

A

SYSCON CONSULTANTS P. LTD.

v.

M/S. PRIMELLA SANITARY PROD. P. LTD. AND OTHERS

(Civil Appeal No. 2910 of 2013)

B

SEPTEMBER 19, 2016

**[KURIAN JOSEPH AND R.F. NARIMAN, JJ.]**

*Specific Performance – Sale agreement – By defendant Nos. 1 to 6 with the plaintiff – Claiming to be absolute owners of the property in question and concealing the fact that the property was mortgaged with Bank and there was another heir (their sister) – However, the defendants 1 to 6 had agreed to give clear title to the plaintiff – Advance paid by the plaintiff – Thereafter defendants 1 to 6 communicated to the plaintiff their inability to sell the property as their sister claimed pre-emptive rights – Plaintiff filed suit (suit No. 88/1987) for specific performance of the contract – The sister and her husband also filed suit for declaration and injunction (Suit No. 105/1987) in respect of suit property as well as other properties, against defendant Nos. 1 to 6 and the plaintiff – In recovery proceedings by the mortgagee Bank, the distress sale of the suit property was averted on plaintiff repaying the loan amount on the request of defendant Nos. 1 to 6 – Mortgage was redeemed – The sister initiated inventory proceedings for division of the property including suit property – In the inventory proceeding the court was not informed about the pending suit, nor the plaintiff was informed about the same – In the inventory proceedings sister and her husband obtained suit property – Writ petition by the sister challenging the proceedings of the Asstt. Registrar culminating in redemption of mortgage – Petition disposed of by High Court giving liberty to pursue their rights as per law – Plaintiff thereafter amended the suit (88/1987) impleading sister and her husband as additional defendants (as defendant Nos. 7 and 8), also challenging inventory proceedings and sought compensation – Defendant Nos. 7 and 8 sold their property to defendant No. 9 – Trial court dismissed the suit of plaintiff and upheld the rights of defendant Nos. 7 and 8 – High Court decreed the suit to the extent of the share of defendant Nos. 1 to 6 – Appeal by the plaintiff, by the defendant Nos. 1 to 8*

H

*and also by the purchaser of the property i.e. defendant No. 9 – A*  
*Held: In view of the conduct of the parties, it is not a fit case to*  
*exercise discretionary jurisdiction u/Art. 136 of Constitution – The*  
*plaintiff had throughout been ready and willing to perform its*  
*obligations under the agreement to sell – In view of the nature of*  
*the property, monetary compensation would not be an adequate*  
*alternative to specific performance – The plaintiff went to the extent*  
*of discharging the mortgage by paying a sum which was almost*  
*three times the amount of sale consideration – Defendant Nos. 1 to*  
*8 had already given up on their rights in the suit property by not*  
*taking steps to avoid the distress sale at the instance of the Bank –*  
*Defendant Nos. 1 to 6 also failed to complete the sale even after*  
*clear title was made out, i.e. when the obstacle of mortgage was*  
*removed – The agreement became enforceable after clear title was*  
*made out – Even if undivided share of one of the other heirs of the*  
*property cannot be transferred, the remaining share of other heirs*  
*can be transferred – Art. 2177 of Portuguese Civil Code, 1867*  
*does not prohibit alienation of undivided interest – No injustice is*  
*caused to defendant No. 9 either, as he purchased the property*  
*under litigation being fully aware of the same – Portuguese Civil*  
*Code, 1867 – Art. 2177 – Constitution of India – Art. 136.*  
B  
C  
D

**Dismissing the appeals, the Court**

**HELD: 1.** The suit property, no doubt is jointly owned by  
Defendants 1 to 8. But the agreement for sale was only by the  
Defendants 1 to 6. They not only excluded the sister and her  
husband but made two deliberate and wrong representations: that  
Defendants 1, 3 and 5 are the only children and that the suit  
property was the only estate left by their parents. [Para 40] [477-  
B-C]  
E  
F

