Supreme Court of India
S.V.R. Mudaliar (Dead) By Lrs. & ... vs Mrs. Rajabu F. Buhari (Dead) By ... on 17 April, 1995
Equivalent citations: 1995 AIR 1607, 1995 SCC (4) 15
Author: H B.L.
Bench: Hansaria B.L. (J)

PETITIONER:
S.V.R. MUDALIAR (DEAD) BY LRS. & ORS.

Vs.

RESPONDENT:
MRS. RAJABU F. BUHARI (DEAD) BY LRS. & ORS.

DATE OF JUDGMENT17/04/1995

BENCH:
HANSARIA B.L. (J)
BENCH:
HANSARIA B.L. (J)
RAMASWAMY, K.
MANOHAR SUJATA V. (J)

CITATION:
1995 AIR 1607 1995 SCC (4) 15
JT 1995 (3) 614 1995 SCALE (2)720

ACT:

HEADNOTE:

JUDGMENT:

HANSARIA, J.

1. This litigation is about three and half decades old by now inasmuch the suit for specific performance for reconveyance of the property sold by the plaintiff was filed in 1962. It was decreed by the trial court (a single Judge of the Madras High Court) on 10.11.65. The letters Patent Bench, however, on appeal being preferred, set aside the decree on 10.5.72. Hence this appeal by special leave by the plaintiff. As the plaintiff died in 1990, his legal representatives have pursued the appeal. It may also be stated that during the pendency of this appeal the appellants assigned their right to two outsiders sometime in September, 1988. We would have, therefore, to see, in case we were to agree with the plaintiff regarding there having been a contract for reconveyance, which is the real bone of contention between the parties, whether in view of the aforesaid assignment, a decree for specific relief is still called for, keeping in view the fact that such a relief is discretionary.

2. We may note relevant facts. These are that the original plaintiff, SV Ramakrishna Mudaliar, was a man of means at one point of time, to run into rough weather, which required mortgage of some of his properties. It is to repay the mortgage debt that the plaintiff sold two of his properties ostensibly to Mrs. Rajabu Fathima Buhari (Mrs. Buhari) described in Schedules 'A' and 'B' of the plaint. The sale deeds in respect of these properties were executed on 26.3.59 (Ex.P 2) and 31.3.59 (Ex.P.3); both were, however, registered on 31.3.1959. The plaintiff's case is that before these properties had been sold there was a 'gentleman's understanding' between him and Mr. Buhari, husband of Mrs Buhari, on 24.3.59 that in case the purchase amounts as per the sale deeds were repaid within three years, the properties would be reconveyed, when in addition to sale price, 10% thereof shall be paid as solatium of the actual amount spent on improvement, if any. This understanding was put in writing subsequently under the title "Record of fact", which was exhibited during the course of the trial as Ex.P1. Plaintiff's another case was that though the sale deeds were in the name of Mrs. Buhari, the real purchaser was Mr. Buhari. To put it differently, Mrs. Buhari was only an ostensible owner. The third important facet of the plaintiff's case was that Ex.P1 had been signed by one Kamal as an agent of the couple, who were impleaded as defendants in the suit. As, however, of the two properties sold, only one, styled as 'Serles Garden' was reconveyed in May, 1960, the suit was filed for seeking a decree for the reconveyance of the second property, described in Schedule 'A' to the plaint.

3. As already noted the trial court decreed the suit, which decree came to be reversed in appeal by the Letters Patent Bench. The following questions are to be answered to dispose of the appeal:-

(1)Whether Ex.P1 is a genuine document. This needs determination because the Letters Patent Bench has allowed the appeal of the defendants principally on the ground that this document is a result of fabrication.

(2)If the aforesaid document be genuine, whether Kamal who is said to have signed the same was an agent of the de- fendants.

(3)Whether the understanding given by Mr. Buhari, could be enforced against Mrs. Buhari. This would also require determination of the question whether Mrs. Buhari was a name lender.

