

## **B.R. Mulani vs Dr. A.B. Aswathanarayana And Others on 17 September, 1992**

**Equivalent citations: AIR1993SC1318, 1993SUPP(4)SCC743, AIR 1993 SUPREME COURT 1318, 1993 AIR SCW 533, 1993 (4) SCC(SUPP) 743, 1993 SCC (SUPP) 4 743**

**Bench: M.N. Venkatachaliah, P.B. Sawant, N.P. Singh**

### **ORDER**

1. The petitioner, the unsuccessful plaintiff in the Courts below, seeks special leave to appeal to this Court from the judgment and decree dated 1st April, 1992 of the High Court of Karnataka in Regular First Appeal No. 37 of 1980 on its file, affirming the judgment and decree of dismissal dated 31st October, 1979 entered by the learned II Additional Civil Judge at Bangalore in O.S. No. 436/1973 of the petitioner's suit for specific performance of an agreement to sell dated 7th May, 1970.

2. In his suit, the petitioner-plaintiff alleged that respondents 1 and 2 who are husband and wife, on their own behalf and on behalf of respondents 3 to 5, their children, agreed to sell, and the petitioner to purchase, the suit property for a consideration of Rs. 1,10,000/- and that respondents having failed to perform their obligations under the said agreement the petitioner is entitled to a decree for specific performance.

3. The execution of the suit agreement, Exhibit P-3, was not disputed. But having regard to the nature and circumstances under which the said agreement came into existence with its own peculiar terms, a question of construction of the instrument as to the nature and of the rights and obligations it sought to create fell for consideration before the Courts below. The relevant recitals in the Exhibit P-3 recapitulate certain antecedent transactions under which respondents had agreed to sell the whole of the properties of which the suit property was a part in favour of a certain Laxmi Narayan, who had also lent moneys to the respondents on a mortgage of the property and that the respondents had approached the petitioner to pay off the immediate and pressing debts and to extend to them financial assistance for the improvement of their business, from the earnings of which they expected to be able to discharge the mortgage debt in favour of Laxmi Narayan. The document proceeded to stipulate that in the event of respondents' not being able to do so, they should sell the suit property to the petitioner. The recitals in Exhibit P-3 in this behalf, are these: And whereas ...(respondents) agreed to help the members of the First Party to pay off the arrears of rents or damages to Sri Lakshmi Narayana and also to help the members of the First Party to improve the Poultry Farm and Dairy Farm which they are running at present to bring them to a remunerative stage so that from the income that they have been realising from various sources they will be in a position to discharge the mortgage loan of rupees one lakh and pay off the rents or damages as stated above and retain the property or in the alternative to sell the schedule property to the Second Party for a consideration of Rs. 1,10,000/- (Rs. One lakh and ten thousand only) which is an attractive one subject to the following terms and conditions:

4. The trial Court came to dismiss the suit holding, inter alia, that the subject-matter of the agreement was coparcenary property and the debt for discharge of which the sale was intended was not for legal necessity. In the petitioner's appeal before the High Court, respondents reiterated their main contention that the document in question recognised the right of the respondents, at their option, to decline to sell the property and that, therefore, the further question as to the entitlement of the petitioner to seek specific enforcement did not at all arise.

The two of the five points formulated by the High Court for its determination in the appeal reflect this aspect of the controversy. Points 1 and 3 formulated in the appeal were:

1. What is the true purport of agreement of sale dated 7-5-1970 marked as Ex. P-3?
3. Whether in the facts and circumstances of the case, the plaintiff is entitled to a decree for specific performance?

On the first point, the High Court held:

To our mind the clause is in clear terms and it gives an option to the defendants either to pay the amount and retain the property or to sell the suit property to the plaintiff for a consideration of Rs. 1,10,000/-.

x x x x x Our reading of the clause is that it gives option to the defendants either to pay the amount or to execute the sale deed. It is supported by the contemporaneous conduct of the parties and the other contemporaneous documentary evidence that has come into existence relating to the terms of the document.

x x x x x Therefore, point No. 1 is answered as follows:

Under Ex. P-3 the plaintiff and the defendants had agreed that the defendants should either pay the amount advanced by the plaintiff under Ex. P-3 or to sell the suit schedule property for the amount agreed. It was not an agreement of sale without an option to the defendants to pay off the amount advanced thereunder by the plaintiff.

On the third point, the High Court, declining relief of specific performance, observed and held:

Thus, we are of the view that the plaintiff has also taken unfair advantage of the agreement and has kept the rental amount with himself at the rate of Rs. 270/- per month from the date of suit till now which itself would come to a several thousands. Hence we are of the view that the plaintiff is not entitled to a decree for specific performance. In the instant case if the equity jurisdiction is exercised in favour of the plaintiff it will result in great hardship to the defendants and it would also be highly inequitable to pass a decree for specific performance in a case like this. Accordingly, point No. 3 is answered in the negative.

5. We have heard Sri Javali, learned senior counsel for the petitioner and Sri R.N. Narasimhamurthy, learned senior counsel for the respondents.

