

RAMATHAL

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v.

MARUTHATHAL & ORS.

(Civil Appeal No. 10741 of 2017)

AUGUST 22, 2017

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[N.V. RAMANA AND PRAFULLA C. PANT, JJ.]

Code of Civil Procedure, 1908:

s.100 – Second appeal, interference on question of fact – When appreciation of evidence suffers from material irregularities and when there is perversity in the findings of the court which are not based on any material, court is empowered to interfere on a question of fact as well – Unless and until there is absolute perversity, it would not be appropriate for the High Court to interfere in a question of fact just because two views are possible – In such circumstances, High Court should restrain itself from exercising the jurisdiction on a question of fact.

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s.100 – Substantial question of law – Agreement of sale of land – Stipulation in the agreement that the seller would conduct a survey for identification of the boundaries of the suit land – Non-compliance by the seller – Suit for specific performance – Trial court decreed the suit – Appellate court upheld the decree – Concurrent finding of two courts that the survey was not conducted by the seller – High Court set aside the judgment on the ground that buyer was unable to prove that suit land was not measured and demarcated by the seller – High court's order challenged on the ground that the same was beyond the scope of second appeal under s.100; that seller was not able to prove that survey was conducted which was condition precedent for payment of agreed consideration and that the buyer was ready and willing to perform his part of contract – On appeal, held: Perusal of various conditions stipulated in the agreement makes it clear that the reciprocal promises were dependent on each other – The view taken by High Court, regarding the interpretation of the contract wherein the execution of the contract was independent of the payment obligation, is erroneous and cannot be sustained in the eyes of law as the contract needs to

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- A *be read as whole and not in piecemeal approach as undertaken by the High Court – Therefore, the buyer’s payment obligation and the obligation to execute the contract, was dependent upon the measurement to be conducted by the seller – DW1 and DW2 stated that the survey was conducted subsequent to the execution of the agreement, but no documents were marked on behalf of the seller*
- B *evidencing this fact – When both the courts below took a view that evidence of the witness was not believable on detailed consideration of their cross examination and non-availability of documentary evidence to prove that survey was conducted, the High Court should not have interfered with such factual findings by taking into*
- C *consideration the oral evidence of witnesses – The crucial fact that the survey was not conducted had attained finality by the earlier judgment of the High Court – Therefore, once trial court and first appellate court which are the fact finding courts have come to the specific conclusion that the plaintiff is entitled for specific*
- D *performance of the agreement of sale, the High Court on re-appreciation of evidence could not have upset the factual findings in second appeal – Specific Relief Act, 1963.*

Specific Relief Act, 1963:

- E *Escalation of prices cannot be a ground for denying the relief of specific performance – Specific performance is an equitable relief and granting the relief is the discretion of the court – The discretion has to be exercised by the court judicially and within the settled principles of law – Equity.*

- F *s.16(c) – Essential ingredients – Proof of readiness and willingness to perform – In a suit for specific performance, burden is always on the plaintiff to aver and prove that they are always ready and willing to perform their part of the contract throughout – s.16(c) of the Act mandates that not only there be a plea of readiness and willingness but it also has to be proved by acceptable evidence*
- G *– Requirement of fulfilling the conditions under s.16(c) of the Act, is a condition precedent for obtaining the relief of specific performance.*

Allowing the appeal, the Court

- H **HELD: 1. It was not appropriate for the High Court to embark upon the task of re appreciation of evidence in the second**

appeal and disturb the concurrent findings of fact of the court below which are the fact finding courts. A clear reading of section 100 and 103 of the CPC envisages that a burden is placed upon the appellant to state in the memorandum of grounds of appeal the substantial question of law that is involved in the appeal, then the High Court being satisfied that such a substantial question of law arises for its consideration has to formulate the questions of law and decide the appeal. Hence a prerequisite for entertaining a Second appeal is a substantial question of law involved in the case which has to be adjudicated by the High Court. It is the intention of the Legislature to limit the scope of second appeal only when a substantial question of law is involved and the amendment made to section 100 makes the legislative intent more clear that it never wanted the High Court to be a fact finding court. However it is not an absolute rule that High Court cannot interfere in a second appeal on a question of fact, Section 103 of the CPC enables the High Court to consider the evidence when the same has been wrongly determined by the courts below on which a substantial question of law arises as referred to in Section 100. When appreciation of evidence suffers from material irregularities and when there is perversity in the findings of the court which are not based on any material, court is empowered to interfere on a question of fact as well. Unless and until there is absolute perversity, it would not be appropriate for the High Courts to interfere in a question of fact just because two views are possible, in such circumstances the High Courts should restrain itself from exercising the jurisdiction on a question of fact. [Paras 14 and 15] [621-D; 622-D-G]