**2.** Fully conscious of the fact that there was another heir  
namely the sister and that the property had already been  
mortgaged to the Cooperative Bank, a very significant clause  
was incorporated in the agreement to the effect that the vendors  
could execute a proper conveyance in favour of the purchasers  
and in that regard, the vendors would make any other person or  
persons to join them so as to convey an absolute title to the  
purchaser or to redeem any charge or encumbrance. This clause  
clearly shows that the Defendants 1 to 6, had still genuinely  
G  
H

A intended to execute the sale covering both the eventualities  
namely, joining the sister and her husband and redeeming the  
mortgage. [Para 40] [477-D-E]

B 3. At one stage, Defendants 1 to 8 apparently were sailing  
together, faced with the distress sale of the suit property by the  
bank. It was in that context that the Defendants 1 to 6 made a  
request to the Plaintiff (by letter dated 14.11.91 Exbt PW 1/F)  
that in case the Plaintiff cleared the loan liability, they would get  
in the sister also for the conveyance of the property and settle  
the whole dispute. Thereafter, Defendants 1 to 6 left the Plaintiff  
and consequently wanted the agreement to get frustrated. [Para  
C 41] [477-F-G; 478-D]

D 4. As far as Defendants 7 and 8 are concerned, they not  
only went back on their undertaking in Court to pay the dues to  
the bank so as to avert the auction sale, they have not pursued  
their claim if any, to the title to the property as per the liberty  
granted to them by judgment dated 10<sup>th</sup> October, 1994 of the  
High Court in Writ Petition No. 277 of 1994. The High Court  
apparently was clear in its mind, that if at all, Defendants 7 and 8  
wanted to save the situation by exercising their right to pre-  
emption under the Portuguese Laws, they could still do that within  
E six months. Yet, nothing was done. In any case, more than six  
months after the judgment dated 10.10.1994, they sold the suit  
property on 14.11.1995 when as a matter of fact, Defendants 1 to  
8 had by their conduct forfeited all rights and interests in respect  
of the suit property. Thus, there is no question of right of pre-  
emption available to Defendants 7 and 8. [Para 42] [478-D-F]

F 5. The Defendants 7 and 8 chose, with the assent of  
Defendants 1 to 6 in the inventory proceedings, the suit property,  
fully knowing that the property was disputed. Normally, one would  
avoid a disputed property or leave a disputed property to the  
authors of the dispute, i.e., the brothers in this case. None of the  
G Defendants 1-8 told the District Judge in the inventory  
proceedings that the property was already in dispute, and that  
two civil suits were pending in which case the District Judge  
would have certainly taken note of the litigation. [Para 43] [478-  
G-H; 479-A]

H

6. It cannot be said that it was not necessary to give notice of inventory proceedings to anybody other than the members of the family who are entitled to succeed to the estate or disclose any charge on the property. So long as there is no bar for transferring the undivided interest in the estate by any of the legal heirs, any charge or liability to the estate was also to be disclosed in the inventory proceedings so that the estate could be partitioned taking note of such charges, and in case of litigation, the proceedings would have awaited the outcome thereof. [Para 45] [479-C-D]

7. Thus, Defendants 7 and 8 had full knowledge of the suit for specific performance and also the liability to the Cooperative Bank when they chose the disputed property as their share in the inventory proceedings and yet, they were not prepared to even clear the liability to the Cooperative Bank. It was the Plaintiff who paid the money and averted the auction sale and redeemed the property. Had the Plaintiff not cleared the dues to the Bank, the property would have been auctioned, divesting Defendants 7 and 8 of their rights and interests in the property. [Para 46] [479-F-G]

8. In view of the conduct of the parties, this is not a fit case to exercise discretionary jurisdiction under Article 136 of the Constitution of India. On reading the correspondence between the parties, it is clear that the Plaintiff has throughout been ready and willing to perform its obligations under the Agreement to Sell. The other unique feature of this case is that the suit property is an island off the coast of Goa which is not readily capable of valuation. This fact also shows that monetary compensation would not suffice and be an adequate alternative to specific performance. The third unique feature of this case is that, the Plaintiff went to the extent of discharging the mortgage with the Bank by paying a sum of Rs. 17 lakhs which was almost three times the amount of the consideration mentioned in the agreement, i.e., Rs. 6,50,000/-. [Paras 48 and 49] [480-E-H]

