

(1983) 10 MP CK 0009

In the Madhya Pradesh High Court

Case No : Letters Patent Appeal No. 3 of 1980

Kanhaiyalal

APPELLANT

Vs

Mulla Abdul Hussain (deceased by L.R.S.) and Others

RESPONDENT

Date of Decision : 31-10-1983

Acts Referred:

Specific Relief Act, 1877 — Section 19, 35

Citation : AIR 1985 MP 24 : (1984) ILR (MP) 393 : (1984) JLJ 455

Hon'ble Judges : P.D. Mulye, J;Faizanuddin, J

Bench : Division Bench

Advocate : S.L. Garg and R.S. Garg, for the Appellant; S.D. Sanghi, N.K. Sanghi and M.L. Agarwal, for the Respondent

Final Decision : Dismissed

Judgement

Faizanuddin, J.—This appeal under Clause 10 of the Letters Patent has been directed by the defendant-appellant against the judgment dt. 2nd Feb. 1980, passed by the learned Single Judge of this Court, in First Appeal No. 30 of 1966 affirming the judgment and decree dt. 30th Jan. 1969 in Civil Suit No. 5 of 1960, passed by the Additional District Judge, Mandsaur, in "Civil Suit No. 5 of 1960, rescinding the contract for sale of agricultural land in respect of which a decree dt. 29th Sept. 1961 for specific performance of contract was passed by the same Court in the same civil Suit No. 5 of 1960.

2. The facts as they emerge out of this appeal are that late Mulla Abdul Hussain by an agreement dt. 23th May, 1958. had contracted to sell his agricultural land to defendant-appellant Kanhaiyalal. of Khata No. 16 comprising an area of 12.92 acres, situated in village Geroth. district Mandsaur together with well and trees, standing thereon for a consideration of Rs. 20,000/-. On the date of the aforesaid agreement a sum of Rs. 4000/- was paid by defendant Kanhaiyalal to late Mulla Abdul Hussain and Kanhaiyalal was put in possession of the said land. The balance of the consideration was agreed to be paid within a month when a registered sale-deed had to be executed and registered in favour of the

defendant. Thereafter a sum of Rs. 5000/- was also paid by Kanhaiyalal to Mulla Abdul Hussain towards the consideration. As the defendant Kanhaiyalal failed to obtain a registered sale-deed on payment of the balance of the consideration of Rs. 11,000/-, late Mulla Abdul Hussain instituted a suit on 26th Sept. 1960, against defendant Kanhaiyalal for specific performance of the contract. Plaintiff late Mulla Abdul Hussain besides claiming a decree for balance of consideration also claimed a relief of mesne profits as the defendant was in actual possession of land and enjoying usufruct thereof or in the alternative interest on the outstanding balance of consideration.

3. Defendant-appellant contested the said suit mainly by contending that plaintiff late Mulla Abdul Hussain himself did not take steps to obtain permission from the Collector for sale of the land in accordance with the provisions of Madhya Bharat Tenancy and Land Revenue Act and that the agreement could not be specifically performed on account of the said default made by late Mulla Abdul Hussain. The learned trial Court, however, decreed the suit for specific performance on 29th Sept. 1961 by holding that the contract could not be carried through on account of the fault of defendant Kanhaiyalal as he had no funds to pay the balance of consideration of Rs. 11,000/-. The trial Court also held that the plaintiff was entitled to interest at the rate of 9 per cent per annum. Learned trial Court, therefore, passed a decree accordingly by directing that the defendant shall pay Rs. 11,000/- to the plaintiff or deposit the same in the Court and on such payment or deposit, the plaintiff shall execute a registered sale-deed in favour of defendant Kanhaiyalal at the expenses of the defendant. It also directed that the said amount of Rs. 11,000/- shall carry interest at the rate of 6 per cent per annum from the date of the suit till realisation.

4. Defendant Kanhaiyalal did not file any appeal against the said judgment and decree for specific performance of contract and remained satisfied with the decree. However plaintiff late Mulla Abdul Hussain preferred an appeal on 25th Jan. 1962 before the High Court in respect of the interest from the date of the contract till the institution of the suit which was disallowed by the trial Court. The said appeal (First Appeal No. 13/62). was allowed by the High Court by its judgment and decree dt. 28th Nov. 1964 awarding interest at the rate of 6 per cent per annum from the date of the contract to the date of the suit.

