

FGP LTD.

v.

SALEH HOOSEINI DOCTOR AND ANR.

(Civil Appeal No. 6257 of 2009)

SEPTEMBER 15, 2009

**[MARKANDEY KATJU AND ASOK KUMAR
GANGULY, JJ.]**

Rent Control – Bombay Rent Act, 1947 – Suit by respondents against appellant for possession of property on ground of reasonable and bonafide requirement – Decreed by Small Causes Court – Order upheld in appeal and in revision before High Court – Maintainability of the suit challenged by appellant on basis of agreement to sell, application of s.53-A and specific performance (in terms of the specific performance suit filed by it and pending in High Court) – Held: Challenge not tenable – Claim by appellant on question of specific performance of contract that he paid sale consideration money in respect of property under an agreement to sell contrary to material documents on record – Case based on specific performance not strong enough – In any event, appellant was required to show that it either performed or was willing to perform its part of the contract, but admitted facts of the case are to the contrary – Doctrine of part performance under s.53-A cannot be invoked – Argument of appellant on competence of respondents to file the suit also misconceived – Respondents were substituted as executors under the Will left behind by the original owner – They were also co-owners of the suit property – Transfer of Property Act, 1882 – s.53-A – Doctrines – Doctrine of part performance.

Rent Control – Title of landlord – Challenged – Held: Normally, a tenant's right to question the title of a landlord is

A *very limited in view of rule of law codified in s.116 of the Evidence Act – Evidence Act, 1872 – s.116.*

B *Will – Executor unable to act – Held: In such case, any other legatee having a beneficial interest may be admitted to prove the Will and letter of administration can be granted to him – Indian Succession Act, 1925 – ss.222 and 234.*

C *Will – Vesting of property – On executor – Effect of probate – Held: Vesting does not take place as a result of probate – Grant of probate does not give title to the executor – It just makes his title certain – Indian Succession Act, 1925 – ss.211 and 213.*

D **The property in question is located in a prime area in Mumbai. In 2001, the respondents i.e legal representatives of the erstwhile owner of the said property filed suit against the appellant-company in the Court of Small Causes under the Bombay Rent Act, 1947 for possession of the property on the ground of reasonable and *bonafide* requirement. The suit was decreed by the Small Causes Court and the appellant was directed to handover vacant and peaceful possession of the property. The order was upheld by the appellate authority and again by the High Court in revision.**

F **Before this Court, the maintainability of the said suit was challenged by the appellant on various grounds.**

G **It is the case of appellant-company that three agreements were executed between it and the owner of the property in question; that the first one was entered into on 14-7-1981 whereby the erstwhile owner agreed to sell the property to the appellant for Rs.5 lacs and received the entire sale consideration of Rs.5 lacs; that the original owner executed a second agreement dated**

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16-07-1981 and thereby let out the suit premises to the appellant as a tenant and that another agreement dated 20-7-1981 was also executed between the original owner and the appellant-company, whereby the original owner again agreed to sell the appellant-company the suit premises for the same price of Rs.5 lacs which the original owner received on 14-07-1981. The further case of the appellant was that as sale in terms of the agreement dated 14-7-1981 was not completed within time, it gave a notice to the vendor to complete the sale and as it was not completed, the appellant thereafter filed a suit for specific performance in 1991 which is still pending in the High Court.

The appellant urged that by an agreement in writing, the original owner of the property had contracted to transfer for consideration the property in question in favour of appellant-company and in part performance of the said contract, the appellant-company had taken possession of the property and was willing to perform its part of the contract; that a suit for specific performance of the contract was pending between the parties in High Court since 1991 and that Section 53-A of the Transfer of Property Act debarred the original owner or any other person claiming under her from enforcing against the appellant-company any right in respect of the property of which the appellant-company had taken and continues to remain in possession; that the handing over of possession to the appellant-company by the tenancy agreement dated 16.07.1981 was in part performance of the agreement dated 14-7-1981. It was accordingly contended that the suit, which was filed to enforce the ownership right against the appellant-company who had paid the entire sale consideration, was not maintainable.

Dismissing the appeal, the Court

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A HELD: 1.1. The main thrust of the argument on the question of specific performance of the contract is that the appellant paid Rs.5 lacs as a sale consideration money under the agreement to sell dated 14.07.1981. But the tenancy agreement dated 16.07.1981 makes it clear that

B the said amount of Rs.5 lacs was given as a security deposit without any interest for carrying out the terms and conditions of the tenancy agreement. In the Specific Performance suit before the High Court, the said amount of Rs.5 lacs has been specifically referred to as security

C deposit. Also the said amount of Rs.5 lacs was deposited by a cheque by Fiberglass Pilkington Limited (by which name the appellant was previously known). The said cheque was given to the original owner by a forwarding letter dated 14.07.1981 and in the said letter the said

D amount has been described as a deposit in compliance of the tenancy agreement. Therefore, the claim of the appellant that the said deposit of Rs.5 lacs was sale consideration money for the suit premises is contradicted by its averments in the suit and also from the material documents on record. [Paras 18, 19, 20 and 21] [1008-F-

E H, 1009-A-C, F, G, 1010-B]

1.2. Apart from that, the agreement dated 20.07.1981, on which the appellant's suit for specific performance is based, stipulates that the sale shall be completed within