2. The agreement contained a provision stipulating time for payment and completion of the contract. Clause 3 of the agreement makes execution of the contract by the buyer contingent on the payment which ultimately hinges on the performance of seller's obligation to conduct survey and affix boundaries. Additionally, the conduct of the seller especially taking into consideration the reply notice by the seller wherein they admit that the 6 month time frame was not binding as the payment obligation may be performed by the end of one year i.e., before completion of the sale. Further by the aforesaid reply notice the sellers were agreeable to accept delayed payment

A subject to payment of extra interest clearly indicates that the
time was not the essence of the contract. Moreover the sellers
were unwilling to perform their part of the contract in any case.
As per the law laid down by this Court in respect of sale of
immovable property, there is no presumption as to time being
the essence of the contract. Even when there is no stipulation
B courts may infer that it has to be performed within a reasonable
time taking into consideration the terms of the contract, the nature
of the property and other surrounding circumstances. This
proposition needs to be revisited in an appropriate case, as the
value of an immovable property rate is fluctuating in recent times.
C Whether the time is an essence of the contract would depend on
facts and circumstances of each case. In this case, after taking
into consideration the terms of the contract, the conduct of the
parties and other material, the contention of the seller that the
time is the essence of the contract is negated. [Paras 18-20] [623-
D-D-H; 624-A]

3. There is no dispute with regard to the proposition that
in a suit for specific performance, burden is always on the plaintiff
to aver and prove that they are always ready and willing to perform
their part of the contract throughout. Section 16(c) of the Specific
Relief Act mandates that not only there be a plea of readiness
E and willingness but it also has to be proved by acceptable
evidence. There is no dispute that the execution of the contract
was made subject to satisfactory survey which is a binding
obligation upon the seller and he has failed to perform his part of
the obligation to the satisfaction of the buyer. Although the
F measurement was mentioned in the sale deed, but from perusal
of other clauses in the agreement would reveal that the said
measurement of 1.87 $\frac{3}{4}$ Acres was a tentative figure mentioned
under the agreement. The buyer has taken prompt steps to file a
suit for specific performance as soon as the execution of the sale
was stalled by the seller. The buyer has always been ready and
G willing to perform his part of the contract at all stages. Moreover
it is the seller who had always been trying to wriggle out of the
contract. Now the seller cannot take advantage of their own wrong
and then plead that the grant of decree of specific performance
would be inequitable. Escalation of prices cannot be a ground for
H denying the relief of specific performance. Specific performance

is an equitable relief and granting the relief is the discretion of the court. The discretion has to be exercised by the court judicially and within the settled principles of law. Absolutely there is no illegality or infirmity in the judgments of the courts below which has judicially exercised its discretion and the High Court ought not to have interfered with the same. [Paras 21-23] [624-C-H; 625-A-C]

K. Prakash v. B. R. Sampath Kumar (2015) 1 SCC 597
– referred to

Case Law Reference

(2015) 1 SCC 597 referred to Para 21

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 10741 of 2017.

From the final Judgment and Order dated 14-03-2014 passed by the High Court of Judicature at Madras in S.A. No.1819 of 2001.

T. Harish Kumar, Ms.Anushree Menon (for Vikas Mehta), Pukhrambam Ramesh Kumar, Advs. for the Appellant.

V. Ramasubramanian, Biju Thankappen, R.C. Gubrele, Advs. for the Respondents.

The Judgment of the Court was delivered by

N. V. RAMANA, J. 1. Leave granted.

2. This appeal by special leave is directed against the judgment and decree, dated 14.03.2014, passed by the High Court of Judicature at Madras in Second Appeal No. 1819 of 2001, wherein the High Court has allowed the second appeal by setting aside the concurrent findings of the courts' below.

3. At the outset it is to be noted that during the pendency of this appeal, respondent no. 1 and respondent no. 3 have settled the disputes by compromise deed dated 04.08.2014. In light of the aforesaid compromise, this appeal is pursued only against respondent no.2.

