

(1976) 04 CAL CK 0018

Calcutta High Court

Case No: A. F. O. O. No 659 of 1969

Chhotalal Hariram and another

APPELLANT

Vs

Dilip Kumar Chatterjee and
others

RESPONDENT

Date of Decision: April 30, 1976

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 2, Order 47 Rule 1, 151
- Contract Act, 1872 - Section 37
- Specific Relief Act, 1963 - Section 19
- Transfer of Property Act, 1882 - Section 40
- Trusts Act, 1882 - Section 91

Citation: AIR 1976 Cal 63

Hon'ble Judges: M.N. Roy, J; Anil Kumar Sen, J

Bench: Division Bench

Advocate: S.K. Kapoor with Mrs. Ruma Pal and Mr. Partha Dutta, for the Appellant;

Final Decision: Allowed

Judgement

Anil K. Sen, J.

This appeal arises out of a suit for specific performance of a contract of sale and raises a short but an important question for decision. The question so raised is as to whether such a suit abates on the death of the vendor defendant when his legal representatives are not brought on record even though subsequent transferees from the vendor are already on record as parties defendants. The question so raised arises on the following facts.

2. One Kali Kinkar Chatterji (predecessor-in-interest of the present respondents) instituted the aforesaid suit for specific performance of a contract dated August 16, 1961, of sale against the vendor F. N. Gazdar in respect of premises No. 31, Benaras Road, Howrah (hereinafter referred to as the suit property). While contesting the

suit F. N. Gazdar sold the suit property on January 7, 1961, to two persons, Karamshi Walji Patel and arsan Patel (hereinafter referred to as the Patels). Patels on an application made by them had themselves added as parties defendants in the suit.

3. Principal defendant F. N. Gazdar died on April 7, 1964. On an application made on June 10, 1964, plaintiff Kali Kinkar substituted one S. N. Gazdar in place of the deceased defendant claiming him to be the nephew of the deceased. On an application made on July 7, 1964, the plaintiff brought on record one Amba Devi as an heir and legal representative of the deceased defendant on a claim that she is a sister of the deceased.

4. Then followed a spate of applications on behalf of the plaintiff either for bringing on record further heirs and legal representatives in place of the deceased defendant or for amendment of the description of such heirs and legal representatives already brought on record, All these applications were opposed by the Patels who in their turn filed an application on January 5, 1965, for recording abatement of the suit on the death of the principal defendant.

5. All these applications were tried on evidence. The learned Judge in the court below found on evidence that S. N. Gazdar who alone was substituted within the period of limitation in place of deceased defendant was no real person and as such there was no substitution at all in time on the death of the principal defendant. On such a finding the learned Judge by an order dated March 1, 1967, recorded abatement of the suit as a whole. Of course in recording such an order of abatement the learned Judge did not expressly refer to the fact that the subsequent transferees from the principal defendant viz., the Patels were already on record.

6. Thereafter the plaintiff filed an application for substitution by setting aside abatement but that application was not pressed and was dismissed. Then came the plaintiff with an application for review of the order recording abatement under Order 47, Rule 1 read with Section 151 of the CPC on March 30, 1967.

7. Pending this application for review, the plaintiff Kali Kinkar died and his heirs and legal representatives, the respondents in this appeal were brought on record by substitution. Patels in their turn sold the suit property to Chotalal Hariram and Morarji Hariram (hereinafter referred to as Harirams) and they were added as parties for allowing them to contest the review application.

8. The review application was heard on contest and was allowed by the successor-in-office of the learned Judge who had earlier recorded the abatement. According to the learned Judge, who allowed the review application, when u/s 19 of the Specific Relief Act the contract is enforceable both against vendor and his transferees, the transferees being already on record the suit cannot abate as against the transferees and hence the suit cannot abate as a whole. He further held that the order recording abatement of the suit as a whole had been made on an apparent error of non-consideration of the fact that the transferees being on record

the suit does not abate against them, and hence the order is liable to be recalled. The learned Judge then made the following order:

Accordingly I hold that the suit could not abate as a whole. It can be proceeded with against the defendant Nos. 2 and 3.

9. The said order was made on April 12, 1969, and being aggrieved there by the second transferees, viz., the Harirams have now filed the above appeal to this Court. Though there is appearance on behalf of the respondents, none appears to contest the appeal at the hearing.

10. Mr. Kapoor, the learned Advocate for the appellant has contended that the learned Judge allowing the review application was in error in not appreciating that in a suit for specific performance of a contract of sale, the vendor is a necessary party and on his death, his heirs and legal representatives are required to be brought on record, inasmuch as, such a contract cannot be enforced in the absence of the vendor or his legal representatives. The person primarily bound to complete the contract is the vendor and on his death his heirs, and legal representatives. The subsequent transferees have merely an obligation to join in the conveyance for completing the title in favour of the vendor, but such transferees have no obligation independent of the vendor to fulfill the contract of sale which was not their contract at all. Hence according to Mr. Kapoor in the absence of the primary party (such is the effect, according to him on the death of the vendor), the suit can no longer proceed and this aspect was wholly overlooked by the learned Judge allowing the review application.