F 3 months after 31.01.1983 or at the vendor's option on or after 31.01.1986. There is nothing on record to show that the appellant ever called upon the owner to complete the sale within 3 months from 31.01.1983. In fact the appellant did not take any step for 10 long years and it only became

G active after the suit was filed by the owner for eviction of the appellant in 1991. Also, neither in the eviction suit filed against the appellant nor in the appeal filed by the appellant against the adverse decision passed against it in the eviction suit, the plea of specific performance was

H an issue or point for consideration. [Para 22] [1010-B-F]

1.3. The remedy of specific performance is special and extraordinary in character and is discretionary in nature. From the facts of the case, it appears that the appellant has not succeeded in making out a strong case on specific performance so as to restrain the respondents from proceeding with their suit for eviction. However, it is made clear that the observations made on the specific performance suit filed by the appellant are tentative in nature and will not affect the merits of the specific performance suit filed by the appellant and which is pending in the High Court. [Paras 23 and 24] [1010-G-H; 1011-A-C]

2.1. The submission by the appellant on part performance of the contract under Section 53-A of the Transfer of Property Act also cannot be accepted. Section 53-A of the Transfer of Property Act is based upon the equitable doctrine of part performance in English Law. The said Section has certain ingredients and, those are:- (1) a contract to transfer immovable property; (2) the transfer should be for consideration; (3) the contract must be in writing; (4) it should be signed by or on behalf of the transferor; (5) the terms of the contract can be ascertained with reasonable certainty from the writing; (6) the transferee takes possession of the whole or part of the property or if already in possession continues in possession; (7) such taking of or continuance in possession should be in part performance of the contract; (8) the transferee should do some act in furtherance of the contract; and (9) he should have performed, or be willing to perform, his part of the contract. [Paras 25 and 26] [1011-C-H; 1012-A-C]

2.2. In the facts and circumstances of the present case, no case for part performance of the contract has been made out. In the plaint filed in the specific performance suit, the case of the appellant is that it was

A put in possession of the suit premises pursuant to the
tenancy agreement dated 16.07.1981 and not on the basis
of any other agreement. From a look at the tenancy
agreement, it is not found that the appellant was put in
possession under the same. In the said suit no evidence
B appears to have been led by the appellant to show how
it came to the possession of the suit premises. This
aspect of the case is quite vague. [Para 30] [1013-C-D]

2.3. Apart from that according to the appellant it
allegedly paid Rs.5 lacs as sale consideration for the suit
C premises. However, in the plaint in the specific
performance suit, it has been clearly averred that the said
amount of Rs.5 lacs was kept in deposit with the original
owner of the premises by way of security deposit in terms
of tenancy agreement dated 16.07.1981. In any event, the
D appellant is required to show that it either performed or
is willing to perform its part of the contract. But admitted
facts of the case are to the contrary. After the execution
of the alleged agreement for sale dated 20.07.1981, the
appellant was totally silent and it is only after more than
E 10 years thereafter i.e. on 19.08.1991, for the first time, it
asked the owner to complete the sale and that too after
the ejectment suit was filed in 1991 by the owner. Thus,
in the facts and circumstances of this case, the doctrine
of part performance under Section 53-A cannot be
F invoked. [Paras 31 and 32] [1031-E-H; 1032-A]

*Sardar Govindrao Mahadik and another v. Devi Sahai
and others (1982) 1 SCC 237, relied on.*

G *Lady Thynne v. Earl of Glengall (2 HL Cases 131),
referred to.*

3.1. The argument advanced on behalf of the
appellant on competence of the respondents to file the
suit out of which the present proceeding arises is also

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misconceived. [Para 33] [1014-B]

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3.2. From the recitals of the Will of the original owner, it would appear that the testatrix (the original owner) appointed her husband to be the executor of the Will and failing him appointed her sons and daughter to be the executors/executrix of the Will jointly as well as severally for all purposes. From the Will, it was clear that whenever the husband was unable to act as executor for whatever reason, the respondents are substituted as executors under the Will. The aforesaid recitals in the Will are in consonance with Sections 222 and 234 of the Indian Succession Act. From a conjoint reading of the two Sections, it is clear that the said Act recognizes the contingency that where the executor appointed by a Will is unable to act, any other legatee having a beneficial interest may be admitted to prove the Will and letter of administration can be granted to him. [Paras 34, 36, 37 and 38] [1014-B-C, F, G, 1015-D]

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3.3. Apart from that, in this case, respondent No.2 is a co-owner of the suit premises. A co-owner can always maintain a suit for eviction. If the status of the respondents as co-owners of the property transpires clearly from the admitted facts of the case, they cannot be denuded of the said status at the instance of some objections by the tenants. Normally, a tenant's right to question the title of a landlord is very limited in view of rule of law which is codified in Section 116 of the Indian Evidence Act. Apart from that it has been held in some decisions of this Court that a co-owner of a property is an owner of the property, till the property is partitioned. Since in the instant case, no partition has taken place, the respondents' status as co-owners cannot be disputed by the tenant and it is nobody's case that there is a clash of interest between the respondent and other co-owners. Therefore, the suit filed by them is maintainable. [Paras

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A 39, 43, 45, 46, 49 and 50] [1015-E, 1016-H, 1017-B-D, 1018-B-D]

Sri Ram Pasricha v. Jagannath and Ors. (1976) 4 SCC 184; *Mohinder Prasad Jain v. Manohar Lal Jain* (2006) 2 SCC 724 and *India Umbrella Mfg. Co. v. Bhagabandei Agarwalla* (2004) 3 SCC 178 relied on.