9. It is clear that Defendants 1 to 6 failed or neglected to complete the sale even after clear title was made out when the obstacle of the mortgage was removed. Clause 9 of the sale agreement specifically states that if after the title is made out,

A the vendor fails and neglects to complete the sale, and/or to carry  
 out any of the obligations on his part as contained in the  
 Agreement, the purchaser shall be at liberty to enforce specific  
 performance of the Agreement or recover the earnest money  
 with interest at 21 per cent per annum at their option. Having  
 clearly opted throughout to enforce specific performance, justice  
 B of the case requires that Clause 9 of the agreement must be  
 applied in favour of the Plaintiff. After inducing the plaintiff as  
 per PW-1/F letter to pay Rs.17 lakhs to the co-operative bank to  
 clear the dues on the clear understanding that the defendants 1  
 to 8 would thereafter execute the sale deed, they cannot go back.  
 C The clear title stood made out at that stage and the agreement  
 was enforceable thereafter. [Para 50] [481-B-E]

10. Even if the undivided share of one of the other heirs of  
 the property cannot be transferred, the remaining share of the  
 other heirs certainly can be transferred. [Para 51] [481-E-F]

D *Kartar Singh v. Harjinder Singh and Ors.* (1990) 3 SCC  
 517; *Sardar Singh v. Krishna Devi (Smt) and Anr.* (1994)  
 4 SCC 18; *A. Abdul Rashid Khan (Dead) and Ors. v.*  
*P.A.K.A. Shahul Hamid and Ors.* (2000) 10 SCC 636;  
*Surinder Singh v. Kapoor Singh (Dead) Through Lrs.*  
 E *and Ors.* (2005) 5 SCC 142 : 2005 (3) SCR1084;  
*Gajara Vishnu Gosavi v. Prakash Nanasaheb Kamble*  
*and Ors.* (2009) 10 SCC 654 : 2009 (14) SCR 569 –  
 relied on.

11. It is not correct to say that under Article 2177 of the  
 F Portuguese Civil Code, 1867, there was an absolute bar for  
 transfer of any portion of the estate or a specific item of the estate.  
 Article 2177 does not prohibit alienation of undivided interest,  
 which is in tune with the principle underlying Section 44 of the  
 Transfer of Property Act, 1882. Defendants 1-8 had already given  
 up on their right in the suit property by not taking steps to avoid  
 G the distress sale at the instance of the Bank. Despite specifically  
 getting reserved a liberty to proceed further after the redemption  
 of the property by the Plaintiff, nothing was done by Defendants  
 7 and 8. They also did not exercise their right of pre-emption  
 available under the Portuguese Law. Conspicuously, none of the  
 H defendants entered the witness box despite the voluminous and

clinging evidence tendered by the Plaintiff, obviously to avoid inconvenient questions, particularly, based on PW-1/F. [Paras 57 and 58] [486-C-D; F-H] A

12. No substantial or grave injustice is caused to the Defendants, in particular, Defendant No. 9, who, with open eyes, purchased litigation. On the contrary, the justice of the case, on facts, is in favour of the Plaintiff, and therefore, no interference under Article 136 of the Constitution is required. Once, it is found that justice of the case on facts does not require interference, this Court, even at the appellate stage, is well within its discretion to stay its hands off. [Paras 59 and 60] [487-A-C] B

*Taherakhatoon (D) by Lrs. v. Salambin Mohammad*  
(1999) 2 SCC 635 : 1999 (1) SCR 901 – relied on. C

Case Law Reference

(1990) 3 SCC 517	relied on	Para 52
(1994) 4 SCC 18	relied on	Para 53
(2000) 10 SCC 636	relied on	Para 54
2005 (3) SCR 1084	relied on	Para 55
2009 (14) SCR 569	relied on	Para 56
1999 (1) SCR 901	relied on	Para 59

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2910 of 2013. D

From the Judgment and Order dated 05.08.2010 of the High Court of Judicature at Bombay, Panaji Bench, Goa in First Appeal No. 179 of 2003.

