverse forms. In our view, the following tests are decisive. The Courts will not proceed with a suit,

a) when the plaintiff could not have brought the action for the necessary relief against those defendants alone who are still before the Court or b) when the decree against the surviving defendants, if the suit succeeds, will be ineffective, that is to say, it could not be successfully executed.

8. Therefore, in the fact of the present case, the learned Trial Judge rightly held that the entire suit had abated. Once the suit had abated, in our view, there was no scope of entering into the merit of the matter and in that respect, the learned Trial Judge committed an error of law.

9. Mr. Banerjee, in this connection, strongly relied upon a decision of the Patna High Court in the case of Rajnath Sahgal and Ors. v. Shiva Prasad Sinha and Ors. reported in : AIR1979 Pat239 where a Division Bench of the Patna High Court was of the view that the power under Order XXII Rule 4(4) of the Code can be exercised even after the actual abatement had taken place.

10. In our view, in this case, there is no scope of entertaining the question whether the power under Order XXII Rule 4(4) can be exercised even after the actual abatement had taken place inasmuch as this Court in revision has already affirmed the order of the learned Trial Judge refusing to exercise discretion under Order XXII Rule 4(4) of the Code. Although, the said order in revision was passed by a learned Single Judge, the same is binding upon this Bench. It was the High Court, which affirmed the order and the learned Single Judge passed the order on merit in accordance with the determination mentioned in the Appellate Side Rules framed by this Court, which authorise a learned Single Judge to entertain a Civil Revisional Application. Therefore, although this is a Division Bench, that order of the learned Single Judge passed in course of the same proceedings is binding upon us.

11. The position, however, would have been different, if the learned Single Judge dismissed the revisional application summarily without giving any reason at the stage of admission or had dismissed the revisional application on the ground that there was no scope of interference with the order impugned within the narrow scope of Section 115 of the Code; in those two circumstances, this Court in exercise of power conferred under Section 105 of the Code could verify whether there was any error, defect or irregularity in the said order, which was the subject-matter of revision, affecting the fate of appellant in the suit.

12. We, thus, find that in the fact of the present case, the learned Trial Judge ought to have merely recorded abatement of the entire suit and dismissed the same accordingly without entering into the merit. We, accordingly, pass such direction instead of dismissal of the suit on merit. The appeal is, thus, disposed of with the aforesaid observation.

13. In the facts and circumstances, there will be, however, no order as to costs.

Rudrendra Nath Banerjee, J.

14. I agree.