5. After passing of the decree dt. 29th Sept. 1961 by the trial Court for specific performance of the contract and also after preferring an appeal before the High Court, plaintiff late Mulla Abdul Hussain waited for quite a long time but defendant Kanhaiyalal neither paid nor deposited the balance of consideration so that sale-deed may be executed and registered by Mulla Abdul Hussain in his favour. After a lapse of about 9 months from the date of decree for specific performance, late Mulla Abdul Hussain made an application on 10-7-1962 purporting to be an application u/s 35(c) of the Specific Relief Act 1877 (Act No. 1 of 1877) before the trial Court in the same Civil Suit No. 5 of 1960 to rescind the contract for sale of land on the ground that defendant Kanhaiyalal had failed

to pay or deposit in the Court the balance of consideration as per decree within a reasonable time. A prayer for restoration of possession and grant of interest was also made on the ground that defendant enjoyed the use and occupation as also the usufruct of the land since the date of the agreement and claimed forfeiture of the earnest money Rs. 40007-paid at the time of entering into the agreement for sale of land.

6. Defendant Kanhaiyalal contested the said application by contending that it was not open to the plaintiff late Mulla Abdul Hussain to claim the relief of rescinding the contract in the same suit but by a separate suit. He also contended that as no time was fixed in the decree for payment or deposit of the balance of the consideration and, therefore, he was entitled to pay the amount at his choice. It was also contended that record of the case was with the High Court in connection with the appeal and unless the record was received back and inspected by the defendant he was unable to submit any reply.

7. The learned trial Judge by its judgment dt. 30th Jan. 1965 allowed the plaintiff's application and rescinded the contract by holding that defendant Kanhaiyalal had failed to pay or deposit within reasonable time the balance of the consideration and he was not prepared to pay the same till the date of passing of the decree. It was also held that u/s 35 of the Specific Relief Act 1877 a party can make a motion for rescission of the contract in the same case and not by a separate suit. Learned trial Judge, however, rejected the prayer for forfeiture of the earnest money. However, applying Section 19 of the Specific Relief Act, 1877,-learned trial Court allowed the interest at the rate of Rs. 9 per cent per annum and restoration of possession. Defendant Kanhaiyalal preferred an appeal in the High Court being First appeal No. 30 of 1966 against the said judgment and decree rescinding the contract; but the learned Single Judge of this Court (Late Mishra, J. as he then was) dismissed the same on 2-2-1980 against which this Letters Patent Appeal has been directed.

It may be pointed out here that after the decree ordering rescission of the contract for sale plaintiff Mulla Abdul Hussain took possession of the land in question after complying the directions of the decree on his part. The defendant-appellant on 29th April 1965 presented an application under Order 44 Rule 1 of the Civil P. C. accompanied by a memorandum of appeal for grant of leave to file appeal as an indigent person which was registered as M. C. C. No. 97/65. The office reported" that the same was barred by limitation by 12 days. Thereafter an application was made on behalf of the defendant appellant seeking amendment in the memo, of appeal accompanying the application under Order 44. Rule 1 of the Civil P. C. to the effect that the Court-fees stamp of Rs. 20/- was payable on the memo, of appeal which was affixed. Another application was made to register the appeal as First Appeal. The application for amendment of the memo, of appeal was allowed; but on the second application for registering the appeal as First Appeal, the office reported that a Court-fee of Rs. 1266/- was deficit and that the appeal was barred by limitation. The matter was placed before the

Taxing Judge for his decision. The learned Taxing Judge (V.R. Newaskar, J. as he then was) ordered that ad valorem Court-fees ought to be paid on the memorandum of appeal. Thereafter on 29th Mar. 1966 an application on behalf of the defendant-appellant was made for extension of time for payment of deficit court-fees which was allowed up to 4-4-1966 on which date the deficiency was made good and the delay in making the payment of Court-fees was condoned by order dt. 11-4-1966 and by order dt. 15-4-1966 the application for leave to appeal as indigent person was dismissed and the appeal was registered as First Appeal No. 30/66 and then it was placed before Division Bench on 25-4-1966 on which date the appeal was admitted for hearing and issue of notice was ordered to the other side.