WITH F

C.A. Nos. 2909, 2911 and 2912 of 2013

Conmt. Pet. (C) No. 89 of 2016 in C. A. No. 2910 of 2013.

J. P. Cama, Amit Sibal, Sr. Advs., Ajay Veer Singh Jain, R. K. Verma, U. R. Bokadia, Atul Agarwal, Ms. Divya Garg, Mohd. Irshad Hanif, Ms. Shobha, Ms. Akanksha Kaushik, Yashraj Singh Deora, Ms. Priyadarshinee Singh, Ms. Ashmita Singh, Ms. Shalini Sati Prasad, Vivek Raja, Tahir Ashraf Siddiqui, Amitesh Chandra Mishra, Nishant Awana, Ms. Rini-Badoni, Azmat H. Amanullah, Ms. Vishakha Jha, Debdatta Ray Choudhary, M/s. Karanjawala & Co., Balaji Srinivasan, Advs. with them for the appearing parties. G H

A The Judgment of the Court was delivered by

**KURIAN, J.:** 1. These appeals essentially deal with a dispute on the validity and executability of an agreement for sale and once that issue is tackled, the rest are practically not of much significance. The parties are described as they are in the suit for specific performance No. 88/1987 on the file of the Civil Judge Senior Division at Margao. The Plaintiff is the first respondent herein. The Plaintiff had sought for specific performance of the agreement dated 04.09.1985 made with Defendants 1 to 6 for conveyance of the suit property known as Conco situated at village Palolem in Canacona Taluka in the State of Goa. The 7<sup>th</sup> Defendant was the Bank where the Defendants had mortgaged the suit property.

2. In the agreement dated 04.09.1985, the Defendants 1 to 6 claimed that they were the absolute owners of the suit property and that the property was free from all attachments, charges, etc. The agreed consideration was Rs.6.5 lakhs and, on the date of agreement, Rs.50,000 was given as advance. The relevant portions of the agreement for sale dated 04.09.1985, are extracted below:

“3. The Vendor hereby declares that the said land agreed to be sold is free from any encumbrance, attachment, charge or other claims, rights and demands, and is not affected by any notice or scheme of acquisition or requisition and that the Vendors have among themselves the full power and absolute authority to sell and deal with the said land. The Vendor shall at his own expense effectually indemnify and keep indemnified the purchasers from and against all claims, demands, losses, damages, cost and expenses, if any and whatsoever, sustained, incurred or suffer by the Purchaser, on account of any defect in the title of the Vendor or any change or encumbrance or any scheme of acquisition or requisition affecting the land hereby contracted to be sold.

4. The Purchaser has this day paid to the Vendor the sum of Rs.50,000/- (Rupees fifty thousand only) as and by way of earnest money (the payment and receipt whereof the Vendor does hereby admit and acknowledges) and the balance of the purchase money amounting to Rs.6 lacs (Rupees six lacs only) shall be paid at the time of the

H

completion of the sale. Simultaneously with the execution of this agreement the Vendor shall at his own cost furnish to the Purchasers an abstract of all title deeds and other papers and writings including copies or extracts from records of the Talati or Circle Inspector relating to the said land. The sale shall be completed within one month from the date of establishment of a good and marketable title of the Vendor.”

A

B

xxx

xxx

xxx

xxx

“6. The Vendor hereby agrees to answer all reasonable requisitions and satisfy all objections on title to be made by the Purchasers or their Solicitor or Representatives. If a good and marketable title is made out and the said land is found to be free from all encumbrance, attachments and charges and other rights, demands and claims and not effected by any notice or scheme of acquisition or requisition AND permission and no objection from any Authority or Authorities, if any, is obtained by the Vendor, the Vendor will execute a proper conveyance or conveyance in favour of the Purchasers or their nominee or nominees or assigns in which the Vendor shall make the other person or persons, if any, join, if necessary, to pass and convey an absolute title unto the Purchaser or his nominee or nominees or assigns or to redeem any charge or encumbrances. The Vendor shall bear and pay all outgoing, expenses and liabilities in respect of the said land upto and inclusive of the day of the completion of the sale. The Vendor shall hand over vacant and peaceful possession to the Purchaser of the said land at the time of completion of the sale.”