4. A brief reference to facts which are necessary for disposal of the appeal before us are, Appellant herein who is the plaintiff in the suit [*hereinafter 'Buyer' for brevity*] and respondent no. 2 who is the defendant [*hereinafter 'Seller' for brevity unless context otherwise*]

A *requires*] entered into an agreement of sale in respect of suit schedule property on 10.12.1986. The sale consideration was fixed at Rs. 1,01,000/- per acre. An amount of Rs.40,000/- was paid as earnest money. As per the terms of the agreement one year was stipulated for completion of the sale by executing an absolute sale deed. Additionally the agreement stipulated that the seller has to conduct a survey for the identification of the boundaries of the suit schedule property. As the said condition was not complied with by the seller, the buyer issued a notice dated 26.09.1987 calling upon the seller to comply with the stipulated obligation without any further delay. Confronted by continuous denials by the seller, buyer having left with no option has filed the instant suit seeking specific performance of the agreement of sale dated 10.12.1986.

5. Trial court after a full fledged trial has decreed the suit for specific performance. On an appeal by the unsuccessful seller/defendant appellate court dismissed the appeal by confirming the judgment of the trial court. Both the courts concurrently found that the survey was not conducted by the seller as no material was placed in support of the same. Moreover, the statements of DW1 and DW2 were held to be unbelievable. Courts' below relied upon the fact that in CRP No. 2195 of 1989, the High Court has given a categorical finding that the property was not surveyed and the price was also not ascertained. As the aforesaid factual finding had become final, the trial court as well as the appellate court came to the conclusion that plaintiff/buyer seller/defendant failed to fulfill his part of the contract.

6. High Court in second appeal, while overturning the concurrent findings, set aside the judgment and decree of the court below. A perusal of the impugned judgment reveals that the High Court was persuaded by the fact that buyer was unable to prove by reliable oral and documentary evidence that the suit property was not measured and demarcated by the seller. Aggrieved by the aforesaid judgment of the High Court in second appeal, buyer is in appeal before this Court.

7. The Ld. Counsel, Mr. T. Harish Kumar, for the buyer submits that:

- i. The High Court in second appeal could not have reversed the findings of fact, as the same was beyond the scope of the second appeal under section 100 of the Code of Civil Procedure, 1908 [*hereinafter 'CPC' for brevity*].

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ii. The Agreement mandated seller to conduct survey and affix boundaries. Conducting the survey being a condition precedent for payment of the agreed consideration, non-fulfillment of such condition was a breach of the contract committed by the seller herself. A

iii. The seller has not adduced any documentary evidence to prove that the survey was conducted. B

iv. The perusal of plaint and the supporting affidavit by the buyer establishes that there was sufficient pleading and evidence on record to show that they were ready and willing to perform their part of the contract. C

8. *Per contra* Ld. Senior Counsel Ms. Indu Malhotra, appearing for the seller submits that-

i. The equitable remedy of specific performance should not be ordered by this court as readiness and willingness has not been pleaded or proved by the Petitioner. D

ii. The condition of measurement was not a condition precedent for the execution of the contract as the property was sufficiently identified and measured which is apparent from the schedule of property appended with the sale agreement. E

iii. The High Court has correctly relied upon the evidence of DW-1 and DW-2 which proves that a surveyor was appointed and accordingly, the land was surveyed.

iv. The buyer has not adduced any evidence to prove that he was having sufficient financial means to complete the sale transaction. F

9. The preliminary objection raised by the Ld. Counsel for buyer is that the High Court has exceeded its appellate jurisdiction in the second appeal under Section 100 of CPC, when it came to a different set of conclusion on facts, in utter disregard to the reasoning of the courts below. It is to be noted that the trial court and the lower appellate court concurrently found that the buyer was ready and willing to perform the contract which was apparent from both pleadings as well as oral and documentary evidence available on record. G

A 10. Before we dwell into this issue, whether the high court went
wrong in interfering with a question of fact in a second appeal it would
be necessary to look into certain clauses of the agreement in order to
effectively deal with this issue. The agreement stipulated Rs. 1,01,000/-
per acre as the sale consideration. A time period of one year was
B stipulated for buyer to execute the sale. Further it narrates that if the
seller commits any default or denies to execute the sale deed in favor of
buyer, then buyer shall have the right to remit the balance amount in the
court and go for compulsory registration, provided the buyer was ready
to pay the balance amount deducting the advance amount and ready to
execute the sale deed. It is to be noted that in such a case, the seller had
C agreed to bear the entire expense of litigation. Moreover in order to
convert the property into marketable plots, possession was also given to
the buyer from the date of contract.