11. At one stage, it seemed to us that the view taken by the learned Judge allowing the review application is correct. On a closer scrutiny of the legal position we, however, find that it is not so and that the contention of Mr. Kapoor has enough substance. The learned Judge in allowing the review application merely held that suit as against the transferees, Patels had not abated. Of course it had not so abated because none of them had died. The Judge recording abatement of the suit as a whole did not really mean that it abated as against the transferees. What in substance he meant is that the suit having abated against the principal defendant, is no longer maintainable and as such the entire suit must be deemed to have abated. But the learned Judge who allowed the review application had not considered as to whether the suit had abated against the vendor, the principal defendant and if so, whether in spite of such abatement the suit can proceed as against the transferee defendants.

12. In our view the suit can proceed on two contingencies after the death of the principal defendant when his heirs and legal representatives had not been substituted. It can so, proceed if the right to sue survives as against the transferee defendants alone. This is what Order 22, Rule 2 of the CPC provides. Alternatively the suit can proceed against the remaining defendants if the claim against them is

distinct and severable and the relief prayed for in the suit can be granted even in the absence of the deceased defendant. But neither of the contingencies can be said to have been fulfilled in the present case.

13. Let us first consider whether on the death of the principal defendant, the right to sue survives as against the transferee defendants alone or not. The privity of contract sought to be enforced was between the plaintiff vendee and the principal defendant vendor. The obligation to fulfill and complete the contract is on the vendor and on his death such obligation vests in the legal representatives of the vendor u/s 37 of the Contract Act - the contract in question not being entirely personal. The law no doubt enjoins that under certain circumstances, such a contract is also enforceable against subsequent transferees from the vendor vide Section 40 of the T. P. Act and Section 19 the Specific Relief Act. But such transferee is not the person to complete the contract since he was not the person who had entered into the contract. His position is of the nature of a trustee holding the property in trust for the benefit of the vendee who had earlier entered into the contract to the extent necessary to give effect to the contract vide Section 91 of the Trusts Act. The position that follows from Section 40 of the T. P. Act and Section 19 of the Specific Relief Act is that such a contract is enforceable against such transferees in the sense that when the vendor is made to perform the contract in favour of the vendee, title to the property passes on to the latter overriding the transfer thereof to the subsequent transferees and the subsequent transferees are in law bound to acknowledge this position and convey the title. The primary obligation to perform the contract therefore, always remains on the vendor and on his death on his legal representatives. As has been pointed out by the Supreme Court in the case of [Lala Durga Prasad and Another Vs. Lala Deep Chand and Others](#), (reaffirmed in [Soni Lalji Jetha and Others Vs. Soni Kalidas Devchand and Others](#),) the correct frame of the relief to be claimed and given in a suit for specific performance of a contract of sale is to direct specific performance against the vendor - the subsequent transferees from him being only called upon to join in the conveyance to ensure passing of full title to the vendee. The balance consideration is also normally payable to the vendor but subject to equities which may arise from the facts of each case. We have already pointed out that the relief so admissible against the vendor shifts on his death on his legal representatives u/s 37 of the Contract Act and not on the transferees, their obligation remaining what it was even when the vendor was alive.

14. In the case of [Kafiladdin and Others Vs. Samiraddin and Others](#), (approved by the Supreme Court in [Lala Durga Prasad and Another Vs. Lala Deep Chand and Others](#),) it was laid down by this Court that in enforcing specific performance of a contract of sale, both the contracting party and the subsequent purchaser must join in the conveyance. The reason assigned is instructive. It was pointed out that in case the vendor, i.e., the contracting party is not made to execute the conveyance then he "may subsequently raise the objection that his title had not passed for want of consideration or otherwise to the subsequent purchaser and therefore the

conveyance executed by the subsequent purchaser in favour of the plaintiff did not pass good title". Therefore, to convey perfect title to the vendee in all such cases both the vendor and the subsequent transferee from him are required to be made parties to convey the title to the vendee. This requirement is not altered in any way by the death of the vendor - his position being taken by 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, Patels alone. That not having been done, the suit must be taken to have abated against the said principal defendant.

15. Now let us proceed to consider whether the second contingency can be said to have been fulfilled. Suit having abated against the principal defendant, it can proceed as against the other defendants only if the claim as against them is severable and distinct and the relief prayed for in the suit can be granted as against them even in the absence of the deceased defendant. On the analysis of the legal position made hereinbefore, in a suit for specific performance of a contract of sale against the vendor and the subsequent transferees from him, the claim against the latter is not at all severable or distinct. They are merely to join in the conveyance to be executed by the vendor on specific performance of his contract. The transferees are not to perform the contract - not their own nor are they to execute any conveyance independently of the original vendor, if performance of contract by the vendor has failed. Hence the relief claimed in the suit is such that it cannot be granted in the absence of the principal defendant, the vendor. Therefore, the suit was no longer maintainable against the Patels when it abated against F. N. Gazdar, the vendor - principal defendant and was liable to be dismissed as against them. That exactly is what was done earlier when abatement of the suit as a whole was recorded. In our view that was the correct order and the learned Judge allowing the review application was clearly in error in setting aside that order on an erroneous view that suit is still maintainable as against the Patels even after the death of the principal defendant and even when his legal representatives had not been brought on record by substitution.

16. On the conclusions as above, we allow this appeal, set aside the order dated April 12, 1969, passed by the Court below and restore the order dated March 1, 1967, passed by the said Court

17. There will be no order as to costs.

M.N. Roy, J.

I agree.