

**Mani Vs. Batcha Sahib and 2 Others**

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**Court :** Chennai

**Decided On :** Sep-20-2000

**Reported in :** 2000(4)CTC329

**Judge :** M. Karpagavinayagam, J.

**Acts :** [Code of Civil Procedure \(CPC\), 1908](#) -- Sections 100 -- Order 41, Rule 33; [Specific Relief Act, 1963](#) -- Sections 16 and 17; [Evidence Act, 1872](#) -- Sections 101 to 104

**Appeal No. :** S.A.No. 946 of 1999 and C.M.P.No. 9660 of 1999

**Appellant :** Mani

**Respondent :** Batcha Sahib and 2 Others

**Advocate for Def. :** Mr. V. Raghavachari, Adv.

**Advocate for Pet/Ap. :** Mr. R. Subramanian, Adv.

**Judgement :**

ORDER

1. Mani, the third defendant in the suit is the appellant herein.

2. Batcha Sahib, the plaintiff, the first respondent herein filed a suit in O.S.No.721 of 1987 on the file of District Munsif, Tirukoilur against Palanivelu and Anjalai Ammal, the defendants 1 and 2 and also against the appellant/third defendant for

specific performance to execute the sale deed as per the sale agreement dated 21.6.1985 and for mesne profits. The respondents 2 and 3, the defendants 1 and 2 filed a written statement and contested the suit denying the execution of the said sale agreement. The appellant/third defendant also filed a separate written statement contending that he purchased the suit property as per the sale deed dated 19.12.1986. Therefore, the suit was liable to be dismissed, as the appellant is the bona fide purchaser for value.

3. The trial Court after considering the evidence, dismissed the suit holding that there is no sale agreement executed by the defendants 1 and 2. The plaintiff, the first respondent preferred an appeal in A.S.No.42 of 1996 on the file of the Principal District Judge, Villupuram. After hearing the counsel for the parties, the lower appellate Court allowed the appeal by decreeing the suit in favour of the plaintiff. Hence, this second appeal by the third defendant, the bona fide purchaser, the appellant herein.

4. This Court while entertaining the second appeal ordered notice of motion and granted interim stay and permitted private notice by the, order dated 2.7.1999. On receipt of the notice, the counsel for the parties entered appearance.

5. In the second appeal, the following substantial questions of law have been formulated:

(1) Whether in law the lower appellate Court is right in wrongly casting the onus on the defendants instead of on the plaintiff especially in a suit for specific performance?

(2) Whether in law the lower appellate Court was right in overlooking that under Section 17 of the Specific Relief-Act, equitable remedy should not be granted if the agreement-holder is not ready to take the sale deed even if it is a single day as laid down in *Vasanth v. M.Senguttu-van*, : (1997)IIMLJ576

(3) Whether in law the lower appellate Court is not wrong in granting equitable relief to the plaintiff whose witnesses had given divergent and concocted versions of the suit transaction?

(4) Whether in law the lower appellate Court was not wrong in omitting to see that the plaintiff had neither pleaded nor proved his readiness and willingness to perform his part of the contract?

6. In elaboration of the above substantial questions of law, Mr. R.Subramanian, learned counsel appearing for the appellant would submit that the lower appellate Court is wrong in setting aside the well considered judgment of the trial Court.

7. On the other hand, Mr. Raghavachari, the learned counsel appearing for the plaintiff, the first respondent herein would submit substantiating the reasonings of the lower appellate Court.

8. Both the counsel would cite several authorities in support of their respective pleas.

9. Before going into the questions Involved in this case, it would be better to deal with the settled position of law, while entertaining the second appeal by which the finding of fact arrived at by the lower appellate Court while reversing the judgment of the trial Court is sought to be interfered with by the High Court under Section 100, C.P.C.

10. It is ruled in the judgment of the Apex Court in Bholaram v. Ameerchand, : AIR 1981 SC1209 and Safi Devi v. Mahadeo Prasad, : AIR1978 All215 that where the first appellate Court found a particular document to be genuine, the finding being a finding of fact, the High Court, in the second appeal, could not interfere with it even if the same was erroneous.

