P. Purushottam Reddy And Anr. vs Pratap Steels Ltd. on 25 January, 2002

Equivalent citations: AIR2002SC771, 2002(2)ALT14(SC), 2002(4)AWC2364(SC), JT2002(5)SC5, (2002)2MLJ99(SC), 2002(1)SCALE447, (2002)2SCC686, [2002]1SCR586, AIR 2002 SUPREME COURT 771, 2002 AIR SCW 417, 2003 (1) ALL CJ 459, 2002 (3) SRJ 523, 2002 (1) SLT 552, 2002 (1) SCALE 447, 2002 (2) SCC 686, 2002 SCFBRC 227, 2003 ALL CJ 1 459, (2002) 5 JT 5 (SC), (2002) 1 ALL RENTCAS 376, (2002) 2 MAD LJ 99, (2002) 4 MAD LW 816, (2002) 2 MAHLR 650, (2002) 1 SCJ 458, (2002) 1 SUPREME 357, (2002) 2 RECCIVR 70, (2002) 2 ICC 315, (2002) 1 SCALE 447, (2002) 1 UC 517, (2002) 48 ALL LR 319, (2002) 2 ANDH LT 14, (2002) 58 ALL WC 2364, (2002) 2 CIVLJ 505

Author: R.C. Lahoti

Bench: R.C. Lahoti, Brijesh Kumar

JUDGMENT

R.C. Lahoti, J.

1. Leave granted.

2. An introductory statement of bare necessary facts would suffice for the purpose of this order. On 31.10.1987, a contract for sale of immoveable property was entered into between the parties whereby the appellant agreed to sell the suit property consisting of a building and the site on which the building stands, for a consideration of Rs. 40,25,000/-. An amount of Rs. 8,00,000/- was paid by way of advance or earnest money: the balance consideration of Rs. 32,25,000/- was to be paid simultaneously with the execution and registration of sale deed. This contract was in supersession of an earlier contract dated 22.9.1986 which had lapsed. The vendor had agreed to obtain the requisite permission from the Urban Land Ceiling Authority before 30th June, 1988. The time so appointed could be extended by mutual consent of the parties. It was expressly agreed upon between the parties that it the requisite exemption or permission under the Urban Land (Ceiling and Regulation) Act, 1976 ('ULCRA', for short) was not forthcoming by 30th June, 1988 or within such extended period as may be mutually agreed to, then the contract was to become inoperative and unenforceable in which event the only obligation surviving on the vendor was to refund the earnest money. The vendor could return the earnest money with three months thereafter and if for any reason whatsoever the amount could not be so repaid then the amount was to carry interest to the

rate of 12 per cent per annum. It appears that proceedings for declaration that the suit property was within the ceiling limits as appointed by the ULCRA were already pending before the Competent Authority at a point of time when the agreement was entered into between the parties. However the decision was not forthcoming within the period of six months from the date of the agreement. On 1.12.1988 the appellant wrote a letter to respondent informing that the agreement to sell stands cancelled as per the terms of the agreement for failure of the requisite clearance from the competent authority (Urban Land Ceiling) forthcoming. With the letter the appellant tendered an amount of Rs. 2,00,000/- through two cheques enclosed with the letter, requesting for the agreement being returned duly cancelled to the vendor and assuring the payment of the balance amount of the earnest money before the end of December, 1988. This letter erupted a conflict between the parties leading to exchange of legal notices and filing by the respondent of a suit for specific performance of agreement to sell on 29.6.1989. On 12.3.1992 the Trial Court decreed the suit against which the appellant filed First Appeal before the High Court. On 19.8.1999 the High Court has allowed the appeal, set aside the judgment and decree of the Trial Court and remanded the case for holding additional trial on the three additional issues framed by the High Court and thereafter to decide the case afresh.

2. A perusal of the order of remand made by the High Court shows that on behalf of the appellants six contentions were raised: (i) that the suit was not maintainable as the pleadings did not conform to the requirements of Forms 47 and 48 of Appendix A of the Code of Civil Procedure: (ii) that there was no pleading in the plaint that the plaintiff-respondent had always been ready and willing to perform his part of the contract and continued to be so; and on the contrary the conduct of the respondent showed the absence of such readiness and willingness; (iii) that the agreement became inoperative and unenforceable on 30th June, 1988 and therefore was rendered incapable of specific performance: (iv) that the grant of relief of specific performance was discretionary, which the facts and circumstances of the case did not permit being exercised in favour of the plaintiff-respondent: (v) that the respondent had not approached the Court with clean hands and therefore was not entitled to the discretionary and equitable relief of specific performance; and (vi) that the respondent was not financially sound and therefore was not in a position to perform his part of the contract.