9. It may also be noted that when the petition of the defendant for leave to appeal as an indigent person was pending the original plaintiff Mulla Abdul Hussain transferred an area of 11.12 acres out of the suit land to one Ramnarayan by registered sale-deed dt. 26/28th Mar. 66 for a consideration of Rs. 24,000/- and said Ramanarayan in turn transferred the said land to respondents 2 to 4 who were impleaded as respondents in First Appeal No. 30 of 1966 by registered sale-deed dt. 1-11-1968 for a consideration of Rs. 33,000/-. Thereafter Mulla Abdul Hussain died on 6-1-1969 and his legal representatives, respondents I(a) to (e) were brought on record being his widow, sons and daughter.

10. The respondents after their appearance in First Appeal before the learned Single Judge submitted an application objecting condonation of delay in payment of Court-fees on the memo, of appeal on the ground that the delay was condoned without hearing them and prayed for dismissal of the appeal on the ground that it was barred by limitation on the date deficiency of Court-fees was made good. By the impugned judgment the learned Single, Judge" took the view that respondents have a right to be heard in the matter of condonation of delay and after having heard them maintained the order of condonation of delay in exercise of the powers vested in the Court u/s 149 of the Civil P. C. Regarding the question of limitation, the learned Single Judge took the view that the limitation for filing of an appeal in the normal course had not expired on 29th April 1965 when the unstamped memorandum of appeal was submitted along with the application under Order 44. Rule I of the Civil P. C.

11. Learned counsel for the defendant-appellant placing his massive reliance on the decision in Chaturbhuj Bhavanidas Vs. Kalyanji Bhimji, first contended that the remedy of the plaintiff for rescission of the contract did not lie in making an application for rescission of the contract in the same suit in which the decree for specific performance of the contract was passed but by a separate suit in that behalf. Here it would be relevant to refer to Section 35 of the Specific Relief Act, 1877 which runs as under :

"35. Any person interested in a contract (in writing) may sue to have it rescinded; and such rescission may be adjudged by the Court in any of the

following cases, namely :

- (a) Where the contract is voidable or terminable by the plaintiff;
- (b) Where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff;
- (c) Where a decree for specific performance of a contract of sale, or of a contract to make a lease, has been made, and the purchaser or lessee makes default in payment of the purchase money or other sums which the Court has ordered him to pay.

When the purchaser or lessee is in possession of the subject matter, and the Court finds that such possession is wrongful, the Court may also order him to pay to the vendor or lessor the rents and profits, if any, received by him as such possessor.

In the same case, the Court may, by order in the suit in which the decree has been made-and not complied with, rescind the contract either so far as regards the party in default, or altogether, as the justice of the case may require."

12. Relying on the decision in *Chaturbhuj Bhavanidas Vs. Kalyanji Bhimji*, learned counsel for the appellant submitted that the words "In the same case" occurring in the last para of Section 35 refer to the first paragraph of Section 35 but not to Clause (c) of Section 35. But after a careful reading of Section 35 as a whole and other decisions of the Bombay High Court and other High Courts, we do not find ourselves in agreement with the proposition of the learned counsel for the defendant-appellant. It may be noted that the aforesaid decision of a learned Single Judge of the Bombay High Court in the case of *Chaturbhuj v. Kalyanji* (supra) is in direct conflict with the earlier decision of a Division Bench of the same High Court in *Kurpal Hemraj Vs. Shamrao Raghunath Raote*, wherein it has been held that the words "In the same case" occurring in last paragraph of Section 35 must refer to Clause (c) of Section 35. So that the Court is empowered to make an order in the suit in which a decree has already been made to rescind the contract instead of putting the opponent to file another suit for rescission. The same view was endorsed in *Tribeni Tewary and Others Vs. Ramratan Nonia and Others*, wherein it was observed that the phrase "In the same case" in the last clause of Section 35, Specific Relief Act refers to the case provided in Clause (c) of that section because the decree for specific performance of contract is in the nature of preliminary decree wherein the Court remains in seisin of the case until the money is paid or the contract is got rescinded as provided in Section 35(c). The similar view was reiterated by the Calcutta High Court in *Anandilal Poddar Vs. Gunendra Kr. Roy and Another*, wherein it has been observed that not only does a suit lie for rescission of a contract after a decree for specific performance if the purchaser makes default in payment of any money which the Court has ordered to pay; but the rescission can also be effected by making an application in the suit in which a decree for specific performance has been passed and that such an application lies u/s 35(c)

of the Specific Relief Act. We find ourselves in respectful agreement with the view taken by a Division Bench of the Bombay High Court in *Kurpal Hemraj Vs. Shamrao Raghunath Raote*, and" that of Calcutta High Court in *Anandilal v. Gunendra* (supra).

