SUPREME COURT OF INDIA

Most. Etwari Devi and Others

Vs

Most. Parvati Devi

C.A. No. 1514 of 2000

(Arijit Pasayat and Tarun Chatterjee, JJ)

17.01.2006

JUDGMENT

ARIJIT PASAYAT, J.

1. Challenge in this appeal is the judgment of the learned Single Judge of the Patna High Court holding that the appellants were not entitled to a decree for specific performance of contract. In a second appeal filed by the respondent, the judgment and decree of the trial Court as affirmed by the first Appellate Court were reversed and suit of the plaintiff was dismissed. Originally the suit was filed by Nunu Mahto, husband of appellant No.l, father of appellant No. 5. After death of Nunu Mahto his legal heirs were substituted. The High Court proceeded on the basis that the plaintiff had not proved that he was ready and willing to perform his part of the contract. There was neither pleading nor evidence was tendered in terms of requirement of Section 16(c) of the Specific Relief Act, 1963 (in short the 'Act'). Learned counsel for the appellants highlighted as to how the judgment of the High Court suffers from various infirmities both factually and on principle of law. None appears for the respondent though she was represented by a counsel who did not appear on several dates of hearing and also is not present today.

2. The second appeal was admitted by the High Court and following questions were framed which according to the High Court were substantial questions of law as required to be framed under Section 100 of the Code of Civil Procedure, 1908 (in short 'Code'):

(i) Whether the finding that the plaintiffs were always ready and willing to perform their part of contract is vitiated on account of absence of evidence point?

(ii) Whether the decree passed by the lower appellate Court is maintainable in absence of the evidence on the point referred to above?

3. The High Court recorded findings to the effect that there were no specific averments in the pleadings that the plaintiff was ready and willing to perform his part of the contract and also no evidence was adduced in this regard. As rightly pointed out by learned counsel for the appellants, the findings are contrary to the materials on record. As noted by the first Appellate Court in various paragraphs of the plaint, more particularly, paragraphs 18 and 22 specific averments regarding readiness and willingness of the plaintiff to perform his part of the contract have been made. Additionally, the plaintiff Nunu Mahto who was examined as PW-9 has categorically stated that he had gone to tender the money, that is the consideration, to the defendant who was not agreeable to return the sale deeds and therefore the only course left open to the plaintiff was to file a suit.

4. On this ground alone, the judgment of the High Court is vulnerable. Another factor which appears to have weighed with the High Court is that even though one month time was granted by the trial Court to the plaintiff to deposit a sum of Rs. 1500, this was not done. This again in a finding contrary to the materials on record. There can be no quarrel with the proposition that in a suit for specific performance of the contract, the plaintiff must prove that he was ready and willing to perform his part of the contract continuously between the date of the contract and the date of hearing of the suit. But the finding that the plaintiff has not proved his capacity to perform his part of the contract as he was not even ready to deposit the money in terms of the trial Court's order is factually wrong. It appears that no such plea was raised by the defendant before the first appellate Court. In the memorandum of appeal filed before the High Court in the second appeal also, there was no such plea taken. On perusal of the records, it appears that the deposit was made on 19.12.1978, that as well within one month time granted by the trial Court by its judgment and decree dated 25.11.1978. Confusion appears to have arisen because notwithstanding the deposit, an application for extension of time was filed. The High Court should have ignored the application and should not have put any emphasis thereon as verification of the records would have revealed that the payment had been made. Even otherwise there was no such plea taken by the defendant (respondent herein) about the non deposit within time granted by the trial Court. The High Court should not have acted on an oral submission made by the learned counsel for the defendant, who was the appellant before it, without granting of an opportunity to the present appellants to have their say in the matter. Above being the position, the impugned judgment of the High Court is indefensible deserves to be set aside which we direct. The inevitable conclusion is that the judgment and decree

passed by the trial Court and the first appellate Court are to be restored. The appeal is allowed accordingly. There shall be no order as to costs.