3. Before we may proceed to notice how the High Court proceeded to dispose of the appeal and the reasons which persuaded the High Court to make a remand, we may place on record two subsequent events which have occurred. Firstly, the Competent Authority (Urban Land Ceiling) had passed an order on 22.12.1989 declaring the land held by the appellants, including the property agreed to be sold, not to be in excess of ceiling limits which order though passed on 22.12.1989 was according to the appellants, communicated to them sometime in May 1992, that is, subsequent to the decision of the suit. In view of this order the need for obtaining clearance from the Competent Authority (Urban Land Ceiling) was obtained. Secondly, the respondent which is a duly incorporated company running an industry fell sick. Proceedings under Sick Industrial Companies (Special Provisions) Act, 1985 were initiated and the Board of Industrial and Financial Reconstruction ('BIFR', for by its order dated 14.10.1996 declared the respondent-company as a sick company directing the promoters to furnish a proposal for revival of the company. During the course of hearing in this Court we were informed at the Bar that the order made by BIFR has been put in issue by the respondent by filing a

writ petition in the High Court of Delhi and it is pending sub-judice.

4. On an analysis of several recitals of the agreement dated 31.10.1987 and of the law the High Court concluded that time was not the essence of the contract and therefore the factum of not obtaining the clearance under the ULCRA by the appellant within the time appointed did not render the agreement inoperative and unenforceable. The High Court also held that the six months time appointed by the agreement could not be said to have been extended by acquiescence and implied consent on the part of the appellant. The High Court then proceeded to examine the crucial question whether the respondent was ready and willing to perform his part of the contract and the pleading in that regard as contained in the plaint. The High Court noticed that there was no specific issue framed by the Trial Court as to such a plea. The High Court also noticed that in the written statement there was no plea taken that the suit for specific performance was not maintainable for non-compliance with Forms 47 and 48 of Appendix A of the Code of Civil Procedure. Having stated so the High Court felt the need of framing three additional issues, viz, (i) whether the suit is maintainable (ii) whether the plaintiff is ready and willing to perform his part of the contract, and (iii) whether the plaintiff is entitled for specific relief of the contract. Having formed that opinion the High Court set aside the judgment and decree of the Trial Court framed the three issues as abovesaid allowed liberty to the parties for adducing in the trial court such evidence as was necessary on the abovesaid issues without amending the pleadings and sent the matter back to the Trial Court. The High Court also left it open to the Trial Court to take into account the subsequent events.

5. Subsequent to the passing of the decree the judgment-debtor had moved an application under Section 28 of the Specific Relief Act, 1963 to have the contract rescinded for failure of the decree-holder to comply with his obligations under the decree specially the one for payment of the purchase money. The application was rejected by the Trial Court. Feeling aggrieved by such order the appellant had filed a civil revision petition which was taken up for hearing along with the First Appeal. Having disposed of the First Appeal in the manner and in the terms as already stated the Trial Court directed the pleas raised in such application also to be decided along with the suit.

6. We have heard the learned counsel for the parties and we are satisfied that the approach adopted by the High Court is unsustainable in law and therefore the order of remand cannot also be sustained. We briefly set out the reasons for forming such opinion in the succeeding paragraphs.

7. For the purpose of deciding the question whether or not time was the essence of the contract the appellant before the High Court relied on K.S. Vidyanandam and Ors. v. Vairavan - which is a two-Judge Bench decision and a few other decided cases. On behalf of the plaintiff-respondent reliance was placed on Chandnee Widya Vati Madden v. C.L. Katial and Ors. - , which is a three-Judge Bench decision. The High Court noticed the facts of both these decisions, and having also dealt with the law laid down therein felt inclined to decide the case in the light of the law laid down in Chandnee Widya Vati's case because the decision in Chandnee Widya Vati's case was as stated by the High Court, "the earlier larger Bench judgment". The attention of the High Court was not invited to a Constitution Bench decision in Chand Rani (Dead) by Lrs. v. Kamal Rank (Dead) by Lrs.- and therefore the law laid down by the Constitution Bench has escaped the attention of the

High Court. The issue as to whether time is the essence of the contract in contracts for sale of immoveable property came up for the consideration of the Constitution Bench and it was held:-

> "It is a well-settled principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of the contract to sell real estate law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language."

xxx xxx xxx ".....in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract the Court may infer that it is to be performed in a reasonable time if the conditions are:

> 1. From the express terms of the contract.
>
> 2. from the nature of the property; and
>
> 3. from the surrounding circumstances, for example: the object of making the contract."