Salmond on Jurisprudence, 13th edition, referred to

C 4. Section 211 of the Indian Succession Act, deals with the vesting of property. This vesting does not take place as a result of probate. On the executor's accepting his office, the property vests on him and executor derives his title from the Will and becomes the representative of the deceased even without obtaining probate. The grant of probate does not give title to the executor. It just makes his title certain. Even if Will is not probated that does not prevent the vesting of the property of the deceased on the executor/administrator and consequently any right of action to represent the estate of the executor can be initiated even before the grant of the probate. So the suit filed by the respondents as executors is also maintainable. [Paras 55, 58 and 59] [1019-E-F, 1020-D-F]

F *Commissioner, Jalandhar Division and Ors. v. Mohan Krishan Abrol and Anr.* (2004) 7 SCC 505, relied on.

Kulwanta Bewa v. Karam Chand Soni AIR 1938 Calcutta 714 and *Meyappa Chetty vs. Supramanian Chetty* (1916) 43 IA 113, referred to.

G 5. This Court does not find any justification for its interference with the decision of the High Court rendered in its revisional jurisdiction, considering the facts of this case and also the fact that appellant is paying a meager sum of Rs. 900/- and odd per month for occupying the said flat in a prime area in Mumbai. Appellant is not in

occupation of the said flat and since 2000 has admittedly allowed a total outsider to occupy the said flat. The flat is lying vacant since May, 2005. As against all these facts, it is found that the suit is for reasonable requirement and this Court, should not exercise its discretionary jurisdiction by interfering with the eviction proceeding which culminated in the revisional order of the High Court. [Paras 60 and 61] [1020-F-G, 1021-A-B]

Balvantrai Chimanlal Trivedi, Manager, Raipur Mafg. Co. Ltd. Ahmedabad v. M.N. Nagrashna and Ors. AIR 1960 SC 407, referred to.

Case Law Reference:

(1982) 1 SCC 237	relied on	Para 27
2 HL Cases 131	referred to	Para 28
(1976) 4 SCC 184	relied on	Para 47
(2006) 2 SCC 724	relied on	Para 51
(2004) 3 SCC 178	relied on	Para 51
AIR 1938 Calcutta 714	referred to	Para 56
(1916) 43 IA 113	referred to	Para 56
(2004) 7 SCC 505	relied on	Para 59
AIR 1960 SC 407	referred to	Para 62

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6257 of 2009.

From the Judgment & Order dated 2.12.2008 of the High Court of Judicature at Bombay in C.R.A. No. 614 of 2008.

Shanti Bhushan, M.S. Ganesh, R. Ayyam Perumal, Seshachary for the Appellant.

A R.F. Nariman, Sumit Goel, Arjun Garg, Somandari Gaud,
M/s. Parekh & Co. for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

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2. The order of the High Court in its revisional jurisdiction is impugned before this Court by the appellant herein, a tenant in respect of the premises being No.D1, Unit Type 401 on the 4th Floor of the Building known as "Daisylea" situated at 17A, Mount Pleasant Road, Mumbai-400006 (hereinafter "the suit premises").

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3. The appellant is a public limited company whose paid up share capital is more than Rs.1 crore and is therefore not entitled to any protection under the Maharashtra Rent Control Act, 1999. On 16.07.1981 the appellant entered into a tenancy agreement with Late Mrs. Sheroo Hooseini Doctor, mother of the respondents and the original owner of the suit premises. The appellant contends that prior to 16.07.1981 the said owner entered into another agreement with it and agreed to sell the flat for a sum of Rs.5 lacs and in the said agreement it was acknowledged that the payment of the entire sale consideration of Rs.5 lacs had been received by the original owner. The further case of the appellant is that as the sale in terms of the sale agreement dated 16.07.1981 was not completed within time, it gave a notice in 1991 to the vendor to complete the sale and as it was not completed, the appellant thereafter filed a suit for specific performance on 10.10.1991 which is still pending in the High Court.

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4. However, the respondents filed a suit being R.A.E. Suit No.127/338 of 1991 against the appellant in the Court of Small Causes under the Bombay Rent Act, 1947 for possession of the suit premises on the ground of reasonable and bona fide requirement. After the amendment of the provisions of Maharashtra Rent Control Act, 1999 the previous suit of 1991

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FGP LTD. v. SALEH HOOSEINI DOCTOR AND ANR. 1005
[ASOK KUMAR GANGULY, J.]

filed under the Bombay Rent Act, 1947 was withdrawn on 24.01.2003. Prior to that another suit was filed on 2.08.2001 by Saleh Hooseini Doctor and Niloofer Arun Sawhney, who are son and daughter respectively of the original owner, in the Small Causes Court against the appellant and it was registered as TE & R Suit No.427/450 of 2001.

5. On 12.08.2005 the said suit was allowed by the Small Causes Court of Bombay, inter alia, holding that the suit is maintainable as the plaintiffs represent the estate of the original owner. The trial Court directed appellant to handover vacant and peaceful possession of the suit premises and ordered an enquiry with respect of mesne profit. Against the said judgment and order, the appellant filed an appeal which was dismissed on 30.08.2008 by the Court of Small Causes Bombay being Appeal No.731 of 2005.