C

D

E

F

xxx

xxx

xxx

xxx

“8. If a good and marketable title is not made out or the said land is found to be subject to any encumbrances charges or attachments or other claims, rights or demands the Purchaser shall be at liberty to rescind this Agreement and the Vendor shall in the event forthwith refund the said earnest money with interest at 21% per annum.

G

9. If the Vendor fails and or neglects to complete the

H

A sale after the title being made out as aforesaid or otherwise to carry out any one or more of the obligations on his part as herein contained or enjoyed upon by any law for the time being in force the Purchaser shall be at liberty to enforce specific performance of this Agreement or recover the earnest money with interest at 21 % per annum."

B

(Emphasis supplied)

3. It may be relevant to note that the sale was to be completed within one month from the date of establishment of a good and marketable title of the vendor and, if the title was not made out or in case the said land was found to be subject to any encumbrance or charges or attachments or other claims, rights or demands, the Plaintiff was at liberty to rescind the agreement and, in that event, the Defendants 1 to 6 would refund the earnest money with interest @ 21 per cent per annum. It was also agreed between the parties that in case the Defendants 1 to 6 fail to complete the sale after a good and marketable title is made out, the Plaintiff was at liberty to enforce the specific performance of the agreement or recover the earnest money with interest @ 21 per cent per annum. It is also significant to note that the Defendants 1 to 6 had clearly agreed to give a clear title to the property, if necessary by joining any other person or persons or even to redeem any charge or encumbrance.

C

D

E

4. Defendants 1 to 6 traced their authority to transfer the property to a deed of declaration of succession executed by them on 03.11.1981 before a Notary Public as provided under the Portuguese Law. It was declared that Vishwanata Purshotam Sinai Gaitonde and his wife Anandibai Viswanata Gaitonde died intestate ... "leaving their sole and only heirs their three children ..." and "... there does not exist persons, who, according to law, may have preferential right over the said legal heirs or may concur with them to the estate." It was further declared that their parents ... "left no movable properties but only an immovable property situated at Palolem Canacona known as Conco" (the suit property).

F

G

5. On account of the Portuguese personal law applicable in Goa, their wives also became heirs and thus the agreement for sale with the Plaintiff was executed by Defendants 1 to 6.

H

6. While the steps for the sale were in progress, Smt. Kishori

Nayak daughter of Vishwanata Purshotam Sinai Gaitonde and Anandibai Viswanata Gaitonde, real sister of Defendants 1, 3 and 5 raised an objection that she was also entitled to succeed to the estate of her parents and, in particular, she was interested in the suit property, and therefore, they should not proceed with the sale. A

7. Smt. Kishori Nayak was later impleaded as 7<sup>th</sup> Defendant in the suit and her husband as the 8<sup>th</sup>. According to the 7<sup>th</sup> Defendant, she had informed the Plaintiff of her objection. But in any case, it has come in the evidence of Plaintiff that the 1<sup>st</sup> Defendant- Shri Gurudas Gaitonde had informed the Plaintiff about the objection, by his letter dated 03.04.1987. B

8. In the Special Civil Suit No. 88/87/A filed by the Plaintiff in the court of Civil Judge Senior Division, Margao, the Plaintiff claimed that the agreement was enforceable at the option of the Plaintiff-purchaser. To quote paragraph-7 of the plaint: C

“7. The Plaintiff submits that the said Agreement dated 4<sup>th</sup> September, 1985 is specifically enforceable at the option of the plaintiff, and the plaintiff is entitled to purchase of the suit property on the terms and conditions contained in the said Agreement. In terms of the said Agreement, the Defendants no. 1 to 6 are liable to make out a good and marketable title of the suit property free from all encumbrances, restrictions, charges, claims and demands and execute a proper conveyance by joining other person or persons thereto, if necessary, to convey an absolute title thereof to the plaintiff.” D E

