

CASE NO.:
Appeal (civil) 4592 of 2005

PETITIONER:
Phool Pata & Anr.

RESPONDENT:
Vishwanath Singh and Ors.

DATE OF JUDGMENT: 01/08/2005

BENCH:
ARIJIT PASAYAT & H.K. SEMA

JUDGMENT:
J U D G M E N T
(Arising out of SLP(C) No. 1371/2005)

ARIJIT PASAYAT, J.

Leave granted.

Challenge in this appeal is to the judgment rendered by learned Single Judge of the Allahabad High Court, Lucknow Bench in a Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (in short 'CPC'). The plaintiffs-respondents herein had filed a suit for specific performance of contract dated 30.7.1977 as well as for cancellation of sale deed dated 14.5.1980. According to the plaintiffs a sum of Rs.2,500/- had been paid as advance money and the consideration for sale was fixed at Rs.10,000/-. Thus the balance amount of Rs.7,500/- was to be paid at the time of execution of sale-deed. The suit was contested by the present appellant-defendant No.3. The present appellant along with defendant No.1 (respondent No.4) contended that the permission to sell the land had been obtained from the Settlement Officer (consolidation) during the year 1980. When the plaintiffs were requested to purchase the land, they did not agree to get the sale deed executed. Thereafter defendant No.1-Jogendra Singh executed the sale deed in favour of the present appellant and respondent No.5.

The trial court decreed the suit and directed for specific compliance of the agreement to sale, in dispute, dated 30.7.1977 and cancellation of sale deed dated 14.5.1980 along with other reliefs. The matter was carried in appeal before the learned Additional District Judge, Gonda who allowed the appeal and set aside the judgment of the trial court and directed dismissal of the relevant suit. It is to be noted that the trial court had held that the plaintiffs had proved that they were ready and willing to perform their part of the contract. Before the first Appellate Court, two stands were taken by the defendants. Firstly, it was submitted that there was change in the area and description of the land in question and though the agreement was purportedly for 1 acre 99 decimals, after completion of the consolidation proceedings the area had become 2 acres and 2 decimals. The area of some chaks had decreased and some had increased. It was further submitted that materials on record did not justify the stand of the plaintiffs that they were ready and willing to perform their

part of the contract. After analyzing the evidence the first Appellate Court recorded two findings. Firstly, it was observed that the description of the properties had completely changed and therefore the suit for specific performance was liable to be dismissed. Reliance was placed on a decision of this court in *Piarey Lal vs. Hori Lal* (1977 (2) SCC 221) for adopting such view. It was also concluded that the materials on record did not justify the conclusion that the plaintiffs were ready and willing to perform their part of the contract. As noted above, the appeal was allowed and the suit was dismissed. The plaintiffs carried the matter in second appeal before the High Court. The following question was formulated for adjudication:-

"Whether in respect of land regarding which the agreement to sell had taken place, was a bit increased or decreased in consolidation proceeding, amounts to change in property and hence the said agreement can be enforced by suit for specific performance of contract?"

The High Court held that there was a minor variation in the area. Referring to a decision of this Court in *Smt. Baikunthi Devi and Ors. v. Mahendra Nath and Anr.* (AIR 1977 SC 1514) it was held that the variation was minor and that too on account of allotment of a new chak. There was no bar to a decree being granted. It appears that the High Court recorded the findings on the appreciation of evidence as done by the first Appellate Court. It observed that the first Appellate Court is under a duty to examine evidence on record and when it refuses to consider important evidence having direct bearing on the disputed issue and the error which arises is of a magnitude, it gives rise to a substantial question of law. With reference to various judgment of this Court, it was noted that where the findings of lower courts are vitiated by non-consideration of relevant evidence or by an essentially erroneous approach to the matter, the High Court is not precluded from recording proper findings. Therefore, the erroneous findings if recorded by the Court below can be set aside by the High Court in second appeal.

Learned counsel for the appellant submitted that the first Appellate Court had recorded positive findings to the effect that the plaintiffs had failed to establish that they were ready and willing to perform their part of the contract. No question of law was formulated in this regard. On the contrary the only question which was formulated related to the effect of minor variation in the area or description of the property. Entire discussions made by the High Court appear to be in relation to that question. Therefore, without formulating the question regarding the readiness and willingness of the plaintiffs to perform their part of the contract, the High Court could not have allowed the second appeal.

In response, learned counsel for the respondents submitted that the High Court had considered the question as regards effect of court of facts not considering relevant evidence or adopting essentially erroneous approach of the matter. The conclusions were actually in relation to the findings recorded by the first Appellate Court regarding the readiness and willingness aspect. Merely because the

question has not been formulated, that should not stand in the way of affirming the decision of the High Court. It was submitted that the present appellant did not take any plea in this regard before the High Court and therefore should not be permitted to make any grievance.

After the amendment of CPC, Section 100(5) reads as follows:

"The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question.

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

As a bare perusal of the provision shows, nothing in sub-section (5) takes away or abridges power of the High Court to hear for reasons to be recorded, the appeal on any other substantial question, not formulated earlier, if it is satisfied that the case involves such question.

In the instant case, the only question that was formulated has been quoted above. Undisputedly, there was no other question formulated regarding the findings of the Appellate Court on the readiness and willingness aspect. In terms of sub-section (5), the High Court could have heard the appeal on a question not formulated if for reasons to be recorded (emphasis supplied) if it was of the view that the case involves such question. In the instant case no such reason has been recorded. The memorandum of appeal filed before the High Court also does not indicate that any specific question was formulated in that regard.

Piarey Lal's case (supra) relied upon the first Appellate Court was clearly distinguishable on the facts and the High Court has rightly observed that the decision in Smt. Baikunthi Devi's case (supra) was applicable on the facts of the case. We, therefore, find no substance in the plea raised by learned counsel for the appellant that the High Court was not justified in answering the question formulated in favour of the respondents. But in view of the fact that no question was formulated regarding the findings recorded by the first Appellate Court on the other aspect, the High Court could not have set aside the judgment of the first Appellate Court in its entirety. On that ground alone, the present appeal succeeds and the judgment of the High Court in second appeal is set aside. This piquant situation has arisen because the appellant before the High Court was not vigilant. It was not for the defendants who were respondents before the High Court to invite any finding against them by agitating an issue which was decided in their favour by the first Appellate Court. As the findings recorded by the first Appellate Court were essentially factual, the High Court was required even otherwise to show as to how those were erroneous and which relevant material

had been left out of consideration and/or which irrelevant material was taken into consideration. It has not been done. The High Court only referred to the principles on law, about which there is no dispute, without specifically pointing out which conclusions of the first Appellate Court suffered from deficiencies and in what way. That being so, the High Court's judgment, even if we accept that appropriate question could have been formulated would not have altered the situation. The appeal is allowed, with no order as to costs.

JUDIS