13. It is settled law that a decree in a suit for specific performance of contract for sale is not a final decree but it is in the nature of a preliminary decree which is clear from the provisions of Section 35 itself as the original Court retains control over the matter by having full power to make any just and necessary orders therein including! the power to extend the time fixed by the decree. On this analogy it, therefore," follows that if the decree is in the nature of preliminary decree and the Court retains full control over the matter having power to make any just and necessary orders can also pass a decree for rescinding the contract u/s 35 of the Specific Relief Act. In this view of the matter, we find that the learned single Judge took the correct view in holding that a motion can be made in the same suit in which a decree for specific performance of the contract for sale of land was passed, by an application to rescind the contract.

14. Learned counsel for the appellant next contended that the learned Judge committed an error in holding that the defendant purchaser was neither prepared nor possessed of the funds to pay or deposit the balance of the consideration. After going through the evidence on record and after having heard the learned counsel for the parties we are of the view that there is no merit in this submission also and we fully agree with the conclusion recorded by the learned Single Judge in this behalf.

15. As stated earlier the defendant had entered into an agreement dt. 25th May, 1958 for the purchase of the land in suit, the registered sale-deed in respect of which had to be obtained within a month on payment of the balance of the consideration. After the agreement the defendant did not pay the balance of consideration with a month but wrote a letter dt. 17-8-1958 (Ex. P. 1) to make the payment within 8 days. When the defendant did not pay as per his promise the plaintiff late Mulla Abdul Hussaingave a notice dt. 4-10-1958 (Ex. P. 7) reminding the defendant to make the payment and obtain a registered sale-deed. A similar notice dt. 3-11-1958 (Ex. D. 2) was repeated by late Mulla Abdul Hussain. Thereafter the defendant Kanhaiyalal by his letter dt. 3-1-1959 (Ex. P. 6) wrote to Mulla Abdul Hussain to see him shortly in connection with the deal. By another letter dt. 24-1-1959 (Ex. P. 2) defendant Kanhaiyalal requested Mulla Abdul Hussain to wait for another 15 days to allow him to manage for the money to obtain the sale-deed, but by his letter dt. 7-12-1954 (Ex. P. 3) the defendant wrote to Mulla Ahdul Hussain that if he could get the amount of compensation payable to him he would himself come down to him at Patan and if he could not get the money he will make some other arrangement and inform him accordingly. A similar letter (Ex. P. 4) was written on 13th Feb. 60 saying that he could not manage for the money. When ultimately the defendant failed to make payment of the balance of the consideration, plaintiff Mulla Abdul Hussain gave a

notice dt. 8-7-1960 (Ex. P. 8) requiring the defendant to pay the balance of consideration and obtain the sale-deed but when he failed to comply with the notice he instituted the suit for specific performance of contract on 26th Sept. 1966, contending that he was always ready and willing to execute the contract on his part but the defendant had no funds and was not willing to perform his part of the contract. Defendant filed the written statement by contending that he never denied to make the payment of balance of consideration but he neither paid nor deposited the amount nor pleaded that he was prepared to pay the balance of consideration.

16. It may also be pointed out here that after filing of the written statement by the defendant-appellant, late Mulla Abdul Hussain made an application dt. 21-7-1961 before the trial Court stating that in fact defendant Kanhaiyalal had neither funds nor any means to make the payment of the balance of consideration and if the defendant really wants to make the payment, he may deposit the same in the Court and on such deposit being made he shall execute the sale deed in his favour in accordance with the agreement. The record shows that defendant neither paid nor deposited the amount even after that. It is also noteworthy that when defendant Kanhaiyalal entered into the witness box as D. W. 1, he categorically admitted that he was not in a position to make the payment of money on the day he made the statement nor on the day next to that nor after 8 days. He deposed that he can pay only by instalment of Rs. 2000/- per year. He also admitted that he had no means to pay Rs. 11,000/- (balance of consideration) and that he was also not prepared to make the payment of the said amount. Ultimately the decree for specific performance was passed directing the defendant-appellant to pay Rs. 11000/- to the plaintiff or deposit the same in the Court whereafter the plaintiff shall execute registered sale-deed in favour of the defendant.