9. At paragraph-14, the Plaintiff has acknowledged the receipt of letter dated 03.04.1987 from Defendant 1, to treat the agreement as cancelled. Paragraph-14 reads as follows: F

“14. In the meantime, the plaintiff received a demand draft bearing No. OL/A/85 016341 dated 3-4-1987 drawn on State Bank of India for a sum of Rs 20,000/- the defendant no. 1 alongwith a letter expressing the intention of the defendants no. 1 to 6 to treat the agreement dated 4<sup>th</sup> September, 1985 as cancelled.” G

10. Contextually, we may refer to the letter dated 03.04.1987 which is Exhibit-PW1/C in the suit. To the extent relevant, the letter reads as H

A follows:

“Dear Shri Malhotra,

In my letter dated 5.3.87, I have informed regarding my inability to sale of land at Canacona.

B Mr. Bhatnagar called on to me last Thursday. I have to explain also the position to him. He advised me to sell the property and forget about the notice of my sister. He said you are able to face any action from my sister’s side, to be frank I am helpless.

C I discussed the issue with lawyer I am told that in any case sale would invite serious litigation and I would not be left out even if you take over this responsibility particularly if my sister exercises her right of preemption.

D As you know that I am not keeping well due to my heart problem and family litigation will aggravate my health.

I have thought over this aspect seriously and only you can relieve me from this agony.

E As promised in my above letter 5.3.87 I am sending with this letter a bank draft for Rs.20,000/-. The balance I shall remit as early as possible kindly bear with me some time. ...”

The Plaintiff, however, did not accept the amount but insisted on specific performance.

F 11. The suit originally maintained only the following reliefs:

“

G (a) That Your Honour may be pleased to pass a decree for specific performance of contract dated 4<sup>th</sup> September, 1985 made between the defendants no. 1 to 6 and the plaintiff and direct the said defendants to execute a proper deed of Conveyance of the suit property viz., the property known as “CONCO” situated at Village Palolem in Canacona Taluka, registered under No. 14858 and 14859 of Book B-41, F1. 64 (overleaf) in the Land Registration Office at Margao, Goa surveyed under Survey No. 119,

H

Sub-Division no. 1 of Nargarsem-Palolem Village and may further be pleased to direct the said defendants to do all acts, deeds and things for registration of the said Deed of Conveyance;

A

(b) That Your Honour may be pleased to direct defendants no. 1 to 6 to join the defendant no. 7 as a confirming party to the said Deed of Conveyance and arrange for execution of the said deed by the defendant no. 7 as a confirming party;

B

(c) For a decree of permanent injunction restraining the defendants from selling, transferring and/or creating any encumbrance, interest, charge, restriction, claim or demand on the said property in favour of any person or persons other than the plaintiff in any manner whatsoever;

C

(d) For interim injunction in terms of prayer (c);

(e) For such other further reliefs as Your Honour may deem fit and proper;

D

(f) For costs as Your Honour may deem fit and proper in the circumstances of the case."

12. In the written statement filed on 10.02.1988, Defendants 1 to 6 took the stand that the sale as per agreement could be performed only "if a good and marketable title is made out" and if not, the agreement was rescindable.

E

13. The objections on the part of the sister of Defendants 1, 3 and 5 and her husband were also brought out in the written statement. To quote:

F

13. "Sometime in the month of Feb. '87, sister of defendant No. 1, 3 & 5 and her husband set up a claim to the ancestral property as a whole including the suit property. On account of this the defendants were in a tight corner on the subject of sale of the suit property. Defendant No. 1 accordingly wrote two letters one after the other to the plaintiffs informing them of the defendants' inability to convey title as per the agreement. A copy of the defendants letter dated 05.03.87 is annexed hereto marked as Exhibit 5. Thereafter on 03.04.87 defendant No. 1 sent a Bank

G

H

A draft of Rs 20,000/- alongwith a covering letter which is self explanatory. Annexed hereto and marked exhibit 6 is a copy of the said letter.

