

(1997) 11 PAT CK 0017
In the Patna High Court
Case No : Civil Revision No. 1798 of 1994

Ganga Singh College

APPELLANT

Vs

Bharati Bidya Mandir and Others

RESPONDENT

Date of Decision : 18-11-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4

Citation : AIR 1998 Patna 128

Hon'ble Judges : Sachchidanand Jha, J

Bench : Single Bench

Advocate : Shashi Shekhar Dwivedi and Janardan Prasad, for the Appellant;

Final Decision : Dismissed

Judgement

Sachidanand Jha, J.—This civil revision by the defendant is directed against an order exempting the plaintiff-opposite party from the necessity of substituting the legal representative of defendant No. 1 Smt. Suchitra Dutta in terms of Rule 4(4) of Order 22 of the Code of Civil. Procedure.

2. The plaintiffs filed suit for specific performance of contract for sale of the property, described in Schedule I of the plaint in favour of plaintiff No. 1-Bharti Bidya Mandir, Chapra. Their case, shortly stated, is that plaintiff No. 1 was the tenant of late Hem Chandra Mitra. After his death, his wife Smt. Suchitra Dutta (defendant No. 1) started realising rent. In the year 1966 the petitioner was allowed to run its Law faculty during evening hours with the consent of the plaintiffs, but the petitioner was never recognised as tenant nor any rent was paid by the petitioner to the plaintiffs or to the landlord. Plaintiff No. 1 had entered into oral agreement for the sale of the property with Rabindra Nath Dutta in the year 1983 for sum of Rs. 1,10,000/- out of which Rs. 10,000/- was paid in advance. However, the petitioner and opposite party No. 13, the University of Bihar (now known as Babasaheb Bhimrao Ambedkar Bihar University) got a forged sale deed dated 23-8-1985 manufactured in their favour. In the circumstances, the suit was filed for decree of specific performance of

contract.

3. The petitioner in its written statement filed on 10-12-1993 stated that the aforesaid sale deed dated 23-8-85 was a genuine document executed by the landlord for consideration of rupees 3 lacs. It also took the stand that defendant No. 1 Smt. Suchitra Dulta had died more than three years ago without any issue, leaving behind her husband's sister Smt. Dalia Bose as the only heir, who was a necessary party in the suit. On account of non-substitution, the suit must be held to have abated long ago.

4. On 1-9-1994 an application was filed on behalf of the plaintiffs to exempt them from the necessity of substituting the legal representative of defendant No. 1 under Order 22 , Rule 4(4) of the Code on the ground that despite valid service of summons defendants No. 1 did not file her written statement nor even appeared, and, therefore, should be deemed a non-contesting defendant in the suit. The petitioner objected to the prayer by filing rejoinder. By the impugned order, as indicated at the outset, the plaintiffs prayer for exemption has been allowed.

5. Mr. Shashi Shekhar Dwi vedi, learned counsel for the petitioner, submitted that the occasion for granting exemption from necessity of substituting of legal representative or any defendant arises only after service of summons. It is only after the summons is validly served that it can be said that the defendant has failed to file written statement or, having filed it, has failed to appear and contest that suit at the hearing, which is condition precedent for passing order of exemption. In the present case, the summons by registered post was issued to defendant No. 1 on 16-7-1993, but defendant No. 1 being dead, there was no question of any service including deemed service under Order 5, Rule 19A(2) of the Code. Therefore, there was no question of her filing any written statement so as to attract the provisions of Order 22, Rule 4(4). It was submitted that specific statement about the death of defendant No. 1 had been made in para 9 of the written statement but no step was taken to substitute the heirs. The application for exemption was filed on 1-9-1994 only after the petitioner filed an application to dismiss the suit on the ground of abatement on 31 -8-1994.

6. Rule 4 of Order 22 provides that where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or the sole defendant or sole surviving defendant dies and the right to sue survives, the Court on application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party. Sub-rule (3) of the said rule lays down that where within the time limited by law, no application is made for substitution, the suit shall abate as against the deceased defendant. Sub-rule (4) which was inserted in the Code by Amendment Act 104 of 1976, around which the controversy revolves, may be quoted as hereunder:--

"The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file

a written statement or who, having filed it, has failed to appear and contest the suit at the hearing, and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."

7. The above rule, it would appear, is in two parts. While the first part exempts the plaintiff from the necessity of substituting the legal representative of a non-contesting defendant to avoid unnecessary delay in disposal of suits, the second part makes the decree binding on a defaulting or recalcitrant defendant even after his death. The normal rule is that no decree is to be passed against a dead person, and if passed, is a nullity in the eye of law. In that sense the rule carves out an exception. By a kind of legal fiction, what would otherwise would have been nullity is made real, effective and binding. Obviously, the object is to ensure that the defendants do not ignore the process of the court. It was in order to create an awareness that the decree may be pronounced, against them notwithstanding the death, which would have the same effect if it had been passed while they are alive, if exemption is granted to the plaintiff, that this provision was made. Thus, while the rule exempts the plaintiff from substituting a legal representative of a deceased defendant in certain situation, it also enables the Court to pronounce the judgment against such defendant. A duty is, therefore, cast upon the Court to satisfy itself that the condition precedent in exercise of power are made out. Where there has been no valid service of summons, it is obvious, there was no occasion for the concerned defendant to file written statement or contest the suit. In these premises, I am inclined to accept the submission of the counsel, as a proposition of law, that where defendant dies soon after the institution of the suit or is already dead on the date the suit is instituted, issue of summons is an empty formality and where summons is issued otherwise or by registered post, no presumption of deemed service under Order 5, Rule 198A(2) can be drawn. In such a situation, the Court cannot pass any order of exemption.

8. Despite my affirmance of the submissions of the counsel for the petitioner, interference with the order, in the facts of the case, is not called for. The suit has been filed for specific performance of contract. The petitioner claims to be the purchaser of the property under registered sale deed. The point for consideration is whether a decree can be passed against the petitioner in the absence of the proposed vendor or his/her legal heirs. Fry in his Treatise on Specific Performance of Contract (Sixth Edition at page 93) states :--

"The general rule, that parties to the contract must alone be parties to the action, is further modified by certain circumstances, one of which, namely, the death of a party to the contract, will now be considered. By this circumstance, with an exception to be mentioned hereafter, the obligation to perform, and the right to call for the performance of, the contract devolve on the rights of the party dying.

If the vendor of the real estate die before the completion, the contract may be

enforced either by the purchaser or by the personal representatives or representative of the vendor, but in both cases the heir or devisee must be a party, as having an interest in disputing the contract....."

The exception carved out (at page 97) covers cases of devolution of the liability to perform contracts by the death of one of the parties, in which the personal skill or tests of one of the contracting parties is required, for in such cases the death of that party discharges the contract and exempts his personal representatives from liability of the breach of contract occasioned by non performance after his death.

9. It is, therefore, obvious that the decree for specific performance of contract can be passed against the petitioner being purchaser of the property. Proviso to Section 115 of the CPC forbids the High Court from interfering with any order which, if it had been made in favour of party applied for the revision, would not have finally disposed of the suit or other proceeding. In other words, even if the Court below had rejected the plaintiffs petition for exemption, the suit would not have abated, the right to issue would survive and the decree could be passed against the petitioner.

10. In the result, I do not find any merit in the revision petition, which is accordingly dismissed, but without any order as to cost.