

Manta Ram Vs. Ram Babu

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Court : Delhi

Decided On : Aug-25-1995

Reported in : 60(1995)DLT386

Judge : Jaspal Singh, J.

Acts : Evidence Act - Sections 32 and 33

Appeal No. : Suit No. 529 of 1980

Appellant : Manta Ram

Respondent : Ram Babu

Advocate for Pet/Ap. : V.K. Srivastava and; R.S. Kela, Advs

Judgement :

Jaspal Singh, J.

(1) In North Delhi there is a sprawling locality known as Paharganj where there is a place known by the name of Laddoo Ghati. It is interspersed with residential houses as well as commercial establishments. In that Laddoo Ghati is a shop bearing private number 93 Municipal No. 4804. Ram Babu owns that shop. Not long time back he used to sit there and prepare and sell Indian sweet meats. As his business did not flourish he decided to wind it up and to sell away the shop. On June 4, 1980 he entered into an agreement of sale of the shop with Manta Ram.

The sale consideration was fixed at Rs. 1,25,000.00 out of which a sum of Rs. 5,000.00 in cash was paid towards advance. The sale deed was to be executed by the 5th of July, 1980 on which date he was to receive the balance consideration of Rs. 1,20,000 .00 and to deliver vacant possession of the shop. That shop is now at the center-storm of this suit instituted by Manta Ram against Ram Babu for specific performance of the said agreement of sale. He alleges that he was always ready and willing to perform his part of the agreement and that it was Ram Babu who had frustrated the fructification of the agreement into a sale.

(2) Ram Babu, however, states that Manta Ram was in fact never ready and willing to perform his part of the agreement and much before July 5, 1980 he had told the property dealer, through whose good offices the agreement of sale had been executed, that sale price being too high he would like to wriggle out of the transaction. In short thus as per Ram Babu if the agreement has not led to the final execution of a sale deed it is Manta Ram who is to be blamed for and not he and that Realizing that Manta Ram was not ready and willing to perform his part of the agreement and the shop was let out and later a fresh agreement of sale was entered into with a third person.

(3) The summon bonus of the pleadings being as noticed above it is time to refer to the issues framed. They are as under:

'1.Has plaintiff been ready and willing to perform his part of the contract?

2.HASdefendant been ready and willing to perform his part of the contract?

3.HASdefendant let out the property in dispute after the execution of the agreement to sell?

If so to what effect?

4.Relief.'

Issues No. 1 & 2

(4) Two dates need to be remembered. They are June 4,1980 and July 5,1980. Whereas the Agreement of sale (Ex P-1) was entered into on June 4, 1980, the

last date for execution of the sale deed was July 5,1980 when the balance payment of Rs. 1,20,000.00 was also to be made by the plaintiff. Did the plaintiff have the means to pay that amount? To my mind, he had. The plaintiff says (Public Witness -9) he had a Current Account in the Grindley's Bank, Cannaught Place in the name of his firm and his wife had hers in Central Bank, Pahar Ganj. He had over Rs. 75,000.00 in his Current Account (Ex Public Witness 3/1) and a Fixed Deposit of Rs. 50,000.00 (EX Public Witness 3/2) and significantly, it is nowhere asserted in the cross-examination of the plaintiff that his firm did not have the money in the Banks or that his wife too had no such deposit. In fact even in the written statement it is nowhere pleaded that the plaintiff did not have the required money with him. Even during arguments it was not so suggested.

(5) Did the plaintiff display willingness to perform his part of the contract? Surely! He made efforts to get in touch with the defendant. He went to his shop and finding it closer, he even went to his house not once but twice but the defendant avoided him and on all those occasions he carried with him the cheque books (See PW-4 Bachan Singh, PW-6 Shyam Behari Verma and PW-9 Manta Ram). He even gave a legal notice (Ex.PW 9 /1) which the defendant refused to accept (See envelop Ex.PW 9/5). He even pasted the copies of that notice at the shop and the house of the defendant (See PW-9, PW-5, PW-6). He sent telegraphic notices too (Ex.PW 9/ 6 and Public Witness 9/7) and got notices published in Hindi Hindustan and in Daily Pratap (Ex.PW 1/1 and Public Witness 2/3) and let us keep it in mind that these efforts to contact the defendant and to cajole him to honour the agreement through various notices were made before the due date.

(6) It was contended by Mr. Kela on behalf of the defendant that the plaintiff had contacted the property dealer and had told him that the sale price being too high, he (the plaintiff) wanted to wriggle out of the arrangement. In support my attention was drawn not only to the statement of the defendant but also to the affidavit (Ex. Dw 1 /1) alleged to have been sworn by the said property dealer who carried the name of Gian Chand and who, unfortunately, is no more in his mortal frame.