 11. The seller had agreed for conducting a survey of the scheduled
property at their own cost and also agreed to demarcate the boundaries
D by affixing stones. Additionally the sale consideration was agreed to be
calculated according to the extent of land found in the survey. On the
other hand the buyer had agreed to pay the entire sale consideration
within six months from the date of the contract. It is to be noted that the
seller had agreed to rectify any hindrance which might occur in selling
E of the land other than those related to Government, Panchayat, and
Housing Board and to extend the period of the agreement on happening
of such hindrances. Moreover the schedule of the property mentions the
extent of property to be 1.87 $\frac{3}{4}$ acres.

 12. Perusal of various conditions stipulated in the agreement makes
it clear that the reciprocal promises were dependent on each other and
F must be determined on the true construction of the contract in the order
which the nature of transaction requires. The view taken by the High
Court, regarding the interpretation of the contract wherein the execution
of the contract was independent of the payment obligation, is erroneous
and cannot be sustained in the eyes of law as the contract needs to be
G read as whole and not in a piecemeal approach as undertaken by the
High Court. Therefore the buyer's payment obligation and the obligation
to execute the contract, was dependent upon the measurement to be
conducted by the seller.

 13. The factual aspect which was supposed to be considered was
H whether the survey was conducted by the seller or not. It is on record

that DW1 and DW2 have stated that the survey was conducted subsequent to the execution of the agreement, but no documents were marked on behalf of the seller evidencing the fact that survey was undertaken. When both the courts below took a view that evidence of the witness was not believable on detailed consideration of their cross examination and non availability of documentary evidence to prove that survey was conducted, then the High Court should not have interfered with such factual findings by taking into consideration the oral evidence of witnesses without there being any documentary evidence. The crucial fact that the survey was not conducted had attained finality by the earlier judgment of the High Court in CRP No. 2195 of 1989. Therefore, once trial court and first appellate court which are the fact finding courts have come to the specific conclusion that the plaintiff is entitled for specific performance of the agreement of sale, the High Court on re-appreciation of evidence could not have upset the factual findings in second appeal.

14. It was not appropriate for the high court to embark upon the task of re appreciation of evidence in the second appeal and disturb the concurrent findings of fact of the court below which are the fact finding courts. At this juncture for better appreciation we deem it appropriate to extract section 100 and 103 of CPC which reads as follows:

Section 100:

(1) Same as otherwise provided in the body of this court or by any other law for the time being in force, an appeal shall lie to high court from every decree passed in appeal by any court subordinate to the high court. If the high court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex-part.

(3) In an appeal under this section the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the high court is satisfied that the substantial question of law is involved in any case it shall formulate that question.

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

A **Section 103:**

“Power of high court to determine issues of fact” In any second appeal the high court may, if the evidence on record is sufficient, determine any issue necessary for the disposal of the appeal.

B (a) Which has not been determined by the lower appellate court or both by the court of first instance and the lower appellate court

Or

C (b) Which has been wrongly determined by such court by reason for decision on such question of law as referred in section 100.

D 15. A clear reading of section 100 and 103 of the CPC envisages that a burden is placed upon the appellant to state in the memorandum of grounds of appeal the substantial question of law that is involved in the appeal, then the high court being satisfied that such a substantial question of law arises for its consideration has to formulate the questions of law and decide the appeal. Hence a prerequisite for entertaining a Second appeal is a substantial question of law involved in the case which has to be adjudicated by the high court. It is the intention of the Legislature to limit the scope of second appeal only when a substantial question of law is involved and the amendment made to section 100 makes the legislative intent more clear that it never wanted the High Court to be a fact finding court. However it is not an absolute rule that high court cannot interfere in a second appeal on a question of fact, Section 103 of the CPC enables the High Court to consider the evidence when the same has been wrongly determined by the courts below on which a substantial question of law arises as referred to in Section 100. When appreciation of evidence suffers from material irregularities and when there is perversity in the findings of the court which are not based on any material, court is empowered to interfere on a question of fact as well. Unless and until there is absolute perversity, it would not be appropriate for the High Courts to interfere in a question of fact just because two views are possible, in such circumstances the High Courts should restrain itself from exercising the jurisdiction on a question of fact.

G 16. When the intention of the legislature is so clear the courts have no power to enlarge the scope of Section 100 for whatsoever

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reasons. Justice has to be administered in accordance with law. In the case on hand the High Court has exceeded its jurisdiction by reversing the well considered judgment of the courts below which is based on cogent reasoning. The learned judge ought not to have entered the arena of re appreciation of the evidence, hence the whole exercise done by the high court is beyond the scope and jurisdiction conferred under section 100 of CPC.

