

(1986) 12 PAT CK 0001

In the Patna High Court

Case No : A.F.A.D. No. 352 of 1982 & Appeal from Appellate Decree No. 352 of 1982

Pradip Narain Singh and Others

APPELLANT

Vs

Brij Nandan Prasad and Others

RESPONDENT

Date of Decision : 01-12-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 4(4), 97(2)(r)

Citation : (1986) PLJR 207

Hon'ble Judges : B.N. Agrawal, J

Bench : Single Bench

Advocate : R.K. Verma, with Sri Rajendra Kishore Prasad, for the Appellant; Rajendra Prasad No. 2, Sri Sheo Sharan Prasad Singh and Sri Ram Prasad Singh, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Agrawal, J.—The defendants are appellants before this Court against the judgment of affirmance passed in a suit for specific performance of contract. The plaintiff's case, in short, is that one Umrao Mahto died in jointness leaving behind two sons Tosila Mistry and Khush Lal Mistri. Khush Lal died leaving behind three sons, Karu, Ugrasen and Sukh Lal. Karu's son is Siri who had two sons and they are plaintiff's. Sukh Lal died leaving behind his widow (defendant no. 1) and three daughters (defendants 2, 3 and 4). The interest of Sukh Lal in the suit property was admittedly 1/6th. It is said that on 21.4.1969 defendant no. 1 who is widow of Sukh Lal executed a Mahadanama in favour of the plaintiff's agreeing therein to transfer 1/6th share in the suit property in their favour for Rs. 5000/-, out of which Rs. 4000/- was paid. Defendants 1 to 4 who are widow and daughters of Sukh Lal sold their 1/6th share in the suit property to defendants 5 and 6 under registered sale deed after execution of the Mahadanama in favour of the plaintiff's by defendant no. 1. Defendants 5 and 6 sold the property purchased by them as stated above to defendants 7 to 13 under a registered sale deed. So far as defendant no. 7 is concerned, he purchased the suit property in

the name of his father who is nonelse than defendant no. 14 and defendant no. 14, as a matter of fact, is Karu Mahto though by mistake he has been shown in the grounds of appeal as well as in the decree under appeal and the plaint as Karu Mahto. Since defendant no. 1 failed to execute the sale deed in favour of the plaintiff's, the same necessitated filing of the present suit in question.

2. Only the purchasers, namely, defendants 7 to 13 appeared and contested the suit and their case, inter alia, was the Mahadanama was not genuine; they were purchasers for value without notice and, therefore, the suit was fit to be dismissed.

3. The trial court after considering the evidence decreed the suit for specific performance of the contract after recording a finding that the Mahadanama was genuine, the contesting defendants were not bonafide purchasers for value and they had notice of the Mahadanama.

4. On appeal being taken, the lower appellate court has dismissed the same and affirmed all the aforesaid findings recorded by the trial court. Hence, this appeal.

5. Sri Rajendra Prasad No. 2, Learned Counsel appearing on behalf of the contesting respondents raised a preliminary objection that the whole appeal has become incompetent in view of the fact that respondent no. 7, who was defendant no. 14, died during the pendency of the appeal and by order no. 10, dated 20.12.1983 time was granted to the appellants either to file a petition for substitution or file an affidavit to the effect that respondent no. 7 is still alive as it was contended on behalf of the appellants that respondent no. 7 was alive. While granting time in the aforesaid order this Court was pleased to observe that in case no steps are taken within the time granted, in that event the appeal would be held to have abated against the heirs of respondent no. 7 without further reference to a Bench. Since neither any affidavit nor any petition was filed on behalf of the appellants, this appeal stood abated against the heirs of respondent no. 7. Therefore, this matter was placed before the Bench again on 11.4.1984 with an office note as to whether the whole appeal has become incompetent or not and this Court directed that this matter should be considered at the time of hearing of the main appeal and in this way this question has been raised before me as a preliminary objection when this appeal was taken up for hearing.

6. Sri R.K. Verma, learned Senior Advocate appearing on behalf of the appellants first contended that respondent no. 7 who was defendant no. 14 neither appeared in the suit nor filed written statement, nor contested the same. Therefore, under Order 22 Rule 4(4) of the CPC the appellants were exempted from substituting the heirs of respondent no. 7. This submission cannot be accepted for two reasons firstly there is no application filed on behalf of the appellants claiming exemption from substitution and secondly in the case in hand the provision of sub-rule (4) shall have no application as order of abatement has been already passed on 20.12.1983, as stated above and thus exemption can be