17. As already stated above, the defendant neither paid nor deposited the amount and Mulla Abdul Hussain was forced by the circumstances to make an application u/s 35 of the Specific Relief Act, 1877 on 10-7-1962 for rescinding the contract after about a period of about 9 months from the date of decree for specific performance of the contract for sale. The defendant did not come forward even thereafter with the balance of consideration or at least with a positive assertion that he was prepared to make the payment and ultimately a decree rescinding the contract was passed against him directing the defendant to deliver back the possession of the land to the plaintiff and the plaintiff to refund the amount after necessary deductions as per decree granted in his favour. There is one more very strong and significant circumstance against the defendant-appellant that first of all he made an application under Order 44, Rule 1 of the Civil P. C. for grant of leave to appeal as an indigent person against the decree: rescinding the contract showing that he possessed only movable property worth Rs. 500/- only which clearly indicated that the defendant-appellant had neither any funds nor any means to pay the balance even after the decree rescinding the contract was passed. Making of simple applications thereafter during the

pendency of the appeal in the High Court that he was willing to pay and time be extended for the same, was of no avail. In the facts and circumstances stated above it could not be said that the learned Single Judge committed any error in arriving at the conclusion that the defendant had neither any funds nor any means to make the payment nor he was prepared to make the payment of the balance of consideration.

18. Apart from the above facts, as stated earlier after about a lapse of a period of more than a year from the date of the decree rescinding the contract the land in question was transferred to one Ramnarayan who in turn sold to respondents 2 to 4 for valuable consideration. They must have been satisfied that the contract was rescinded by a decree long back and they can safely purchase the land, by inferring that defendant had abandoned his right. They were thus bona fide purchasers. As is clear from the sale-deeds which were filed on record, the value of the land had considerably increased when it was transferred to respondents 2 to 4. In somewhat similar facts and circumstances a Division Bench of the Madras High Court in *Sriram Cotton Pressing Factory (P) Ltd. Vs. K.E. Narayanaswami Naidu*, in which there was a delay of about 9 months on the part of the purchaser during which period the purchaser did not show his inclination to obtain the sale-deed it was inferred that there was a waiver or abandonment of the contract. The case of the defendant in the present case is worse than the one decided in *Sriram Cotton Pressing Factory v. Narayanswamy* (Supra).

19. Learned counsel for the defendant-appellant then contended that the application for rescission of the contract for sale under S. 35(c) of the Specific Relief Act 1877 was not maintainable as the said act was repealed and new Specific Relief Act 1963 had come into force. We do not find any merit in this submission also for the reason that the right of the applicant to have the decree rescinded was dependent upon the default of the purchaser in paying the purchase money and the said default occurred when the Specific Relief Act, 1877 was in force and reasonable time for the performance of the obligation under the decree had elapsed particularly when the plaintiff had made an application u/s 35 of the Act of 1877 on 10-7-1962 when the Act of 1877 itself was in force while the new Act of 1963 came into force on 1st Mar. 1964. In this view of the matter we are supported by the decision of the Supreme Court in *H. I. Trust v. Haridas Mundhra* : AIR 1972 SC 1826.

20. Learned counsel for the appellant lastly contended that plaintiff's First Appeal No. 13/62 was pending before the High Court and the amount payable by the defendant could not be ascertained until the decision of that appeal in order to enable him to make the payment. It was also contended that neither in the decree passed by the trial Court for specific performance of contract nor in the decree passed by the High Court in First Appeal No. 13/62, no time was fixed for payment or deposit of the money and, therefore, the trial Court before ordering rescission of the contract ought to have allowed time to the defendant to deposit the money on the basis of the principle of equitable relief. Reliance was placed on

the decision in K. Kalpana Saraswathi Vs. P.S.S. Somasundaram Chettiar, . Learned counsel further submitted that the Court has discretion even now to fix the time within which the defendant may deposit all the amount due against the appellant-defendant. In our opinion all these submissions were fully considered and dealt with by learned single Judge which have been found without any substance. We also find ourselves in agreement with the findings recorded by the learned single Judge in that behalf and, therefore, the same have to be rejected.