(4)In case the factual basis of the plaintiff's case be correct, the legal question to be decided would be whether in the facts and circumstances of the case, more particularly the assignment of the right by the successors- in-interest of the plaintiff in favour of third persons, granting of the relief of specific performance is called for, which the statute has left to the discretion of the Court.

GENUINENESS OF EX.P1

4. The Letters Patent Bench of the High Court regarded Ex.P1 not as a genuine document mainly because Exs.P.2 and 3 do not contain a stipulation regarding the reconveyance of the properties sold by the plaintiff. Not only this, even Ex.P. 15, by which Selers Garden was resold, does not mention about the same having been done pursuant to any contract of reconveyance. This apart, as in support of proof of Ex. P. 1, the plaintiff had examined, apart from himself, his agent Narayana Iyer,

the appellate court did not fell satisfied about there being credible evidence in this regard. It may be mentioned that when the trial began, another signatory to P.1, Shri VS Rangachari, who had played prominent part throughout, having died was not available for examination. The only other signatory to Ex.P. 1 is aforesaid Kamal, who could not be examined by the trial Judge even as a Court witness.

5. Shri Vaidyanathan, learned counsel representing Mrs. Buhari, has, apart from mentioning about silence of Exs.P.2, 3 and 15 relating to any agreement of reconveyance, urged that the evidence adduced in the case by the plaintiff would itself show that P. 1 had not seen the light of the day on 24.3.59. The basic submission in this regard is that his document was described by PW 1 Narayana in his evidence as 'letter'. We do not think if we should go by labels, because even if it was a letter which came into existence that shows that something in writing had been put on record; and it may because of this that P. 1 was described as 'record of fact' and it being on a letterhead of the plain- tiff, might have loosely described as "letter" of PW 1.

6. As to why in Exs.P.2,3 and 15 no mention was made about P.1, has been sufficiently explained by PW2 (the plaintiff) in his evidence, whose purport is that Shri Rangachari who had played a vital role in the entire episode, had advised accordingly. The evidence clearly shows that Rangachari was a legal advisor both to the plaintiff and Mr. Buhari. On PW2 being specifically asked as to why Exs.P2 and P3 did not contain the recital about reconveyance, his answer was:

> " I wanted it to be included in the sale deed. Rangachari told that the gentleman's agreement is binding on Mr. Buhari to reconvey the property and so need not be included in the sale deed".

7. Shri Salve, appearing for Mr. Buhari, puts his weight (and he has enough of it) to the submissions of Shri Vaidyanathan and asks why is it that P. 1 was not signed by Buhari; and why is it that the plaintiff himself did not sign the same? The queries do not stop here as, the fulcrum senior lawyer asks why was the sale not in the nature of conditional sale? When first two questions were put to the plaintiff his short, simple and unsophisticated answer was that the confidence-inspiring advocate Rangachari had stated that signing by the two agents in the presence of the two principals would meet the requirement of law. And it does, as acts done by agents within the permitted field do bind the principals. The first two questions raised by Shri Salve may be answered also by pointing out that we have seen lesser mortals signing big inter-country agreements in presence of higher-ups. The third poser is no doubt pertinent, but as there are many ways of getting a thing done, all concerned might have thought that instead of making the sales conditional, for reasons not quite known, the situation demanded that the arrangement of the type gone into was better suited. All important question is whether parties were ad idem; if so, how did they express their meeting of mind is not material. And on their agreeing as recorded in P. 1, we are in no doubt.

8. The case of the plaintiff in this regard receives support from P.28 which is a letter from the plaintiff to Mr. Buhari, dated 1st Feb. 1961, which mentions about the understanding in question. Though the Division Bench of the High Court has held that Ex.P.28 is also fabricated document, we find ourselves unable to agree with it on this point. There is some force in the case of the plaintiff that the defendants challenged about the understanding in question after the death of Rangachari.