6. Challenging the said order, the revision application was filed before the High court which was also dismissed by the High Court on 2.12.2008. As noted above impugning the High Court judgment the present proceeding has been initiated before this Court by the appellant.

7. Before the High Court it was conceded on behalf of the appellant that it is a public limited company having paid up share capital of more than Rs.1 crore and, therefore, the suit premises is exempted from the provisions of Maharashtra Rent Control Act, 1999.

8. From the reading of the judgment of the High Court, it appears that the only point urged before the High Court in revision was that plaintiffs cannot file the suit, inter alia, on the ground that the original owner Mrs. Sheroo Doctor and her husband Hooseini Doctor, even though belonged to Dawoodi Muslim Community and married according to Muslim rites, they got their marriage registered under the Special Marriage Act on 11.01.1991. As a result of such registration, the marriage shall, as from the date of such registration, be deemed to be a

A marriage solemnized under the said Act and as a consequence thereof under Section 21 of the said Act, the property of the parties shall be regulated under the provisions of Indian Succession Act, 1925. It was further urged that as a result of the necessary corollary of the same, the provisions of sub-section (2), Section 213 of the Indian Succession Act is not applicable. Therefore, in the absence of any probate having been obtained by the plaintiffs the suit is not maintainable.

9. It was further stated that under Section 216 of the Indian Succession Act it is provided once a probate or letters of administration have been granted to a particular person, no other person can sue or prosecute any suit or otherwise act as representative of the deceased unless such probate or letters of administration have been recalled or revoked. Relying on this legal position, the learned counsel for the appellant argued that on 8.5.2002 the probate was granted by the Bombay High Court to the husband of the testatrix and her husband was the sole executor. Since the probate has not been granted to other executors the plaintiffs have no right to file a suit without obtaining probate or letters of administration. Reliance was also placed on Section 232(c) and 234 of the Indian Succession Act.

10. No other point was urged before the High Court.

11. However, before this Court it was submitted on behalf of the appellant that three agreements were executed between the appellant and the owner of the flat in July 1981. The first one was entered into on 14.7.1981 whereby the erstwhile owner of the flat agreed to sell the same to the appellant for a sum of Rs.5 lacs and the said agreement also acknowledged that the entire sale consideration of Rs.5 lacs have been received by the erstwhile owner and in the said agreement it was stipulated that the appellant would be entitled to occupy the suit premises as tenants of the vendor till the suit for specific performance was decreed. It was also urged that in pursuance of the said agreement dated 14.7.1981 the original owner executed

FGP LTD. v. SALEH HOOSEINI DOCTOR AND ANR. 1007
[ASOK KUMAR GANGULY, J.]

another agreement dated 16.07.1981 and thereby let out the suit premises to the appellant as a tenant. Another agreement dated 20.7.1981 was also executed on the stamp paper between the original owner and the appellant-company, whereby the original owner again agreed to sell the appellant-company the suit premises for the same price of Rs.5 lacs which the original owner received on 14.07.1981.

12. It is, therefore, urged that under these circumstances it is wholly illegal for the Bombay Small Causes Court to decree the suit in favour of the legal representatives of the original owner and the High Court, by not interfering in revision with those orders, was in error.

13. The appellant also placed reliance on Section 53-A of the Transfer of Property Act and urged that the original owner of the suit premises had admittedly contracted to transfer for consideration by an agreement in writing the suit premises in favour of the appellant-company and in part performance of the said contract the appellant-company had taken possession of the property and was willing to perform its part of the contract. It was also urged that in fact a suit for specific performance of the contract is pending between the parties in Bombay High Court since 1991 and therefore, Section 53-A of the Transfer of Property Act debars the original owner or any other person claiming under her from enforcing against the appellant-company any right in respect of the suit property of which the appellant-company had taken and continues to remain in possession. It was urged that the handing over of possession to the appellant-company by the tenancy agreement dated 16.07.1981 was in part performance of the agreement dated 14.07.1981 and Section 53-A of the Transfer of Property Act is applicable. Therefore, the suit, which was filed to enforce the ownership right against the appellant-company who had paid the entire sale consideration, is not maintainable.

14. As noted above, neither the case arising out of the agreement to sell and the application of Section 53-A nor the

A case of specific performance was argued before the High Court. It appears that the same was also not argued before the Small Causes Court either at the trial or at the appellate stage.

15. Therefore, we can refuse to consider those arguments. However, since arguments have been advanced, this Court is considering the same. But we do not find much substance in those arguments for the following reasons.

16. Before this court the learned counsel for the appellant placed reliance on Clause 7 of the alleged agreement to sell dated 14.7.1981.

17. But in the suit which was filed by the appellant before the Bombay High Court for specific performance reliance was not placed on the agreement dated 14.7.1981. Reliance instead was placed on the substituted agreement dated 20.07.1981. The plaint which was filed by the appellant before the High Court was produced before this Court and in the plaint reference was made to Clause 5 of the agreement dated 20.07.1981. The said Clause 5 is set out below:-

"5. The sale shall be completed within three months after the 31st day of January 1982 or at the Vendors option on or after 31st January, 1986 upon the Purchaser calling upon the Vendor to execute the conveyance in favour of the Purchaser and upon the Vendor procuring the income-tax clearance certificate under Section 230A of the income-tax Act and all other permissions and consents which may be required under law."

