

PETITIONER:  
SATGURU SHARAN SHRIVASTAVA

Vs.

RESPONDENT:  
DWARKA PRASAD MATHUR [DEAD] THROUGH LRS. A ORS.

DATE OF JUDGMENT: 14/08/1996

BENCH:  
RAMASWAMY, K.  
BENCH:  
RAMASWAMY, K.  
MAJMUDAR S.B. (J)

CITATION:  
JT 1996 (7) 460 1996 SCALE (6)189

ACT:

HEADNOTE:

JUDGMENT:

O R D E R

Mr. Sushil Mr. Jain, Advocate takes notice for respondents.

This special leave petition arises from the judgment and order of the High Court of Madhya Pradesh, Gwalior Bench made on May 15, 1996 in First Appeal No.17/89. The admitted position is that one Dwaraka Prasad Mathur was a member of the Secretarial Staff Housing Cooperative Society Plot No.14-C was allotted to him as a member and thereon he had constructed a house. It is the case of the petitioner that he had entered into an oral agreement of sale with him to purchase the house for a consideration of Rs.20000/subject to his obtaining permission for transfer from the Society as per the law. It is his case that he had paid up the amount due from Dwaraka Prasad Mathur to the Society and became member of the Society as per the resolution passed by the Society. But before he got the possession, surprise pruned upon him in the form of a decree of specific performance obtained by the second respondent Narvedeshwar Prasad Saxena in O.S.No.77-A of 1976, dated October 11,1976. So he filed civil suit No.121-A of 1984 on the plea that both the respondents had played fraud upon him and it was a collusive decree and sought to avoid the decree passed in suit No.77-A of 1976 (suit No.121-A of 1984 of the petitioner). Admittedly pending suit both the defendants died. As far as the first defendant is concerned, his widow Shakuntala was brought on record as his legal representative. As regards the second defendant, Prakash Chand Saxena, his son was brought on record as legal representative. He is the decree holder in the above suit No.77-A of 1976 and the judgment-debtor is the first defendant. As far as the first defendant is concerned, since Shakuntala also died pending suit, the decree as against the judgment-debtor in that suit No.77-A/76 has become final and no legal representative of her came on record and the suit No.121A/84 got abated.

The question that arises is whether the appeal could be

filed against dead person, namely, the first respondent? When it was brought to the notice of the learned counsel, an application came to be filed to delete the name of the first defendant. It was accordingly deleted. The consequence is that as regards the first defendant/judgment-debtor in the above suit No.77-A/76 the decree has become final. Equally decree of dismissal in suit No.121-A of 1984 also become final.

The question then arises: whether the legality of the decree against the second defendant, decree-holder in suit No.77-A/76, can be gone into? In view of the fact that the plea of fraud has been pleaded as against the first defendant and the second defendant, to avoid the decree in suit No.77-A/76, necessarily any finding that would be given by the High Court in the appeal arising out of suit No.121A/1984 would be inconsistent qua the first respondent. Under those circumstances, the suit No.121-A/84 as a whole stands abated. (As a consequence) the high court rightly has dismissed the appeal.

Shri Bagga, learned counsel for the petitioner, contended that by operation of Order 22, Rule 4(4), CPC as amended by CPC Amendment Act, 1976, it is not necessary that suit should abate as a whole. We find no force in the contention. It is true that under the amended rules even a counsel can give notice of the death of the parties and on the basis thereof, the legal representatives could be brought on record. But when the factum of the death of Shakuntala was brought to the notice of the counsel for the petitioner, an application came to be filed to delete the name of the first defendant from the array of the parties and accordingly it was allowed; consequence being that the decree as against the first defendant in O.S. No.121-A/1984 had become final. Since it has become final, the decree as against the second defendant's legal representative would become inconsistent with the decree as against the first defendant. Therefore, the mere fact that the application came to be filed later is of no avail and Order 22, Rule 4(4), CPC is clearly inapplicable to the facts. In this view, it would be unnecessary for the High Court to go into the merits in the appeal and to record any findings in that behalf.

The special leave petition is accordingly dismissed.