Plaintiffs have suppressed these material facts and as such are disentitled for equitable relief of specific performance. Plaintiffs have not approached this Court with clean hands and this suit therefore has to be dismissed on this ground alone.”

14. At paragraph-16 of the written statement, it was also disclosed that the attempt on the part of the Defendants 1, 3 and 5 to purchase peace with their sister did not fructify and that she had filed a civil suit for injunction. To quote paragraph-16:

“16. Defendants did write to the plaintiff’s lawyer that detailed reply would be sent as there was attempt from the defendant’s side to close the issue with the disputant sister and her husband to enable the defendants to complete the sale. But unfortunately, the sister Smt. Kishori P. Nayak and her husband, Shri Prabhakant R. Nayak did not settle the issue amicably and filed a civil suit in the court of the Civil Judge Senior Division at Margao. The said suit is registered as special civil suit no. 105/87/A and a civil application filed in the same is registered as Misc. Application No. 212/87/A. The Honourable Court has passed a temporary injunction order restraining the defendants from executing sale deed in respect of the suit property in favour of the plaintiffs who are impleaded as Defendant no. 7 in the said suit. The plaintiffs in the said suit have inter alia challenged the enforceability and legality of the agreement dated 4.09.85 which is the subject matter of this suit also.

Defendants 1 to 6 herein state and submit that for proper and effective adjudication of this suit Smt. Kishori Prabhakant Nayak and Shri Prabhakant R. Nayak should be added in this suit as defendants as they have leveled a challenge to the enforceability of the agreement sought to be specifically enforced in this suit by the plaintiff herein.”

15. In short, Defendants 1 to 6 wanted the suit to be dismissed in

view of the objection of Smt. Kishori Nayak.

A

16. It may be noted that Defendant 7 originally was the Cooperative Bank with whom the suit property had been mortgaged; but it appears on clearing the loan, the Bank was deleted and thereafter Smt. Kishori Nayak was impleaded as Defendant 7 and her husband Shri Prabhakant Ramrai Nayak as Defendant 8.

B

17. Special Civil Suit No. 105/1987/A was filed by Smt. Kishori Nayak, real sister of Defendants 1, 3 and 5 and her husband Shri Prabhakant R. Nayak before the Civil Judge Senior Division, Margao against Defendants 1 to 6 and the Plaintiff. It was a suit for declaration, permanent and temporary injunction. It was stated in the plaint that apart from the suit property of Civil Suit No. 88/1987, five other items of property were also left intestate. It was averred that the agreement of sale of any property without the sister and her husband is null and void. To quote from paragraph-7:

C

“7. Plaintiffs state that the defendants no. 7 is a company which has entered into an agreement to sell the suit property with defendant nos. 1 to 6 on the 4<sup>th</sup> of September, 1985, which agreement is impugned herein, ignoring the legal rights of the plaintiffs to the suit property, in collusion with one another and are about to execute the deed of conveyance and as such the plaintiffs are compelled to file the suit to seek the assistance of this Hon’ble Court by an appropriate order of declaration and permanent injunction restraining the defendant number 1 to 6 from in any manner alienating and/or executing any deed of conveyance or any other instrument of transfer of possession of the suit property to the name of the defendant no. 7 in pursuance of the impugned agreement to sell allegedly entered into on 4<sup>th</sup> September 1985 declaring that the said agreement is ab-initio null and void ad hence unforceable specifically.”

D

E

F

18. Again, at paragraph-9, it has been averred that:

G

“9. Plaintiffs state that they being co-sharers and co-owners of the suit property as aforesaid the defendant nos. 1 to 6 had no authority in law to negotiate the said deal without their consent and knowledge with defendant no. 7 and on this count alone the alleged agreement to sell and/or the

H

A       alleged deed of sale dated 4<sup>th</sup> December 1985 is ab-initio void and the plaintiff's are entitled in law for such a declaration."