18. The main thrust of the argument on the question of specific performance of the contract is that the appellant has paid Rs.5 lacs as a sale consideration money under the agreement to sell dated 14.07.1981. But Clause 5 of the tenancy agreement dated 16.07.1981 makes it clear that the said amount of Rs.5 lacs was given as a security deposit without any interest for carrying out the terms and conditions

FGP LTD. v. SALEH HOOSEINI DOCTOR AND ANR. 1009
[ASOK KUMAR GANGULY, J.]

of the tenancy agreement. Clause 5 of the agreement dated 16.7.1981 is set out below:- A

“5. The tenant to deposit with the Owner Rs.5,00,000/- (Rupees Five Lakhs only) as security deposit without interest for carrying out the terms and conditions of this agreement. This deposit will be refunded to the Tenant on the Tenant vacating the said flat and the said open parking space by giving vacant possession of the said flat and the said open parking space to the Owner.” B

19. In paragraph 2 of the Specific Performance suit before the Bombay High Court the said amount of Rs.5 lacs has been specifically referred to as security deposit. Paragraph 2 of the said plaint is set out hereinbelow:- C

“By a Deed of Lease executed on 16th July, 1981, the Defendant granted a monthly tenancy to the plaintiffs of the said premises on the terms mentioned therein. The plaintiffs kept a deposit with the Defendant of a sum of Rs.5 lacs by way of security deposit as mentioned in the said agreement. The plaintiffs crave leave to refer to and rely upon the said agreement when produced. Pursuant to the said agreement the plaintiffs were put in exclusive possession of the said premises and the same have been in possession of the plaintiffs since then.” D E

20. It may also be mentioned herein that the said amount of Rs.5 lacs was deposited by a cheque by Fiberglass Pilkington Limited, previously the appellant was known in that name. The said cheque was given to the original owner by a forwarding letter dated 14.07.1981 and in the said letter the said amount has been described as a deposit in compliance of the tenancy agreement. The relevant parts of the letter are: F G

“We refer to the agreement in respect of the above premises and as agreed enclose herewith our cheque No. 990188 dated 14.7.81 for Rs.5,00,000/- on Chartered H

A Bank in your favour, being deposit for compliance with the terms of tenancy agreement between us.

Please acknowledge receipt.”

B 21. Therefore, the claim of the appellant that the said deposit of Rs.5 lacs was sale consideration money for the suit premises is contradicted by its averments in the suit and also from the material documents on record.

C 22. Apart from that, Clause 5 of the agreement dated 20.07.1981, on which the appellant's suit for specific performance is based, stipulates that the sale shall be completed within 3 months after 31.01.1983 or at the vendor's option on or after 31.01.1986. There is nothing on record to show that the appellant ever called upon the owner to complete the sale within 3 months from 31.01.1983. In fact the appellant did not take any step for 10 long years and it only became active after the suit was filed by the owner for eviction of the appellant in February 1991. The appellant for the first time wrote a letter dated 19.08.1991 calling upon the owner to complete the sale in terms of agreement dated 20.07.1981. To this letter a reply was sent by the owner on 26.08.1981 refusing to execute the contract in terms of the option of vendor under Clause 5 of the agreement dated 20.07.1981. These facts are admitted in paragraphs 5 to 7 of the plaint filed by the appellant in specific performance suit. It may be mentioned in this connection that neither in the eviction suit filed against the appellant nor in the appeal filed by the appellant against the adverse decision passed against it in the eviction suit, the plea of specific performance was either an issue in the suit or a point for consideration in the appeal.

G 23. It is well known that the remedy of specific performance is special and extraordinary in character and is discretionary in nature. From the facts discussed above, it appears that the appellant has not succeeded in making out a strong case on specific performance so as to restrain the respondents from

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proceeding with their suit for eviction.

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24. We, however, make it clear that the observations made by us on the specific performance suit filed by the appellant are tentative in nature. Those observations have been made as submissions have been made before this Court that during the pendency of the appellant's suit for specific performance, the eviction suit should have been stayed. In order to deal with those submissions we have made the observations as aforesaid. But those are tentative and will not affect the merits of the specific performance suit filed by the appellant and which is pending in the Bombay High Court.

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25. The submission by the appellant's counsel on part performance of the contract under Section 53-A of the Transfer of Property Act also cannot be accepted. Section 53-A of the Transfer of Property Act is based upon the equitable doctrine of part performance in English Law. Initially Section 53-A was not incorporated in the Transfer of Property Act but the same came by way of an amendment for the first time by the Transfer of Property Amendment Act 1929 (Act of 1929). The amendment had to be made in view of some divergence in judicial opinion on the application of the aforesaid equitable doctrine by various Courts in India.

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26. Section 53-A of the Transfer of Property Act has certain ingredients and, in our judgment, those are:-

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- (1) a contract to transfer immovable property;
- (2) the transfer should be for consideration;
- (3) the contract must be in writing;
- (4) it should be signed by or on behalf of the transferor;
- (5) the terms of the contract can be ascertained with reasonable certainty from the writing;

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A (6) the transferee takes possession of the whole or part of the property or if already in possession continues in possession;

B (7) such taking of or continuance in possession should be in part performance of the contract;

(8) the transferee should do some act in furtherance of the contract; and

C (9) he should have performed, or be willing to perform, his part of the contract.