17. Although this specific ground is sufficient to set aside the judgment and decree of the High Court, but we tend to examine the case on other issues in view of the elaborate submissions made by the respective counsels. Now we shall embark upon the issue, whether the time is the essence of the contract.

18. We are mindful of the fact that the agreement contained a provision stipulating time for payment and completion of the contract. It is to be noted that Clause 3 of the agreement makes execution of the contract by the buyer contingent on the payment which ultimately hinges on the performance of seller's obligation to conduct survey and affix boundaries. Additionally the conduct of the seller especially taking into consideration the reply notice, dated 05.10.1987, by the seller wherein they admit that the 6 month time frame was not binding as the payment obligation may be performed by the end of one year i.e., before completion of the sale. Further by the aforesaid reply notice the sellers were agreeable to accept delayed payment subject to payment of extra interest clearly indicates that the time was not the essence of the contract. Moreover the sellers were unwilling to perform their part of the contract in any case.

19. As per the law laid down by this Court in respect of sale of immovable property there is no presumption as to time being the essence of the contract. Even when there is no stipulation courts may infer that it has to be performed within a reasonable time taking into consideration the terms of the contract, the nature of the property and other surrounding circumstances. We feel that this proposition needs to be revisited in an appropriate case, as the value of an immovable property rate is fluctuating in recent times.

20. At the cost of repetition, it should be noted that, whether the time is an essence of the contract would depend on facts and circumstances of each case. In this case, after taking into consideration

A the terms of the contract, the conduct of the parties and other material placed before us, the contention of the seller that the time is the essence of the contract is negated.

21. The Ld. Senior Counsel appearing for seller contends that the Specific performance being an equitable remedy, condition precedent of
B 'readiness and willingness' has to be specifically pleaded and proved by the buyer for enforcement of the specific performance [*refer K. Prakash v. B. R. Sampath Kumar*, 2015 (1) SCC 597]. She further submits that there are only vague averments in the pleading that the buyer was ready and willing to perform his part of the contract. There is no dispute with regard to the proposition that in a suit for specific performance burden is
C always on the plaintiff to aver and prove that they are always ready and willing to perform their part of the contract throughout. Section 16 (C) of the specific relief act mandates that not only there be a plea of readiness and willingness but it also has to be proved by acceptable evidence. Requirement of fulfilling the conditions under section 16 (C) of the Specific
D Relief Act, 1963, is a condition precedent for obtaining the relief of specific performance. Whereas in the instant case the plaint as well as the documents available on record goes to show that it was specifically pleaded that buyer was ready and willing to perform his part of the contract. Additionally the evidence of PW1 also proves readiness and willingness on the part of the buyer. In light of the aforesaid discussion,
E the contention of the Ld. Senior counsel appearing on behalf of the seller is repelled as being meritless.

22. Lastly, it is vehemently contended by the Ld. Senior counsel appearing on behalf of the seller that this Court should not exercise its
F discretion to grant specific performance in favor of the buyer, as the same would be inequitable for the seller. It was submitted that the price of the property has increased manifold and further during the pendency of litigation, the seller has executed another contract of sale with another person. There is no dispute that the execution of the contract was made subject to satisfactory survey which is a binding obligation upon the seller
G and he has failed to perform his part of the obligation to the satisfaction of the buyer. Although the measurement was mentioned in the sale deed, but from perusal of other clauses in the agreement would reveal that the said measurement of 1.87 $\frac{3}{4}$ Acres was a tentative figure mentioned under the agreement.

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23. The buyer has taken prompt steps to file a suit for specific performance as soon as the execution of the sale was stalled by the seller. From this discussion, it is clear that the buyer has always been ready and willing to perform his part of the contract at all stages. Moreover it is the seller who had always been trying to wriggle out of the contract. Now the seller cannot take advantage of their own wrong and then plead that the grant of decree of specific performance would be inequitable. Escalation of prices cannot be a ground for denying the relief of specific performance. Specific performance is an equitable relief and granting the relief is the discretion of the court. The discretion has to be exercised by the court judicially and within the settled principles of law. Absolutely there is no illegality or infirmity in the judgments of the courts below which has judicially exercised its discretion and the High Court ought not to have interfered with the same.

24. In light of the above discussion, while allowing this appeal, we set aside the judgment of the High Court and restore back the judgment of the trial court. There will be no order as to costs.