11. However, it has been discussed in detail by referring various judgments of the High Courts and the Supreme Court in Johinder Singh v. Nidhan Singh, and held that when the lower appellate Court, in arriving at its conclusion while reversing the judgment and decree of the trial Court, had ignored and misread the important evidence on record and has failed to refer to the important pieces of evidence and has also failed to give any sound reason to rebut the grounds taken and the reasons advanced by the trial Court for decreeing the suit of the plaintiff for specific performance and when it has failed to take stock of the entire material on

record and has come to its conclusion while reversing the judgment of the trial Court which is not supportable from the evidence on record, this Court in second appeal would certainly interfere with the lower appellate Court's finding, though it is a finding of fact. In this judgment, the Supreme Court's judgments like *Dilbagri Punjabi v. Sharad Chandra*, : AIR 1988 SC1858 , *Jagdish Singh v. Nathu Singh*, : AIR 1992 SC1604 and *Shrimati Sonwati v. Sri Ram*, : [1968]1SCR617 have been referred to in order to rule the above proposition.

12. In short, it can be safely held that it is incumbent upon the final court of fact, i.e., the first appellate Court; particularly when the judgment and decree of the trial Court is sought to be reversed, shall meet the reasoning of the trial Court while decreeing the suit and shall also indicate its own reasons for arriving at a contrary conclusion. It is the duty of the lower appellate Court to discuss the entire evidence afresh, take notice of the grounds taken and the reasons advanced by the trial Court to reach its decision.

13. In the light of the above legal situation, the judgment of the lower appellate Court and the materials available on record have got to be scrutinised.

14. According to the plaintiff, the first respondent herein, the defendants 1 and 2 have executed a sale agreement dated 21.6.1985 and on the very same date, the suit property was handed over to the plaintiff and without executing the sale deed, the defendants 1 and 2 sold the property to the third defendant, the appellant herein as per the sale deed dated 19.12.1986, in spite of the receipt of the notice by the defendants 1 and 2 calling upon them to execute the sale deed.

15. According to the defendants 1 and 2, there is no such document executed by them and when he received notice, they sent immediate reply stating that there is no such sale agreement and they have executed a sale deed on 19.12.1986 to the third defendant/appellant and as such, the suit is liable to be dismissed.

16. In order to establish his, case, the plaintiff besides examining himself as P.W.1, examined two other witnesses who are the scribe and attestor respectively. On behalf of the defendants, D.Ws.1 to 3 were examined. According to D.W.1, the defendant, the sale agreement was never executed but he executed a release,

deed in respect of the transaction which he had with one Dhivyanathan and in that transaction, he received Rs.3,000 and in that deed both D.W.1 and Anjalai Ammal, the second defendant signed.

17. When the execution has been denied, it is for the plaintiff to prove that the sale agreement was executed by the defendants 1 and 2. According to P.W.1, the plaintiff on the date of sale agreement, the entire amount of sale consideration was paid and as per the agreement, he has to execute the sale deed after Sithirai. But, as pointed out by the trial Court in detail, this aspect of the evidence adduced by P.W.1, the plaintiff has not been supported by P.W.2, the scribe and P.W.3, the attester.

18. Furthermore, P.W.1 would state in the cross-examination that he was not able to arrange for money for registration of the sale deed. Admittedly, survey number is not mentioned in the agreement. He would state in the cross-examination that at that time he would not know the survey number, though he would admit that P.W.2 would know the survey number. Admittedly, P.W.2 is the person who wrote the agreement. He was not able to say whether the entire amount had been paid to the defendants 1 and 2. P.W.3, the attester would also specifically state that he did not know whether the defendants 1 and 2 had signed the document. Thus, as detailed in the trial Court's judgment, there are various contradictions and suspicious features with reference to the execution of Ex.A1, the sale agreement.

19. Despite those circumstances, the lower appellate Court allowed the appeal without going into the reasons given by the trial Court regarding the failure on the part of the plaintiff to prove the execution of the sale agreement but mainly concentrating on the question as to whether the third defendant, the appellant herein, had established that he is the bona fide purchaser for value without notice.

20. Furthermore, the lower appellate Court has not properly considered Section 16 of the Specific Relief Act. Section 16 reads thus:-

' 16. Personal bars to relief.-- Specific performance of a contract cannot be enforced in favour of a person--

(a) x x x x x x

(b) x x x x x x

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him. other than terms the performance of which has been prevented or waived by the defendant.'