8. Vide para 29, the Constitution Bench on an analysis of evidence, concluded that though as a general proposition of law time is not the essence of the contract in the case of sale immoveable property yet the parties intended to make time as the essence under Clause (1) of the suit agreement. This Constitution Bench decision in Chand Rani's case was placed before and followed by the two-Judge Bench deciding Vidyanadam's case. The High Court ought to have noticed the Constitution Bench decision, while dealing with the facts and circumstances of the present case as emerging from evidence and then decided the case in the light of the law handed down by the Constitution Bench.

9. The next question to be examined is the legality and propriety of the order of remand made by the High Court. Prior to the insertion of Rule 23A in Order 41 of the Code of Civil Procedure by CPC Amendment Act 1976, there were only two provisions contemplating remand by a court of appeal in Order 41 of CPC. Rule 23 applies when the trial court disposes of the entire suit by recording its findings on a preliminary issue without deciding other issues and the finding on preliminary issue is reversed in appeal. Rule 25 applies when the appellate court notices an omission on the part of the trial court to frame or try any issue or to determine any question of fact which in the opinion of the appellate court was essential to the right decision of the suit upon the merits. However, the remand contemplated by Rule 25 is a limited remand in as much as the subordinate court can try only such issues as are referred to it for trial and having done so the evidence recorded together with findings

and reasons therefore of the trial court, are required to be returned to the appellate court. However, still it was a settled position of law before 1976 Amendment that the court, in an appropriate case could exercise its inherent jurisdiction under Section 151 of the CPC to order a remand it such a remand was considered pre-eminently necessary ex debito justitiae, though not covered by any specific provision of Order 11 of the CPC. In cases where additional evidence is required to be taken in the event of any one of the clause of Sub-rule (1) of Rule 27 being attracted such additional evidence oral or documentary, is allowed to be produced either before the appellate court itself or by directing any court subordinate to the appellate court to receive such evidence and send it to the appellate court. In 1976, Rule 23A has been inserted in Order 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23A as it is under Rule 23. After the amendment all the cases of wholesale remand are covered by Rule 23 and 23A. In view of the express provisions of these rules, the High Court cannot have recourse to its inherent powers to make a remand because as held in Mahendra v. Sushila (AIR 1965 SC 365 at p. 399), it is well settled that inherent powers can be availed of ex debito justitiae only in the absence of express provisions in the Code. It is only in exceptional cases where the court may now exercise the power of remand de hors the Rules 23 and 23A.

To wit the superior court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 11 Rule 31 of the CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for re-writing the judgment so as to protect valuable rights of the parties. An appellate court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25 of the CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore must be avoided.

10. In the case at hand, the trial court did not dispose of the suit upon a preliminary point. The suit was decided by recording findings on all the issues. By its appellate judgment under appeal herein, the High Court has recorded its finding on some of the issues, not preliminary, and then framed three additional issues leaving them to be tried and decided by the trial court. It is not a case where a retrial is considered necessary Neither Rule 23 nor Rule 23A of Order 41 applies. None of the conditions contemplated by Rule 27 exists so as to justify production of additional evidence by either party under that Rule.

The validity of remand has to be tested by reference to Rule 25. So far as the objection as to maintainability of the suit for failure of the plaint to satisfy the requirement of Forms 47 and 48 of Appendix A of CPC is concerned, the High Court has itself found that there was no specific plea taken in the written statement. The question of framing an issue did not, therefore, arise. However, the plea was raised on behalf of the defendants purely as a question of law which, in their submission, strikes at the very root of the right of the plaintiff to maintain the suit in the form in which it was filed and so the plea was permitted to be urged. So far as the plea as to readiness and willingness by reference to Clause (c) of Section 16 of the Specific Relief Act, 1963 is concerned, the pleadings are there as they were and the question of improving upon the pleadings does not arise in

as much as neither any of the parties made a prayer for amendment in the pleadings nor has the High Court allowed such a liberty. It is true that a specific issue was not framed by the trial court. Nevertheless the parties and the trial court were very much alive to the issue whether Section 16(c) of the Specific Relief Act was complied with or not and the contentions advanced by the parties in this regard were also adjudicated upon. The High Court was to examine whether such finding of the trial court was sustainable or not - In law and on facts. Even otherwise the question could have been gone into by the High Court and a finding could have been recorded on the available material in as much as the High Court being the court of first appeal all the questions fact questions of fact and law arising in the case were open before it for consideration and decision.