Sri Javali strenuously contended that serious injustice was done to the petitioner who had come to the rescue of the respondents during their bad days and, virtually, enabled them to save the property from the said Laxmi Narayan on the specific understanding that a part of the property which was in his occupation as a tenant, be sold to him. Sri Javali further urged that Ex. P-3 was really in two parts and though the first part may have intended a relationship of debtor and creditor between the parties in respect of the amounts advanced, however, it was clear and unambiguous that after that relationship came to an end-as indeed there were express provisions contemplating the cessation of that relationship-the relationship of vendor and vendee had commenced. He submitted that the High Court went wrong in its construction of Ex. P-3. There ought to be, urges counsel, a decree for specific performance.

6. Secondly, Sri Javali submitted that on the strength of Ex. P-3 the petitioner had, in fact, paid the mortgage debt under deed dated 9-8-1967 in favour of the said Laxmi Narayan and obtained an assignment of the mortgage. The fact that the High Court, while dismissing the suit, had reserved liberty to the petitioner to work out his rights as such assignee is small consolation as, indeed, the amount paid for the assignment really represented and was intended to be a set-off against the sale consideration under Ex. P-3. Sri Javali submitted that, at all events, it was erroneous and unfair to dismiss the petitioner's suit without at least restoring to him the mortgage debt for the assignment which was really intended as a future appropriation and adjustment against the sale price stipulated in Ex. P-3. Sri Javali contended that it would be a travesty of justice that while the respondent was allowed to retain the whole of the property, which had appreciated several times in value over the years owing entirely to petitioner's beneficial intervention, he was left high and dry for the recovery of even the mortgage amount which really was a part of the price.

7. Thirdly, Sri Javali says that there should also be some compensation or damages, in lieu of specific performance, to be awarded to the petitioner. Sri Javali stated that the petitioner put at stake large sums of his own money to bail out respondents from their straightened circumstances and saved them from the consequences of the litigation at the instance of Laxmi Narayan and it would be unfair to ask petitioner to be content with the return of his money. Sri Javali says that the petitioner should be held entitled to some compensation in lieu of specific performance if specific performance is refused.

8. We have perused the judgment of the Courts below. On the first contention, we are unable to agree with Sri Javali that it is a case in which specific performance should be granted. We are left with the impression that though the course of the transactions between the parties was chequered and meandering, the ultimate conclusion of the High Court that specific performance should be refused, is correct and requires to be upheld. But this is not to deny that there are certain equities which require to be taken note of and adjusted in moulding the relief. On the first contention of Sri Javali we hold that denial of relief of specific performance was right, but there should be some compensation to be given, in view of the particular facts and circumstances of the case, to the petitioner.

9. So far as Sri Javali's second contention that the petitioner should not be driven to a separate suit for the recovery of the amounts under the deed of mortgage dated 9-8-1967, which the petitioner took on assignment on 8-4-1971, is concerned we are relieved of the need to go into this controversy as Sri Narasimhamurthy, with his usual fairness, submitted that it would be appropriate for the respondents to pay the mortgage money without the need to drive the petitioner to another suit. Sri Narasimhamurthy further submitted that the respondents would not stand on technicality either as to the liability under the mortgage or of its enforceability in these proceedings and would voluntarily agree to pay the entire mortgage money together with accrued interest at the rates stipulated in the mortgage bond.

We, accordingly, direct that while the prayer for specific performance is refused, there will be a decree for payment of the mortgage money which really was intended to be a mode of application and appropriation of the sale price and was, in that sense, a part of the same transaction. It is appropriate that the petitioner should not be driven to a separate suit to enforce the obligations which must, in the circumstances of this case, be held to be a part of the same transaction. We, accordingly, direct that while there be a decree of dismissal of the suit for specific performance, there should, however, be a decree for the repayment of the monies paid on the assignment of the mortgage together with accrued interest thereon. In this case, as the money so laid out is on mortgage the relief must take the form of a preliminary decree for sale on mortgage with two years' time to the respondents to deposit in the trial Court the mortgage money and accrued interest till date of deposit. If the mortgage amount is not deposited within two years from today, the petitioner shall be entitled to seek a final decree to be made in the same suit in the trial Court, in furtherance of the preliminary decree we have now directed to be drawn up in the suit.

10. The payment of the mortgage money under the aforesaid mortgage deed shall be in addition to the sum of Rs. 20,000/- directed by the High Court to be paid by the respondents to the petitioner in the judgment under appeal.

11. The other point that survives is the third contention. Here again, we place on record the fair stand of Sri Narasimhamurthy. He submitted that it would not be unreasonable to offer the petitioner some Compensation. He suggested a sum of Rs.50,000/- but left the quantification thereof to the Court. We think, having regard to the equities of the matter and certain contentions of the petitioner which are not unarguable, we should award to him a compensation of Rs. 1 lakh. This amount which shall not carry any interest shall also be paid within two years from today. If it is not paid within two years, it shall be open to the petitioner to sue out execution for its recovery.

12. It is also directed that the outstanding arrears of rent shall be paid by the petitioner to the respondent and rent shall be continued to be paid in future till the tenancy subsists.

With these directions and modifications of the decree, the special leave petition is disposed of. No costs.