(7) The affidavit Ex.DW 1 /1 was verified on October 27,1980 and was attested by the Oath Commissioner on October 30,1980. It appears that the deponent was

identified before the Oath Commissioner by one Mr. I.D.Gupta, Advocate.

(8) The affidavit shows that the plaintiff had approached the deponent sometime in the third week of June, 1980 and had expressed 'his desire to cancel the contract' besides requesting him 'to prevail upon Shri Ram Babu (Defendant) to refund to him the earnest money of Rs. 5000' and that the deponent had expressed his inability 'to accede (sic) to the request of Shri Mamta Ram' (plaintiff)

(9) As per Mr. Kela, the affidavit was enough in itself to demolish the case of the plaintiff. Shri Srivastav, appearing for the plaintiff, on the other hand, debunked the affidavit as a forgery or in any case a document containing lies and being unworthy of reliance.

(10) As already noticed, Gian Chand is dead. He could not thus be subjected to the acid test of cross-examination. The Madras High Court has held in Dorraishwami Ayyar v. Balasundaram Ayyar Air 1927 Mad 507 that the affidavit of a person who is dead and who is not subjected to cross-examination is not evidence either under Section 32 or Section 33 of the Evidence Act. Besides, it is significant to note that neither the Oath Commissioner who attested the affidavit nor the Advocate who identified him before the Oath Commissioner have been examined. It is in evidence that Gian Chand was an illiterate person and could only put his signatures. The affidavit is in English. It contains no certification that it was read over and explained to him in vernacular. Even the typist who could throw some light on it has not been examined.

(11) True, the defendant states that he was present when the affidavit was got typed in the Tis Hazari Courts premises and was present even when it was got attested, but then, even he does not state anywhere that the matter contained in the affidavit was prepared on instructions of the deponent or that the same had been read over and explained to him or that he had attested the same after accepting the contents to be correct.

(12) It was argued by Mr. Kela and with great vehemence that as the affidavit contains a certificate from the Oath Commissioner, it must be taken that the affidavit was read over and explained to the deponent and that he had signed and

verified it only after having accepted its contents to be correct.

(13) The certificate of the Oath Commissioner which appears on the affidavit is a blurred stamp-pad impression with a few blanks filled in hand but surely not by the Oath Commissioner himself as would be apparent to the naked eye. It is thus a mechanical certificate showing lack of application of mind. Anyhow the legible part of the Certificate runs as under:-

'CERTIFIED THAT The Deponent Shri Gyan Chand (not legible but probably s/o) Lal Ch (not legible) r/o... (not legible) (Not legible but probably 'identified') by Shri D.Gupta(Not legible) solemnly affirmed before me at Delhi (Not legible but probably 'on') 30. x .80(Not legible, but probably 'that the') contents of the affidavit which..... (not legible but probably 'have') been read over and explained to him... (not legible but probably 'are') true and correct to his knowledge. sd/- Oath Commissioner R.N.Singhal'

(The portions underlined are handwritten.)

(14) It needs no reminding that the deponent was an illiterate person who could put his signatures only and that too in Urdu. In such a situation and more so when the affidavit is in English, it was incumbent upon the Oath Commissioner to certify that the contents of the affidavit had been explained to the deponent in the language known to and understood by him and vouched by him to be correct. While the Supreme Court in Krishan Chander Nayar v. Chairman, Central Tractor Organisation : (1963)ILLJ661SC has emphasised the responsibility for making precise and accurate statements in affidavit, in M. Veerabhadra Rao v. Tek Chand : [1985]1SCR1003 it has been observed that the part or role assigned to the person entitled to administer oath is no less sacrosanct. Unfortunately, in the present case, the Oath Commissioner seems to have not kept it in mind.

(15) And, while I am on it, reference may be made to the Delhi High Court Rules Chapter xviii Rule 17 which requires an Oath Commissioner in a case like the present to translate and interpret the contents of the affidavit to the deponent and then to certify the said fact separately under his signature. We find nothing of the sort in the case of affidavit Ex.DW 1/1.

(16) I do feel that even otherwise it is difficult to believe that the defendant was present when the affidavit was got typed or got attested. His name does not figure anywhere. He does not know the typist who typed it. He does not know the Advocate who identified the deponent and does not even know the name of the Oath Commissioner who did the job of attestation. And, above all, if the affidavit was verified on October 27 at Tis Hazari Courts, why was it not attested on the same day? Why go again to the Tis Hazari Courts on the 30th to get it attested? Significantly the defendant nowhere states that the deponent had signed in the presence of the Oath Commissioner. Since the verification is of 27th October it has to be taken that it was signed and verified on that very day. If so, the attestation on the 30th without insisting upon the deponent to sign again, makes the whole affair smell rat.