D 27. The rationale of the equitable doctrine of part performance in English Law has been traced in Section 53-A by this Court in the case of *Sardar Govindrao Mahadik and another vs. Devi Sahai and others* – (1982) 1 SCC 237.

E 28. In paragraph 13, page 249 of the report while tracing the said equitable doctrine in the way it has been assimilated in Section 53-A of the Transfer of Property Act, the learned Judges held that the act or action relied upon as “evidencing part performance” must be of such nature and character that its existence would establish the contract and its implementation. The learned Judges further held that the crucial act or action must be of such a character as to be unequivocally referable to the contract as having been performed in performance of the contract. In support of the said conclusion, the learned Judges referred to an Old English decision rendered in the case of *Lady Thynne vs. Earl of Glengall* (2 HL Cases 131). In referring to the said case, the learned Judges quoted the observations therefrom and which are reproduced herein below:

G “...part performance to take the case out of the Statute of Frauds, always supposes a completed agreement. There can be no part performance where there is no completed agreement in existence. It must be obligatory, and what is done must be under the terms of the agreement and by
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force of the agreement...”

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(Page 158 of the report)

29. Relying on the aforesaid principle, the learned Judges in *Sardar Govindrao Mahadik* (supra) reiterated that the act relied upon by the party invoking the said doctrine must be such as by its own force to show the very existence of the same contract.

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30. Applying the aforesaid tests, as we must, to the present situation we find that no case for part performance of the contract has been made out. Here in the plaint filed in the specific performance suit, the case of the appellant is that it was put in possession of the suit premises pursuant to the tenancy agreement dated 16.07.1981 and not on the basis of any other agreement. If we look at the tenancy agreement, we will not find that the appellant was put in possession under the same. In the said suit no evidence appears to have been led by the appellant to show how it came to the possession of the suit premises. This aspect of the case is quite vague.

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31. Apart from that according to the appellant it allegedly paid Rs.5 lacs as sale consideration for the suit premises. As already pointed out in para 2 of the plaint in the specific performance suit, it has been clearly averred that the said amount of Rs.5 lacs was kept in deposit with the original owner of the premises by way of security deposit in terms of tenancy agreement dated 16.07.1981.

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32. In any event, the appellant is required to show that it either performed or is willing to perform its part of the contract. But admitted facts of the case are to the contrary. After the execution of the alleged agreement for sale dated 20.07.1981, the appellant was totally silent and it is only after more than 10 years thereafter i.e. on 19.08.1991, for the first time, it asked the owner to complete the sale and that too after the ejectment suit was filed in February 1991 by the owner. Thus, in the facts

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A and circumstances of this case, the doctrine of part performance under Section 53-A cannot be invoked. Therefore, there is no merit in the argument advanced on behalf of by the appellant on that score.

B 33. Argument advanced on behalf of the appellant on the competence of the respondents to file the suit out of which the present proceeding arises is also misconceived.

C 34. If we look at the recitals in paragraphs 2 and 3 of the Will of the original owner, it would appear that the testatrix appointed her husband Hooseini Salehbhoy Doctor to be the executor of the Will and failing him appointed her sons Saleh Doctor and Parvez Doctor and daughter Niloofar Sawhney to be the executors/executrix of the Will jointly as well as severally for all purposes.

D 35. Paragraph 3 of the Will is very relevant and is set out as below:

E "I DECLARE that in the subsequent clauses of this my Will the expression "my Executors/Trustees" (Whenever the context permits shall mean and include the Executors/ Executrix and Trustee or Trustees of this my Will for the time being whether original additional or *substituted*)."

(Emphasis supplied)

F 36. It is clear that whenever Hooseini Salehbhoy Doctor (husband) is unable to act as executor for whatever reason, the respondents are substituted as executors under the Will.

G 37. The aforesaid recitals in the Will are in consonance with Sections 222 and 234 of the Indian Succession Act. For better appreciation of this point, both the Sections are set out below:

H "222. *Probate only to appointed executor.* – (1) Probate shall be granted only to an executor appointed by the Will.

FGP LTD. v. SALEH HOOSEINI DOCTOR AND ANR. 1015
[ASOK KUMAR GANGULY, J.]

(2) The appointment may be expressed or by necessary implication.” A

“234. *Grant of administration where no executor, nor residuary legatee, nor representative of such legatee.* – When there is no executor and no residuary legatee or representative of a residuary legatee, or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the Will, and letters of administration may be granted to him or them accordingly.” B
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38. From a conjoint reading of these two Sections, it is clear that the said Act recognizes the contingency that where the executor appointed by a Will is unable to act, any other legatee having a beneficial interest may be admitted to prove the Will and letter of administration can be granted to him. D

39. Apart from that, in this case, the respondent No.2 – Niloofar, one of the plaintiffs is a co-owner of the suit premises. In paragraph 9 of the Will there is a specific reference to the suit premises and also to the pending litigation in Small Causes Court at Bombay as well as in the High Court. In paragraph 9 there is a specific recital that the suit premises is bequeathed to Parvez H. Doctor. However, Pervez died on 28.11.1998 and, thus, predeceased the testatrix who died on 30.1.1999. In such a situation, the provisions of Section 105 of the Indian Succession Act, 1925 is attracted. E
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40. Section 105 of the Indian Succession Act reads thus: G

“105. *In what case legacy lapses.* – (1) If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the Will that the testator intended that it should go to some other person. H

A (2) In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.”