21. The reading of the above provision would clearly show that the obligation imposed upon the Court not to grant specific performance to a plaintiff who has not met the requirements of Clauses (a), (b) and (c) thereof. A Court may not, therefore, grant to a plaintiff who has failed to aver and to prove that he has performed or has always been ready and willing to perform his part of the agreement the specific performance whereof he seeks. It is open to any defendant to contend and establish that the mandatory requirement of Section 16(c) has not been complied with and it is for the Court to determine whether it has or has not been complied with and, depending upon its conclusion, decree or decline to decree the suit. This principle has been laid down in Jugraj Singh v. Labh Singh, AIR 1995 S.C. 945 and Ram Awadh v. Achhaibar Dubey, AIR 2000 SCW 442.

22. As indicated above, there is no material to prove that the plaintiff was, since the date of the agreement, continuously ready and willing to perform his part of the contract. As mentioned above, he admitted that he had no sufficient funds to get the stamps for registration. In such a situation, it cannot be said that he has established the aspect of continuous readiness and willingness from the date of the agreement to the date of the hearing to perform his part of the contract.

23. It is settled law as laid down in Vasantha v. M.Senguttuvan, : (1997) IIMLJ576 , the plaintiff must in a suit for specific performance of an agreement plead and prove that he was ready and willing to perform his part of the contract continuously between the date of the contract and the date of hearing of the suit. Even if for single day, the plaintiff-agreement holder is not ready to take the sale deed, the equitable remedy should not be granted. Readiness and willingness must be there continuously from the date of agreement upto the date of hearing.

24. This aspect has not been gone into by the lower appellate Court. On the other hand, the lower appellate Court took pains only to give reasonings to hold that the third defendant/appellant had not proved that he is a bona fide purchaser for value.

25. It is true that the settled law is, where the land in respect of which an agreement to sell had been entered into, on being sold by the vendor to another person in breach of contract of sale, the person in whose favour an agreement to sell was executed by the vendor earlier brings a suit for specific performance of the Contract against the vendor and the transferee from him, the onus is on the transferee to prove that he had no notice of the prior agreement to sell in favour of that person. It is also well settled that this onus can only be discharged by the evidence led in the case and the mere denial by the transferee to the effect that he had no notice of the previous contract for sale will not discharge the onus that rests on him.

26. But in this case, P.Ws.2 and 3 themselves would admit in the cross-examination that the third defendant, the appellant herein would not know anything about the earlier sale agreement. D.Ws.1 and 3 also would state that the appellant was not informed about the earlier transaction.

27. Yet another aspect of the matter needs to be considered. According to P.W.1, the plaintiff, the property was in possession of the plaintiff after sale agreement and only in 1987, the appellant/third defendant trespassed into the property and took forcible possession of the property. But in the cross-examination, both P.W.1 and P.W.3 would admit that the properties were taken possession by the third defendant, the appellant herein, immediately after the sale deed executed by the first defendant in favour of the third defendant, i.e. on 19.12.1986.

28. It is also to be pointed out that P.W.1 would state in the cross-examination that after getting possession of the suit property from the defendants 1 and 2, i.e. on the date of the agreement, he leased out to one Poosari, who in turn was in possession and enjoyment of the property. This is a newly introduced case which was not in the plaint and the said Poosari was also not examined. Under those circumstances, the lower appellate Court without considering the reasonings given

by the trial Court, hastily has come to the conclusion that the plaintiff would be entitled to the relief of specific performance.

29. Furthermore, P.W.1, the plaintiff would attempt to say in the cross-examination that he tried to stop the registration. This has not been supported by any of the materials either through document or through the oral evidence of P.Ws.2 and 3.

30. Under these circumstances, the remedy of specific performance, which is an equitable remedy, cannot be granted to the plaintiff, who has not come with the consistent and clean version. Therefore, the judgment and decree passed by the lower appellate Court are set aside and the judgment and decree passed by the trial Court are restored. Thus, the second appeal is allowed. No costs. Consequently, C.M.P.No.9660 of 1999 is closed.

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