21. As regard the principle decided by their Lordships of the Supreme Court in the case of K. Kalpana Saraswathi v. P.S.S. Chettiar (supra) there is no dispute but the decision does not help the defendant-appellant in the facts and circumstances of the present case. In the decree for specific performance of the contract the rights and liabilities of the parties were determined against which the defendant did not prefer any appeal. According to the terms of the contract the amount of consideration was Rs. 20,000/- only on payment of which the plaintiff was liable to execute a registered sale-deed in favour of the defendant-appellant. Admittedly the defendant had paid in all a sum of Rs. 9000/- and he had to pay Rs. 11,000/- as balance of the consideration. The rest of the decretal amount was the compensation under para 3 of Section 19 of the Specific Relief Act which had nothing to do with the contractual consideration. The sale-deed could have been executed by the plaintiff if the defendant had deposited or paid the contractual amount of the consideration. If the plaintiff had filed an appeal for enhancement of the compensation it has nothing to do with the execution of the registered sale-deed which could have been executed on payment or deposit of the balance of consideration.

22. It is true that no time to pay or deposit was fixed in the decree for specific performance of the contract but the question of fixing the time by the High Court in the decree passed in First Appeal No. 13 of 1962 did not arise as it was not an appeal against the decree for specific performance of the contract but an appeal by the plaintiff only for enhancement of the compensation u/s 19 of the Specific Relief Act. When no time for payment or deposit is fixed in the decree for specific performance the law implies a reasonable time within which the contract is to be performed. When the (sic) it should be performed within reasonable time. The decree or contract is silent as to the performance reasonable time depends upon the facts and circumstances of each case. In the present case, the contract as stated earlier was entered into on 25th May, 1958 and the sale-deed had to be obtained on payment of balance of consideration within a month. The non payment of balance of consideration till 1-10-1959 is understandable as the Madhya Bharat Tenancy and Land Revenue Act was in force under which the permission of the Collector was to be obtained for sale of land and as no permission was obtained the defendant could not be said to be at fault. But on 2-10-1959 the above Madhya Bharat Tenancy and Land Revenue Act was repealed and Madhya Pradesh Land Revenue Code, 1959 came into force under which there was no provision by which the permission of the Collector was necessary. As discussed above, the defendant had neither any funds nor any

means to make the payment of consideration right from the year 1959 up to the date of passing of the decree for specific performance. The defendant could not pay the money even up to the date of decree rescinding the contract. Thus more than sufficient time had elapsed within which the defendant could have made the payment but he failed to do so. In these circumstances, it could not be said that the contract was rescinded before the expiry of the reasonable time. See *Dinkerrai Lalit Kumar Vs. Sukhdayal Rambilas*, .

23. In *Abdul Shaker Sahib Vs. Abdul Rahiman Sahib and Another*, a Division Bench took the view that it is a well established principle that persons who desire the assistance of the Court in obtaining equitable relief must come quickly. In the present case not only the defendant failed to come quickly but he absolutely failed to come forward with the amount at any stage of the relevant proceedings.

24. Learned counsel for the respondents took following preliminary objections in the maintainability of the present appeal by the defendant:

(i) that First Appeal before the learned Single Judge was barred by limitation and there was no justification for condoning the delay;

(ii) That the appellant having deleted the name of Smt. Mamoonabai, respondent No. 1 (d), the daughter or original plaintiff late Mulla Abdul Hussain, the appeal is not now properly constituted as she and in her absence her legal representatives were the necessary party and that the appeal also abated as her heirs were not brought on record and, therefore, it deserves to be dismissed on this ground alone.

25. In the foregoing discussion we have already accepted the view taken by the learned trial Judge in rescinding the contract which has been further affirmed by the learned Single Judge of this Court in First Appeal and in view of which findings in the foregoing paragraphs the preliminary objections remained only academic. Several decisions were cited by the learned counsel for the parties in support of the rival contentions raised by them on the aforesaid two questions but it is not necessary to catalogue them all here as there is no dispute as regards the principle decided in those decisions.

26. As regards the first question the delay was first condoned by the Division Bench in First Appeal No. 30/66 and thereafter the learned single Judge after hearing the learned counsel for the defendant appellant maintained the order of condonation of delay for the reasons stated in the impugned judgment. In our opinion there are no reasons to interfere with that finding as we do not find that it was a wrong exercise of the discretion.