(17) Of course, the defendant has examined the son of Cyan Chand. He does not say that he can identify the signatures of his father but says nothing beyond it. He does not say that he had seen his father writing or signing. He does not say he is conversant with his writing and signatures. He is not even possessed of any document signed by his father and to crown it all he was doubtful as to whether the signatures at Mark C in Ex. Dw 1/1 were of his father or not.

(18) Besides all this, there are other circumstances also which need to be noticed.

(19) The defendant says as DW-1 that he had come to know about what had transpired between the plaintiff and Cyan Chand only after he had received summons in this suit. The suit was instituted on July 14, 1980 and on July 15, 1980 summons were ordered to be issued for 26.8.1980. It means that Cyan Chand had told about his talks with the plaintiff much after July 15, 1980. However, at another place the defendant wants to make us believe that he had been told about the talk between the plaintiff and Cyan Chand much before the issuance of notice Ex. PW-9/DX1 to the plaintiff and that before issuing that notice he had briefed his lawyer about it. The notice (Ex. Public Witness 9/DX1) is dated July 7, 1980. Thus, if this version is to be believed he knew about the talks much before the service of summons on him. Besides this material contradiction, there are two other circumstances which need to be re-emphasised. First, the keenness of the plaintiff

to make the agreement bear fruit and second, the institution of this suit within seven days of the expiry of the date fixed for execution of the sale deed.

(20) For what has been discussed above Issue No. 1 stands proved while issue No. 2 goes against the defendant. Issue No. 3

(21) The defendant's case is that the shop in question was let out by him to one Chothu Ram on July 8, 1980, that is, much after the execution of the Agreement of sale with the plaintiff. He admits that he himself was in physical possession of the shop at the time of execution of the said Agreement and that his physical possession had continued till July 8, 1980.

(22) The plaintiff claims that the plea of letting is sham and I do feel that there is substance in it. Significantly, the defendant has not examined the said Chothu Ram. Though the plaintiff claims that he had obtained Rs. 10,000.00 from him as advance, strongly that amount was not deposited anywhere and there is no document to prove the receipt of that amount. There is no rent note also and no reason is given as to why it was not executed. And, then the haste in creation of tenancy and the timing are also not without significance. Admittedly till 7th of July, 1980 the defendant had no mind to let out the shop. He decided to let and did allegedly let out the shop on 8th of July. What a transformation in less than 24 hours? And, add to it the statement of the defendant that he had 'no particular reason for such a hurry'. It all appears so unreal.

(23) True, the defendant has placed on the record counterfoils of rent receipts. However, no effort was made to summon the rent receipts. We do not know who is the author of these counter foils. They all appear, even to the naked eye, as having been prepared with the same pen and same ink.

(24) It may not be out of place to mention that the defendant has also come up with the plea that he has entered into yet another agreement of sale with one Jagat Parsad Nand. Significantly that person has not been examined and agreement alleged to have been entered into with him has also not seen the light of the day. The sale consideration was allegedly Rs. 45,000.00 as against the price of Rs. 1,25,000/- settled with the plaintiff. On the face of it the transaction

appears to be tainted and probably that is the reason why, during arguments, Mr. Kela avoided saying anything on the alleged transaction. However, what I am trying to emphasise is that here is a person who has made every effort to thwart the transaction and that this further takes away the sting from his case.

(25) I am not inclined, for the reasons recorded above, to rely upon the evidence with regard to the alleged tenancy. To me it appears to be a made up story or in any case a sham transaction to somehow create problems for the plaintiff.

(26) Even if it is assumed that tenancy was created on July 8 and Chothu Lal or Chothu Ram is in possession of the shop as its tenant, since the tenancy was created after the execution of the Agreement of Sale and obviously for ulterior reasons, it would not come in the way of specific performance of the contract and all its terms including one regarding delivery of possession, I need say no more on the issue.

(27) In view of my findings on the issues I pass a decree, with costs, for specific performance of the agreement to sell dated 4.6.1980 directing the defendant to execute and get registered sale deed in his favor on receipt of balance sale consideration of Rs. 1,20,000.00 with respect to Shop No. 4804, (private No. 93) measuring 25 square yards situated in Ladoo Ghati, Paharganj, New Delhi after obtaining the necessary permissions as required under the law and to comply with the other terms of the agreement including that of delivery of possession.

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