9. According to us, therefore, it would not be correct to doubt the existence of P. 1 because of non-mentioning about any stipulation to reconvey in Exs. P2 and 3 and for that matter for Ex.P. 15 having not mentioned about it- nor do the questions raised by Shri Salve take away the ring of ,truth, the plaintiff's case has in this regard. So, we hold that P. 1 is a genuine document, as opined by the trial Judge.

WHETHER KAMAL WAS AN AGENT OF THE DEFENDANTS

10.We come to the role played by Kamal. According to the plaintiff full name of Kamal who had signed Ex.P1 is MH. Kamal, son of MS Mohammed Hasan, who at the relevant time was residing at Nos.5/ and 58, 3rd Main Road, Gandhi Nagar. As per the second defendant, who alone appeared in the witness box, there were many Kamals in his employment and the signature appearing in P. 1 is not MH Kamal, who at some point of time was in employment of the defendants.

11.The trial Judge has dealt with this aspect in detail and to find out the truth as to whether ME Kamal has signed PI, he even wanted to examine this Kamal as a court witness; but, according to him, Kamal was kept out by the defendants, because of which some adverse inference has been drawn against them by him.

12.Mr. Parasaran, appearing for the appellants, fully supports the finding of the trial Judge in this regard and, according to him, law permits an adverse inference to be drawn, where a party in possession of best evidence withholds the same, even if the onus of proving the fact in question were not to be on him. To support him on the legal submission, the learned counsel has relied on a three-Judge Bench decision of this Court in Gopalakrishnaji v. Mohammed Hazi Latiff, AIR 1968 SC 1413. In that case this Court while stating as above observed that a party cannot rely on abstract doctrine of onus.

13. According to the learned counsel for the respondents, the case of the defendants on this score finds support from none other than aforesaid Kamal, if what has been stated by him in his affidavit filed before this Court is borne in mind. That affidavit is a part of IA No.2, in which the prayer Is to direct examination of MH Kamal as a witness in the appeal. Shri Salve has drawn our attention to the account of salary and batta paid to Kamal, as mentioned in the enclosure to the affidavit, according to which, for the year 31.3.63 batta paid was Rs. 124 and salary was Rs. 525. The learned counsel brings to our notice that in earlier years the batta had ranged about four times more and the salary more than that, which would go to show that after 31.3.62 Kamal was in the service not upto 31.3.63, but for a few months after 31.3.62, as in the case of the defendants. There seems to be some force in this contention.

14. We, therefore, do not propose to decide this fact by drawing any adverse inference against the respondent- but would do so on the basis of evidence led by the plaintiff As already stated, this evidence has received better treatment at the hand of trial Judge, who, while holding that Kamal had acted as an agent of the defendants, referred to many circumstances also. Shri Parasaran has submitted that though the appellate court is within its right to take a different view on a question of fact, that should be done after adverting to the reasons given by the trial Judge in arriving at the

finding in question. Indeed, according to Shri Parasaran an appellate court should interfere with the Judgment under appeal not because it is not right, but when it is shown to be wrong, as observed by three-Judge Bench of this Court in Dollar Co. v. Collector of Madras, 1975 Supp. SCR 403. As to this observation, the contention of Shri Vaidyanathan is that what was stated therein was meant to apply when this Court examines a matter under Article 136. We do not, however, think if this meaning can be ascribed to what was observed.

15.There is no need to pursue the legal principle, as we have no doubt in our mind that before reversing a finding of fact, the appellate court has to bear in mind the reasons ascribed by the trial court. This view of ours finds support from what was stated by the Privy Council in Rani Hemant Kumari v. Maharaja Jagadhindra Nath, 10 CWN 630, wherein, while regarding the appellate judgment of the High Court of Judicature at Fort William as "careful and able", it was stated that it did not "come to close quarters with the judgment which it reviews, and indeed never discusses or even alludes to the reasoning of the Subordinate Judge."