B 41. It is clear from the aforesaid Section that the suit premises thus become residuary estate of the testatrix which was to be distributed in accordance with Clause 11 of the will.

42. Clause 11 (iii) of the said Will reads as follows:

C “One-third share to be given to my daughter Niloofer absolutely. If my said daughter Niloofer predeceased me the said one-third share of my said daughter Niloofer shall be given to my son-in-law Arun to be held by him in Trust for my grandchildren Manisha and Alisha and any other child born to my said daughter Niloofer, who may be surviving at the time of my death to use the income-interest, if any, from such bequest, for the benefit of the children of my said daughter Niloofer who may be surviving at the time of death and to handover the proportionate share of the corpus in equal shares to each of my said grandchildren on their attaining the age of 25 years or on their marriage whichever is earlier. In case of my son-in-law Arun also predeceased me the said one-third share of my said predeceased daughter Niloofer shall be held in trust by my Executors and Trustees for the benefit of my grand-children born to my said daughter Niloofer and I direct my Executors/Trustees to use the income-interest, if any of such bequest for the benefit of my said grandchildren and to handover the proportionate share of the corpus in equal shares to each of my said grandchildren on their attaining the age of 5 years or on their marriage whichever is earlier.”

G 43. Therefore, respondent no.2- Niloofer along with others is the residuary legatee and is one of the owners of the suit premises. A co-owner can always maintain a suit for eviction.

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FGP LTD. v. SALEH HOOSEINI DOCTOR AND ANR.1017
[ASOK KUMAR GANGULY, J.]

44. It has been urged by the learned counsel for the appellants that in the Suit which has been filed by the respondents they have not asserted that they are filing it as co-owners but they have claimed that they are filing it as executors/ executrix. So they cannot now meet the challenge of maintainability of the Suit on the ground that it was filed by the respondents as co-owners.

45. It is not possible to accept the aforesaid contention in the facts of this case. This Court is of the opinion that if the status of the respondents as co-owners of the property transpires clearly from the admitted facts of the case, they cannot be denuded of the said status at the instance of some objections by the tenants. Normally, a tenant's right to question the title of a landlord is very limited in view of rule of law which is codified in Section 116 of the Indian Evidence Act.

46. Apart from that it has been held in some decisions of this Court that a co-owner of a property is an owner of the property, till the property is partitioned.

47. In *Sri Ram Pasricha vs. Jagannath and Ors.* (1976) 4 SCC 184, it has been held that a co-owner is as much an owner of the entire property as any sole owner. In coming to the said finding, the learned Judges relied on the proposition laid down in *Salmond on Jurisprudence* (13th edition). The relevant principles in *Salmond on Jurisprudence* are set out herein below:

"...It is an undivided unity, which is vested at the same time in more than one person....The several ownership of a part is a different thing from the co-ownership of the whole. So soon as each of two co-owners begins to own a part of the thing instead of the whole of it, the co-ownership has been dissolved into sole ownership by the process known as partition. *Co-ownership involves the undivided integrity of what is owned.*

A 48. Relying on the aforesaid jurisprudential principles, this Court in *Sri Ram Pasricha* (supra) held as under:

B “Jurisprudentially it is not correct to say that a co-owner of a property is not its owner. He owns every part of the composite property along with others and it cannot be said that he is only a part-owner or a fractional owner of the property. The position will change only when partition takes place...” (Para 27, page 190 of the report)

C 49. Since in the instant case, no partition has taken place, the plaintiffs’ status as co-owners cannot be disputed by the tenant and it is nobody’s case that there is a clash of interest between the respondent and co-owners.

50. Therefore, the Suit is maintainable.

D 51. Reference in this connection may be made to a decision of this Court in *Mohinder Prasad Jain vs. Manohar Lal Jain* – (2006) 2 SCC 724. In para 10 of the said report, learned Judges referred to a decision of this Court in *India Umbrella Mfg. Co. vs. Bhagabandei Agarwalla* – (2004) 3
E SCC 178, which in turn relies on *Sri Ram Pasricha* (supra). The principles which have been affirmed in *Mohinder Prasad Jain* (supra) are that one co-owner filing a suit for eviction against the tenant does so on his own behalf in his own right and as an agent of the other co-owners. In this matter, the
F consent of other co-owners is assumed as taken unless it is shown that the other co-owners were not agreeable to eject the tenant and the suit was filed in spite of their disagreement. (See para 10 page 727 of the report). It is nobody’s case here that other co-owners are objecting to the filing of the suit in question.

G 52. Apart from that in this case, the appellant has admitted the title of the respondents as it has joined them as defendants in their specific performance suit as executors. This appears from the judgment in Appeal No. 731 of 2005 dated 30.8.2008
H in the Court of Small Causes at Bombay. The exact conclusions

FGP LTD. v. SALEH HOOSEINI DOCTOR AND ANR. 1019
[ASOK KUMAR GANGULY, J.]

of the appellate Court are set out below:

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"...In that suit (specific performance suit), present plaintiffs are joined as defendants..... It means the defendant admitted derivative title of the present plaintiffs...."