27. In support of the second objection referred to above learned counsel for the respondents submitted that decree rescinding the contract passed by the trial Court and affirmed by the learned single Judge of this Court had become final in favour of Mst. Mamoonabai, respondent I(d) also who had been deleted from the cause title and the decree being indivisible the appeal abates as a whole. The second limb of his argument was that in the event we allow the appeal and set

aside the decree for rescinding the contract no decree for specific performance of the contract can be passed in the absence of legal representatives of deceased-respondent 1(d) Mst. Mamoonabai.

28. It appears that on the oral request of the learned counsel for the defendant-appellant the name of respondent 1(d) Mamoonabai was deleted from the array of respondents although there was an application dt, 27-4-1981 (I. A. No. 1774/81) filed on behalf of the appellant praying to allow to delete the name of respondent 1(a) and (d) and to exempt the appellant from bringing the legal representatives of respondent 1(d) on record for the reasons stated in the said application. It appears that this applications missed notice of the. learned counsel for the Appellant as well as the learned single Judge and no order on the said application has so far been passed.

29. In the application referred to above (I.A. No. 1774/81) it was submitted that Mamoonabai respondent 1(d) had died and despite the best efforts the appellant could not trace out the names of her legal representatives. It was stated that though she was served in the first appeal No. 30/66 but she preferred not to contest the said appeal and remained ex parte and never took any part in proceedings of that appeal. It was in these circumstances that the prayer was made to delete her name and to exempt the appellant from bringing her legal representatives on record of this appeal. This application was supported by an affidavit. Although this application was made u/s 151 of the Civil P. C. but in our opinion it purports to be an application under Order 22, Rule 4(4) of the Civil P. C. which runs as under :

"Order 22, Rule 4-- Procedure in case of death of one of several defendants or of sole defendant.

(1) to (3) xxx xxx xxx

(4) 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."

A perusal of the record of First Appeal No. 30/66 will go to show that though Mst. Mamoonabai deleted respondent "No. 1(d) was served with the notice of the appeal; but she did not turn up to contest the appeal and took no interest in the proceedings. There is no dispute that the provisions of Order 22, Rule 4(4) are applicable to appeal as well. A reading of the said provision distinctly goes to show that power to exempt can be exercised at any time before the delivery of judgment because the opening words "The Court whenever it thinks fit" occurring in Sub-rule (4) of Rule 4 of Order 22 are indicative of the fact that such power can be exercised at any time before the judgment and even after the abatement has taken place. It is also clear from the said sub-rule that no application in

writing is required for such exemption as there are no words in the sub-rule to that effect. According to said Sub-rule (4) the Court may exempt from the necessity of substituting the legal representatives of any defendant or respondent who has failed to file written statement or who having filed it has failed to appear and contest the suit at the hearing. It also provides that the judgment may, in such case, be pronounced against the said party whose legal representatives have not been brought on record if the Court has exempted from the necessity of substitution of legal representatives notwithstanding the death of such a party and the judgment so pronounced shall have the same force and effect as if it has been pronounced before the death took place. In this view of the matter we are supported by the decision in *Nepal Chandra v. Rebati Mohan* AIR 1979 Gau 1 and *Janabai Ammal Vs. T.A.S. Palani Mudaliar*, . The same view has been reiterated by a recent decision of the Allahabad High Court in *Mohammad Mustaqeem v. Aftab Ahmad* AIR 1983 All 368 in which it has been observed that intention behind Sub-rule (4) of Rule 4 of Order 22, C. P. C. is that the plaintiff need not be asked to file an application for bringing on record the heirs of the deceased defendant when he has not taken any interest in the suit and keeping this intention in mind it must be held that an application by the plaintiff for exemption from the substituting of legal representative of non-contesting defendant is not required to be filed within 90 days of the death of the defendant. It has been further observed that the exemption granted under Sub-rule (4) of Rule 4 of Order 22 of the Code relieved the plaintiff from the liability of moving a separate application. Having regard to the facts of the present case we are of the view that there are no reasons to disallow the "defendant-appellant's application (I. A. No. 1774/81) seeking exempting from bringing the legal representatives of deceased-respondent 1(d) on record. We, therefore, allow the application and exempt the appellant from bringing the legal representatives of deceased-respondent 1(d) on record. In the circumstances of the case, the appeal neither abates nor is found to be incompetent.

30. For the reasons stated above, the appeal fails and is hereby dismissed with costs. Counsel's fee as per schedule, if certified.