16.Shri Salve has taken pains to satisfy us that it is not quite correct to submit that the Division Bench did not take note of circumstantial evidence noted by the trial Judge. To satisfy us in this regard, our attention has been invited to what was stated by the Bench at page 291 of Vol. 11. As perusal of this part of the appellate judgment shows that two circumstances mentioned by the trial Judge were traverssed, but all were not. This apart, first circum- stance was not regarded as connecting Kamal with the defendants mainly because the Bench was not satisfied if Kamal who had taken part in the documents marked as Ex. P9, 10, 64 and 65, and the Kamal referred in PI are the same. We do not, however, think that this view is sound because though the defendants might have had many Kamals as employees but they had only one employee, named MH. Kamal, son of Mohammad Hasan, and it is this Kamal who had signed Ex.P. 1. As to the second circumstance relatable to issuance of Ex.P.28, we have already observed that we do not agree with the view of the Division Bench qua this. WHETHER MRS. BUHARI WAS A BENAMIDAR OF MR. BUHARI

17.The trial Judge has answered this question in favour of the plaintiff-, the Division Bench has observed that it is not necessary to advert to this aspect of the case of the plaintiff. We also propose to traverse the path taken by the appellate court and resist from giving our finding on this aspect of the case. We have taken this stand because we are satisfied about the genuineness of Ex.P. 1; so also about Kamal who had signed the same as being an agent of the defendants, because of which the understanding recorded in Ex.P. 1 has to be regarded as binding on the defendants. For the sake of completeness, we may also observe that the understanding having had consent of Mr. Buhari, and there being evidence a-galore about Mr. Buhari acting as an agent of Mrs. Buhari, there is nothing to doubt that the understanding given by Mr. Buhari has to be regarded as bindIng on Mrs. Buhari. The leading role played by Mr. Buhari in the entire episode is writ large and there is no escape from the conclusion that the consent of Mr. Buhari has to be regarded as a consent given by Mrs. Buhari.

18.We, therefore, conclude that there did exist an understanding to reconvey two properties as recorded in the document executed on 24.3.59. This conclusion of ours receives support from reconveyance of 'Serles Garden' within the period of 3 years as stipulated in Ex.P.1 and that too at the added solatium of 10%. Ibis property having been sold at Rs.85,000, 10% of the same comes of

Rs. 8,500/- and Ex.P. 1 5 evidences the sale at Rs. 95,000/-Though it is correct that Rs.85,000/- and 10% of that comes to Rs. 93,500/-, it may as well be at this figure was rounded to Rs.95,000/ In this context Shri Vaidyanathan's submission, however, is that 'Serles Garden' was sold back, not pursuant to the agreement to reconvey, but because Mrs. Buhari could not get a lessee despite advertisement having been put in 'The Hindu' and 'The Mail', as evidenced by Exs. D 1 to D4. Though this contention has some cutting edge, we were inclined to think, on the totality of facts, that the transfer of Serles Garden back to the plaintiff was in discharge of the legal obligation contained in P. 1, as both the period during which it was transferred and for the sum it was so done, fit in well with the terms embodied in P. 1. IS A CASE FOR SPECIFIC PERFORMANCE MADE OUT IN LAW?

19.Being satisfied that the parties had agreed as recorded in Ex.P 1, the question to be examined is whether the agreement of the type at hand, described as " gentlemen's understanding" in Ex.P.1, permitted the plaintiff to seek a decree for specific performance. According to learned counsel for the respondents, the agreement has created no legal obligation and as such is not agreement, even if en- forceable, can be so done only against the executable of the original contract. The final submission is that the remedy of specific performance being discretionary, the same may not be granted at this length of time; more so, when the appellants have assigned their interest to some outsiders.

20. So far as the first submission is concerned, we agree that it is a valid and enforceable contract which is the basis for the jurisdiction to order specific performance, as pointed out in Mayawanti v. Kaushalya Devi, 1990 (3) SCC 1. The point for determination is whether the agreement as recorded in Ex.P1 is enforceable. It has been contended on behalf the respondents that while agreeing as embodied in the document the parties had no intention to create any legal interest, because of which the agreement cannot be enforced. Strong reliance has been placed, in support of this submission, on the decision of House of Lords in Rose and Frank Co. v.J.R. Crompton & Bros. Ltd., 1924 All E.L.R.(Reprint) 245. In that case, after noting what had been agreed upon, the House of Lords came to the conclusion that the parties had not intended that the document should be legally enforceable.