11. Assuming that there was any deficiency in the pleadings and also an omission on the part of the trial court to frame a specific issue, the present one is a case where the applicability of the law laid down by this court in Nagubai Ammal and Ors. v. B. Shama Rao and Ors., was squarely attracted. In Nagubai case this court was called upon to examine if the plea of lis pendens was not open to the plaintiff on the ground that it had not been raised in the pleadings. Neither the plaint nor the reply statement of the plaintiff contained any averment that the sale was affected by the rule of lis pendens. There was no specific issue directed to that question. However, evidence was adduced by the plaintiff on the plea of lis pendens and not objected to by the defendants. The question was argued an tested by taking into consideration the evidence that the proceedings were collusive in character with a view to avoid operation of Section 52 of the T.P. Act. This court felt satisfied that the defendants went to trial with full knowledge that the question of lis pendens was in issue, had ample opportunity to adduce then evidence thereon, and fully availed themselves of the opportunity. This court formed the opinion that in the circumstances of the case, absence of a specific pleading on the question was a mere irregularity which resulted in no prejudice to the defendants. After having noticed the rule of pleadings as applicable to civil law that "no amount of evidence can be looked into upon a plea which was never put toward", this court held. "The true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present in the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon and adduce evidence relating thereto".

12. In the case before us it was not the grievance raised by any of the parties before the High Court that there was any failure on the part of the trial court in discharging its obligation of framing issues. Nobody complained of prejudice at the trial for want of any issue or a specific issue. It was nobody's case that any evidence, oral or documentary, was excluded or not allowed to be taken on record by the trial court. The very fact that the defendant-appellants have come up to this court laying challenge to the order of remand shows that the appellants are not interested in remand and do not want any additional issue to be framed or to adduce any further evidence. One of the pleas taken by the appellants in the memo of special leave petition is that the High Court had erred in remanding the matter back for fresh trial and the High Court had failed to appreciate that there was sufficient material on record to show absence of readiness and willingness on the part of the plaintiff to perform its part of the contract. On the other hand, after the passing of the impugned order of remand the plaintiff-respondent has also through his counsel, filed a memo before the trial court on

18.2.2000 submitting that on the additional issues framed pursuant to the direction of the High Court, the evidence on behalf of the plaintiff was already on record and the plaintiff would lead rebuttal evidence only if any evidence only if any evidence was adduced by the defendants. Thus the plaintiff is also not desirous of adducing any additional evidence on the issues.

13. The subsequent events which are material and ought to be noticed by the appellate court are only two i.e. (i) communication of the order of the competent authority (Urban Land Ceiling) holding the land of the appellants to be within ceiling limits, and (ii) order of DIFR holding the plaintiff-respondent to be a sick company. These two events are subject matter of documentary evidence and almost admitted between the parties. The High Court can be requested to take note of such subsequent events by bringing the relevant documents on record which being public documents would not require any formal proof. The High Court may take note of such subsequent events and test the validity of judgment under appeal by reference to those events also or mould the relief suitably and as may be considered necessary.

14. For the foregoing reasons the appeals are allowed. The impugned order of remand made by the High Court is set aside. The first appeal and the civil revision petition shall stand restored on the file of the High Court and shall be decided afresh after affording the parties an opportunity of being heard and consistently with the observation made hereinabove. No order as to the costs.

15. Before parting, we would like to make it clear that we have not expressed any opinion on the merits of any of the issues arising for decision in the suit or appeal and whatever we have stated herein is only for the purpose of demonstrating that no remand was required. So also although the order of remand has been set aside and the parties too are not desirous of adducing any evidence excepting for placing on record the relevant requisite documents as to the two admitted subsequent events yet we should not be understood as depriving the High Court of its power to require any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause within the meaning of Clause (b) of Sub-rule (1) of Rule 27 of Order 41. That power inheres in the court and that court alone which is hearing the appeal. It is the requirement of court (and not of any of the parties) and the conscience of the court feeling inhibited in satisfactory disposal of lis which rule the exercise of this power.