

Supreme Court of India

Kaulashwari Devi vs Nawal Kishore on 2 April, 1993

Equivalent citations: 1994 AIR 1200, 1995 SCC Supl. (1) 141

Author: B Jeevan Reddy

Bench: Jeevan Reddy, B.P. (J)

PETITIONER:

KAULASHWARI DEVI

Vs.

RESPONDENT:

NAWAL KISHORE

DATE OF JUDGMENT 02/04/1993

BENCH:

JEEVAN REDDY, B.P. (J)

BENCH:

JEEVAN REDDY, B.P. (J)

VENKATACHALA N. (J)

CITATION:

1994 AIR 1200

1995 SCC Supl. (1) 141

ACT:

HEADNOTE:

JUDGMENT:

ORDER

1. Leave granted. None appears for the respondents. Heard counsel for the appellant.

2. This appeal is preferred by the plaintiff. His suit for specific performance was decided by the trial court and affirmed in appeal by the first appellate court. On second appeal, however, the High Court has reversed the judgment and decree of courts below and dismissed the suit.

3. The plaintiff's case was that the first defendant executed an agreement of sale on 10-9-1969, whereunder he agreed to sell the suit property for a consideration of Rs 9500. A sum of Rs 5000 was paid by way of earnest money. The balance was to be paid and the sale deed registered on or before 31-10-1969. Plaintiff's case was that though he called upon the first defendant to execute the sale deed, he did not. He said, he even purchased requisite stamps and was ready with the balance consideration. The first defendant avoided to execute the sale deed whereupon he issued a notice on

26-12-1969 and filed the suit soon thereafter. The first defendant contested the suit. She complained that the plaintiff played fraud upon her. According to her, some other land was to be + Arising out of SLP (C) No. 1599 of 1986 sold and she was paid only Rs 1000. She denied the execution of the agreement of sale sought to be enforced by the plaintiff.

4.The first defendant Pachia Devi died and in her place Smt Jamuni Devi was brought on record as the legal representative.

5.Pending the suit, Jamuni Devi sold the suit land in favour of second defendant, Nawal Kishore.

6.On a consideration of the material placed before the parties, the trial court decreed the suit. The operative portion of the trial court's judgment reads as follows:

"In the result, it is hereby ordered that the suit be decreed on contest with cost as against defendant 2, namely Nawal Kishore but ex parte without cost as against defendant 1, Jamuni Devi. It is to be noted that defendant 2, Nawal Kishore is a purchaser from Jamuni Devi, heir of Pachia Devi pendente lite and hence, his purchase is subject to the result of the suit. The result is that the contract of sale is found legal and valid and can be upheld against Jamuni Devi. The intervenor-defendant Nawal Kishore has no locus standi and is not entitled to retain possession, if any, of the disputed property. The plaintiffs are directed to deposit Rs 4500 as a balance amount of the price on which the disputed land was contracted to be sold to them within a month from the passing of the decree on deposit of the said money in favour of Jamuni Devi, the plaintiffs will be entitled to get a sale deed executed in their favour in respect of the properties in dispute by Jamuni Devi within period of a month thereof failing the execution of the sale deed by Jamuni Devi, the plaintiffs will have a right to get the sale deed executed through the agency of the Court at the defendants' cost. Pleader's fee Rs 32 and pleader's clerk fee Rs IO only."

7.The first defendant vendor did not file any appeal. Only Nawal Kishore, the second defendant preferred the appeal which was dismissed by the 4th Additional District Judge, Gaya on 12-2-1977. Nawal Kishore then approached the High Court by way of second appeal (being appeal against appellate decree No. 329/776). The learned Judge observed in the first instance that the plaint does not contain an averment to the effect that the plaintiff was ready and willing to perform his part of the contract. He then observed that even if such a statement can be said to be implicit in the plaint, even so it must be held that the plaintiff was not ready and willing to perform his part of the contract. This, the learned Judge said, was evident from the fact that even though the decree of the trial court directed him to deposit the balance purchase money within one month, he did not deposit the same. Indeed, the learned Judge observed the plaintiff did never deposit the balance amount in the court. On the above basis, the learned Judge concluded that the plaintiff was not ready and willing to perform his part of the contract and accordingly dismissed the suit.

8.In paragraph 10 of the SLP, it is stated that the plaintiff paid the balance consideration of Rs 4500 to the first defendant-Jamuni Devi on 16-9-1974 and that she executed the sale deed which was

registered on 12-12-1974. This is how the statement in para 10 reads-

"... that on 16-9-1974 defendant 1, Smt Jamuni Devi, wife of Baso Thakur who was substituted in place of Pachia Devi who had died, executed the sale deed in favour of the petitioners after receiving Rs 4500 the balance amount due as per the judgment of the trial court, continued in Annexure 1.

The said deed was registered on 12-12-1974."

9. Learned counsel for the petitioner points out that this statement in para 10 of the SLP has not been controverted by the respondent-second defendant in his counter-affidavit though he chose to controvert other allegations in the SLP. On this basis, the learned counsel for the appellant contends that the main basis upon which the High Court has dismissed the suit is unsustainable. Counsel says that there was no occasion for the plaintiff to state this fact in the first appellate court or High Court, since it was never alleged by the second defendant that he failed to deposit the amount as per the decree of the trial court. Not only has the plaintiff paid the amount within one month of the trial court's decree but has also obtained the sale deed from the first defendant. The learned counsel submits that the mere fact that he paid the amount directly to the first defendant, instead of depositing the same into court as per the judgment and decree of the trial court, cannot be termed as a default on his part nor does it disentitle him from the relief. He asserted that his allegation has not even been dealt with or denied by the respondent in his counter-affidavit. Apart from the above, there is another important circumstance against the respondent-second defendant; he is a purchaser pendente lite. It is not as if he holds an agreement of sale deed executed prior to the institution of suit. The first defendant has not chosen to file an appeal against the decree of the trial court. Even the second appeal is filed only by the second defendant. The second defendant cannot claim any right of his own; he is bound by the decree passed against the first defendant, it is argued.

10. The suit was initially instituted only against the vendor (first defendant). Nawal Kishore got himself impleaded, after purchasing the same pendente lite. Section 52 of the Transfer of Property Act provides that any such transfer shall not affect the rights of the other party. In such a case there can be no question of his claiming to a bona fide transferee for value. However, we do not wish to rest our judgment on the said ground since it has not been put forward in the courts below. Suffice it to hold that the reasoning of the High Court, viz., that the plaintiff was not ready and willing to abide by the decree passed by the trial court, is found to be unsustainable. No such contention was ever urged by the respondent-second defendant before the first appellate court. The said contention appears to have been urged for the first time at the hearing of the second appeal. Once it is held that the plaintiff did pay the amount and obtain the sale deed within the period prescribed by the trial court, the main ground upon which the High Court had dismissed his suit becomes untenable. Regarding the absence of averment in the plaint that the plaintiff was ready and willing to perform his part of the contract, we must say we are not satisfied with the reasoning of the High Court, apart from the fact that the said finding is a halting one. It is evident from the pleadings qua the facts of the case that the plaintiff was anxious at all points of time and was ready and willing to perform his part of the contract.

11. The appeal is accordingly allowed. No cost.