21. As the aforesaid decision was arrived at on the basis of what was contained in the document, it would be pertinent to note the clause in question, which read as below:

> "This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the law courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they each honourably pledge themselves with the fullest confidence based on past business with each other that it would be carried through by each of the three parties with mutual loyalty and friendly co- operation. "

22. The decision being on the facts of the case cannot apply to facts here which a different; and we do think that what agreed upon in the present case is much different, as would appear from Ex.P 1 which reads as below:

> "Record of fact This is to record the gentleman's under- standing between Mr. S.V.R. and Mr. A.M. Buhari that Mr. Buhari will see to it that in case the purchase amounts as per the sale deeds in favour of Mrs. A.M.B. Buhari is repaid within 3 years from this date, the properties will be reconveyed to Mrs. S.V.R. who will also have to pay in addition to sale price 10 per cent thereof as solatium of the actual amount spent on improvement if any."

23. The aforesaid shows that though what has been recorded was described as "gentlemen's understanding", according to us, the understanding was such which was meant to be acted upon. We have taken this view because terms and conditions of reconveyance have been clearly mentioned and document was executed by the agents of both the sides. It was, there- fore, intended to create legal obligation. In this context, Shri Parasaran has brought to our notice a decision of this Court rendered in Commissioner of Wealth Tax, Bhopal v. Abdul Hussain Mulla Mohammad Ali, (dead) by LRs., 1988 (3) SCC 562, in which after referring to the decision of the House of Lords in the aforesaid case and some other decisions, as well as what has been stated in legal treatise, it was observed in para 24 that the proposition that in addition to the existence of an agreement and the presence of consideration, there is also a third element in the form of intention of parties to create legal relations, is one which has not passed unchallenged. The Bench observed that it is not possible to accept the argument that an agreement will not, by itself, yield legal obligations unless it is one which can reasonably be regarded as having been made between the parties in contemplation of legal consequences. From the averments made in Ex.P 1 and the legal position being what has been noted in this case, we are satisfied that an enforceable contract had come into existence on the parties executing Ex.Pl. According to us, they were ad idem and the plaintiff was within his rights to seek specific performance of the same.

24. On the second legal question raised, we may not spend much time because the prop of this submission being what was held by this Court in Annapoorani Ammal v. G. Thangapalam, 1989 (3) SCC 287, whose facts were entirely different, the ratio of that decision cannot be called in aid by the respondents. In that case the mother of the appellant who had allegedly executed the 'yadast' was not the owner of the property because of which it was held that the suit against the appellant filed for reconveyance of the property on the basis of 'yadast' could not have been decreed. In our case Ex.P 1 had been executed by Kamal as an agent of the defendants and what had been agreed upon by him has to bind the principals.

25. We now come to the main legal submission, which is that the relief of specific performance being discretionary, we may not grant the same for two reasons in the main: (1) lapse of about 33 years after filing of the suit during which period price of the property has gone up enormously; and (2) the plaintiff's legal representatives having assigned their right of repurchase. the assignees are the real person interested in getting back the property, and we may not allow the same, as what they had purchased was not the property as such, but litigation, which could be said to be akin to champerty.