claimed only when no order of abatement has been passed in view of the express provisions contained in section 97(2)(r) of the CPC Amending Act, 1976 (Central Act 104 of 1976) which came into force on 1st February, 1977. Clause (r) specifically provides that sub-rule (4) which has been inserted in the Statute Book for the first time by Act 104 of 1976 shall not apply to such suit in which order of abatement has been already passed before enforcement of the substituted provision. This point has been considered by a Division Bench of this Court in *Rajnath v. Shiva Prasad* (1979 B.B.C.J. 281) wherein it has been laid down that provisions of sub-rule (4) shall have no application in such suits in which the order of abatement has been already passed. It was further contended by the Learned Counsel that the appellants cannot take advantage of this decision as in the reported case their Lordships were dealing with the case in which no order of abatement was passed. He also contended that the bar put by clause (r) for application of sub-rule (4), shall apply in those cases only where the order of abatement has been passed prior to the coming into force of the Amending Act, i.e., Act 104 of 1976 and in the case in hand the order was passed after coming into force of the Amending Act, as such he can take benefit of sub-rule (4). I think technically the Learned Counsel may be right, but in my view the principle laid down in the reported decision should apply with equal force even to those cases where the order of abatement has been recorded after coming into force of the Amending Act. In my view intention of the legislation in engrafting clause (r) would be better served by giving the interpretation that the benefit of sub-rule (4) cannot be given even to those cases where the order of abatement has been passed after the coming into force of the Amending Act. Therefore, on this score as well, there is no substance in the contentions raised on behalf of the appellants.

7. Sri Verma next contended that the whole appeal will not become incompetent because respondent no. 7 was, not a necessary party, but was a pro for (sic) defendant as he is purchaser from the purchaser and the specific performance decree could have been enforced only against the vendor of this respondent who alone could have taken defence that he was purchaser for value without notice. He further contended that respondent no. 7 is not a necessary party for another reason because according to the defendant's case themselves defendant no. 7 had purchased the property in the name of defendant no. 14 (respondent no. 7) which shows that defendant no. 14 was a benamidar for defendant no. 7 and defendant no. 7 was really the owner of the property who was made a party in the suit and who is alive. It is well settled that in absence of a benamidar the matter can be decided if the real owner has been impleaded as party in the suit. Thus, in my view, the preliminary objection is not sustainable and the same is accordingly rejected.

8. Sri Verma next contended that on merit this appeal should be allowed in part and the judgment and the decree passed by the courts below be modified as according to him defendant no. 1 has no right to enter into the contract of sale with the plaintiff's with regard to the entire 1/6th share of Sukh Lal as her share

in the property of Sukh Lal was 1/24th only in view of the fact that Sukh Lal died leaving behind 5 daughters as well. Therefore, defendant no. 1 could not have agreed to sell any share in excess of her 1/24th and consequently the plaintiff's could not have enforced the agreement to sell beyond 1/24th share of defendant no. 1.

9. Learned Counsel appearing on behalf of the contesting respondents submitted that it was not specifically pleaded in the written statement by the contesting defendants that defendant no. 1 has entered into the agreement to sell the suit property beyond her share, as such, the decree for specific performance of contract could have been granted only with respect to 1/24th share of respondent no. 1. Learned Counsel next contended that the question whether defendant no. 1 had right to sell the entire 1/6th share of Sukh Lal or she had right to sell her 1/24th share in the suit property of Sukh Lal could not have been gone into in the present suit. In support of that the Learned Counsel placed reliance upon a Bench decision of this Court in the case of Diwali Lal v. Baldev Singh (A.I.R. 1985 Patna 344 : 1986 PLJR 37) in paragraph 9 whereof it was laid down as follows :--

The first submission of Mr. Prasad was that the learned Subordinate Judge was not right in holding that the defendants had failed to prove the partition of 1969 and that the suit property had fallen in the exclusive share of Bangali Lal. In my opinion, it was wholly unnecessary for the learned Subordinate Judge to go into these questions as it was beyond the scope of a suit for specific performance of contract. Apart from it, the contract, if any, can be enforced only against a person who is a party to it and not against a person who is not a party to it; but the person who is a party to the contract for sale is bound to execute the sale deed if other terms are fulfilled by the purchaser, even though the property in question might not be belonging to him, as in that case the purchaser would take the risk of purchasing from him with his open eyes. It is obvious that the person to whom the property might legally belong cannot be bound by that sale, but all the same the parties to the contract would be bound by the contract to sell and the purchaser under the contract can enforce the vendor under the contract to perform his part of the contract. In such circumstances, I leave the question of title over the suit property open to be decided in a properly framed suit".

10. I find that this question was not pleaded in the written statement and the only pleading of the contesting defendants was that after the death of Sukh Lal his 1/6th share in the suit property was inherited by his widow and three daughters. I find that even in the evidence this question was not so specifically deposed by the witnesses examined on behalf of the defendants. No issue was framed in the suit on this question. Since the question was not raised in any of the two courts below, the appellants cannot be allowed to raise this question for the first time before this Court at this stage of the litigation as the plaintiff's will be prejudiced thereby and no ground is made out as to why this question was not agitated earlier.

11. I find sufficient force in the contention of the Learned Counsel for the respondents who was placed reliance on the aforesaid decision that the question of title namely whether defendant no. 1 could agree to sell the entire 1/6th share of Sukh Lal or was entitled to execute the Mahadanama only with respect to her 1/24th share cannot be gone into in the present suit which is a suit for specific performance of contract. Therefore, for this reason it appears that rightly this question was not agitated in any of the two courts below by the defendants. In this view of the matter, I do not find any (sic) in the contentions raised on behalf of the appellants. In the result, the appeal fails and is accordingly dismissed, but in the circumstances of the case there shall be no order as to cost.