53. In this connection, we must see the distinction between Sections 211 and 213 of the Indian Succession Act. Under Section 211 of the said Act, the executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. Here the legal representatives will have the same meaning as has been given in Section 2(11) of the Code of Civil Procedure.

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54. Section 2(11) of the Code of Civil Procedure provides as under:

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"legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued".

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55. Therefore, it is Section 211 and not Section 213 that deals with the vesting of property. This vesting does not take place as a result of probate. On the executor's accepting his office, the property vests on him and executor derives his title from the Will and becomes the representative of the deceased even without obtaining probate. The grant of probate does not give title to the executor. It just makes his title certain. Under Section 213, the grant of probate is not a condition precedent to the filing of a suit in order to claim a right as an executor under the will.

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56. This vesting of right is enough for the executor or administrator to represent the estate in a legal proceeding. It

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A has been held in *Kulwanta Bewa vs. Karam Chand Soni* -
reported in AIR 1938 Calcutta 714 that the whole scheme of
the Act is to provide for the representation of the deceased's
estate for the purpose of administration. That vesting is not only
for the beneficial interest in the property but is also for the
purposes of representation. Similarly, it has been held in
B *Meyappa Chetty vs. Supramanian Chetty* - (1916) 43 IA 113,
that an executor derives his title from the Will and not from the
probate and the right of action in respect of personal property
of the testator vests in the executor on the death of the testator.

C 57. But Section 213 operates in a different field. Section
213 enjoins that rights under the Will by executor or a legatee
cannot be established unless probate or letters of
administration are obtained.

D 58. Therefore, Section 211 and Section 213 of the said
Act have different areas of operation. Even if Will is not probated
that does not prevent the vesting of the property of the
deceased on the executor/administrator and consequently any
right of action to represent the estate of the executor can be
initiated even before the grant of the probate.
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59. Similar opinion has been expressed by this Court in
*Commissioner, Jalandhar Division and Ors. vs. Mohan
Krishan Abrol and Anr.* - (2004) 7 SCC 505 (See para 10 at
page 513). So the suit filed by the respondents as executors
F is also maintainable.

60. Thus on the facts of the case this Court does not find
any justification for its interference with the decision of the High
Court rendered in its revisional jurisdiction. In coming to this
conclusion, this court has considered the facts of this case and
also the fact that appellant is paying a meager sum of Rs. 900/
- and odd per month for occupying the said flat in a prime area
in Mumbai. Appellant is not in occupation of the said flat and
since 2000 has admittedly allowed a total outsider, one Mr.
G Abhik Mitra, the Managing Director of a Company known as
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FGP LTD. v. SALEH HOOSEINI DOCTOR AND ANR. 1021
[ASOK KUMAR GANGULY, J.]

Sa Re Ga Ma Pa Ind. Ltd., to occupy the said flat. The flat is lying vacant since May, 2005.

61. As against all these facts when we find that the Suit is for reasonable requirement and was filed by the grandchildren of the testatrix, this Court, in our judgment, should not exercise its discretionary jurisdiction by interfering with the eviction proceeding which culminated in the revisional order of the High Court.

62. Reference in this connection be made to a decision of this Court in *Balvantrai Chimanlal Trivedi, Manager, Raipur Mafg. Co. Ltd. Ahmedabad vs. M.N. Nagrashna and Ors.* – AIR 1960 SC 407. In para 5 at page 408 of the said report, a three-Judge Bench of this Court posed a question whether this Court should interfere under Article 136 of the Constitution and when in the facts of the case there is no failure of justice. The question has been answered by this Court as follows:

“5. The question then arises whether we should interfere in our jurisdiction under Article 136 of the Constitution, when we are satisfied that there was no failure of justice. In similar circumstances, this Court refused to interfere and did not go into the question of jurisdiction on the ground that this Court could refuse interference unless it was satisfied that the justice of the case required it; see: *A.M. Allison vs. B.L. Sen* (1957) SCR 359: ((S) AIR 1957 SC 227). On a parity of reasoning we are of the opinion that as we are not satisfied that the justice of the case requires interference in the circumstances, we should refuse to interfere with the order of the High Court dismissing the writ petition of the appellant.”

63. An attempt was made to review the said judgment. The review petition was decided by a Constitution Bench of this Court. Justice Wanchoo speaking for unanimous Constitution Bench has very succinctly, if we may say so, outlined the parameters of this Court's jurisdiction under Article 136 of the

A Constitution and those observations, which we should always remember while exercising jurisdiction under Article 136, are as follows:

B "...It is necessary to remember that wide as are our powers under Article 136, their exercise is discretionary; and if it is conceded, as it was in the course of the arguments, that this, Court could have dismissed the appellant's application for special leave summarily on the ground that the order under appeal had done substantial justice, it is difficult to appreciate the argument that because leave has been granted this Court must always and in every case deal with the merits even though it is satisfied that ends of justice do not justify its interference in a given case..." (See AIR 1960 SC 1292 at 1294)

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D 64. For the reasons stated above, we do not find any merit in this appeal which is dismissed accordingly. However, we are restraining ourselves for passing any order as to costs in view of the excellent assistance rendered to this Court by the learned counsel for the appellant. Therefore, there is no order as to costs.
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B.B.B.

Appeal dismissed.