26.Shri Parasaran contends that the relief of specific performance is said to be discretionary only in the sense that the court may not act arbitrarily and nothing beyond this, and while exercising the discretion judicial conscience and judicial statesmanship alone are the guiding facts. That this is the

legal position is sought to be sus- tained by referring to sub-section (1) of section 20 of the Specific Relief Act, 1963, in which, it has been stated that the jurisdiction to decree the specific performance is discretionary, but the discretion is not arbitrary; it is sound and reasonable and is to be guided by judicial principles. As to when the court may not exercise discre- tion to grant the decree for specific performance has been mentioned in sub-section (2); whereas subsection (3) states as to when the court may properly exercise its discretion to decree specific performance. No doubt what has been stated in these two sub-sections is not exhaustive, but is illustrative, yet the intention of the legislature has been well reflected, both as regards the granting of the relief and nongranting of the same. Clause(c) of subsection (2) states that if granting of specific performance would make it "inequitable", the court may not grant the relief It is this part of the statutory provision which is sought to be relied by the learned counsel for the respondents by contending that it would be inequitable to grant specific performance for the aforesaid two reasons.

27.In so far as the delay in the disposal of the case and the rise in prices during interregnum, Shri Parasaran urges that the delay not having been occasioned by any act of the plaintiff, he may not be punished for the same on the principle of ' actus curiae neminem gravabit" an act of the court shall prejudice no man. As regards the rise in prices,, the submission is that it should not weigh with the court in refusing the relief if otherwise due, as opined in S. V. Sankaralinga Nagar v. P.I.S. Ratnaswami Nadar, AIR 1992 Madras 389, which decision was cited with approval in Mr. Abdul Hakeem Khan v. Abdul Menon Khadri, AIR 1972 Andhra Pradesh 178. We are in agreement with this view because of the normal trend of price in prices of properties situate especially in metropolitan city like Madras, where the property in question is situate. If merely because the prices have risen during the pendency of litigation, we were to deny the relief of specific performance if otherwise due, this relief could hardly be granted in any case, because by the time the litigation comes to an end sufficiently long period is likely to elapse in most of the cases. This factor, therefore, should not normally weigh against the suitor in exercise of discretion by a court in a case of the present nature.

28.The final onslaught is on the ground that the plaintiffs successors-in-interest having assigned the right to third parties in the meantime, we may not grant the relief because the assignees have, as already noted, purchased litigation and so the transaction could be described as champertous. Shri Parasaran, however, contends that all assignments pendente lite cannot be regarded as champertous; the same would depend on the facts of each case. It is also urged that an assignee has the right to pray for specific performance because he is one who has to be regarded as "representative-in-interest", of which mention has been made in clause (b) of section 15 of the aforesaid Act dealing with the persons who may obtain specific performance. 'Mat an assignee would be such a person was accepted by this Court in T.M. Balakrishna Mudaliar v. M. Satyanarayana Rao, 1993 (2) SCC 740.

29.We are of the view that if in a case the act of the third party could be regarded akin to champertous, the relief of specific performance may be refused; indeed, should be refused. In the present case, however, we find that the assignees themselves applied to this Court for impleading them as appellants and put on record the deeds of assignment, a perusal of which shows that the need for assignment was It for pressing reasons. There has been no hide an seek with the court and

the legal representatives of the original plaintiff having received a sum of about Rs. 13 lacs pursuant to the contract of assignments entered between September to November '1988, we do not think if we would be justified in refusing the relief of specific performance, if the conduct of the respondents is also borne in mind, about which one could say that the same is tainted inasmuch as they departed from truth to bolster their case and went to the extent of not complying with the desire of the trial judge in allowing aforesaid Kamal to be examined even as a court witness. Such parties who pay foul with equity cannot be allowed to use the shield of equity to protect them.

30.The result of the foregoing discussions is that we allow the appeal, set aside the impugned judgment of the Letters Patent Bench and restore that of the trial Judge and decree the suit for specific performance. The respondents or their successors- in- interest would reconvey the property mentioned in Schedule 'A' of the plaint within a period of 1 month, failing which it would be open to the trial Judge to execute the required document(s). In the facts and circumstances of the case, the parties are left to bear their own costs throughout.

[A. Nos.], 2 & 5 of 1994

31.I.A. Nos. 1 and 2 are dismissed. I.A. No.5 is allowed; the cause title may be amended accordingly.