B       19. At paragraph-14, it was averred that the entire properties, left intestate being ancestral, the same are to be divided only as per Portuguese Law of Succession through inventory proceedings. To quote from paragraph-14:

C       "14. Plaintiffs state that their share in the ancestral suit property is undivided and indivisible till the suit property as well as other ancestral properties are auctioned in appropriate inventory proceedings to be initiated under the Portuguese Law of Succession and till the shares of the heirs are ascertained and as such the suit property or any part of the same cannot be sold as contemplated under the agreement of sale dated 4<sup>th</sup> September 1985 in exclusion to them. Plaintiffs state that even if the inventory proceedings are initiated and the properties are auctioned amongst the members of the family, they are entitled to exercise their right of preemption and under the prevailing law of succession governing this land."

D       20. Though there had been several other developments in between, it is not necessary to refer to those aspects. Suffice to note that in the meantime, inventory proceedings were initiated before the same court of Civil Judge Senior Division at Margao at the instance of Defendants 7 and 8 namely, Smt. Kishori P. Nayak and her husband Shri Prabhakant R. Nayak. Paragraphs- 1 to 4 of the petition being relevant are extracted herein:

F       "1. The applicants are the daughter and son-in-law of the Late Visvonata Purxotoma Sinai Gaitonde and the late Anandibai V. Gaitonde who died on 26.10.1966 and 25.06.1976 respectively. Hereto annexed are the death certificates.

G       2. The deceased left behind their heirs, their three sons and their daughter, the applicant no. 1 herein.

H       3. The estate of the deceased has not yet been partitioned and continues undivided.

4. The son of the deceased, Mr. Ratnakar Vishwanath Gaitonde, resident of Vishwanath Sunirti, Super Market, Ponda, Goa is competent to be appointed as Cabeça de casal, he being the eldest son of the deceased.”

A

21. In the inventory proceedings, the auction took place on 01.12.1990. The suit property was auctioned by the 7<sup>th</sup> Defendant- Smt. Kishori Nayak and the remaining estate was also divided amongst the other heirs and the final orders in the inventory proceedings was passed by the Civil Judge Senior Division, Margao on 30.01.1991.

B

22. The Plaintiff, thereafter, filed Civil Suit No. 329/1992 seeking a declaration that inventory proceedings were vitiated by fraud to the extent of allocation of suit property to the 7<sup>th</sup> Defendant Smt. Kishori Nayak and her husband and for setting aside the inventory proceedings.

C

23. In the meantime, the Cooperative Bank initiated recovery proceedings by putting the suit property to public auction. The Bank obtained an award and published the proclamation for the sale of the suit property by public auction. On 10.01.1989, the Defendants 7 and 8, hence, filed a Regular Civil Suit No. 3/1989/B for injunction restraining the bank from proceeding with the sale. That suit was decreed as compromised on 23.04.1992. The relevant paragraphs from the decree read as follows:

D

“5. In such circumstances, the plaintiff was though legally not bound, morally feels her obligation not to put in jeopardy the interest of the Bank, therefore she guarantees the payment of the debt to the Bank (defendant no. 2) reserving her right to recover the amount from defendant no. 1 (Smt. Sunita Gaitonde)”

E

xxx                      xxx                      xxx                      xxx

F

“9. The plaintiff further agrees that in the event the plaintiff fails to pay the entire liability within a period of 15 (fifteen) days, the defendant no. 2 is free to sell the suit property in auction and realize from the proceeds of the auction sale the amount of loans, interest and other charges with clear understanding that the asset value shall not be less than the amount of principal and interest and other charges.”

G

(Emphasis supplied)

H

A           24. The Defendants 7 and 8 did not make any payment to the  
Bank so as to avert the distress sale of the suit property and neither did  
Defendants 1 to 6. The Defendants 7 and 8 in the compromise decree  
had gone to the extent of giving up all hopes by agreeing that in case,  
they failed to pay the dues, the suit property could be sold but the only  
B           condition was that the sale amount should cover the entire liability arising  
out of the loan including interest and other charges meaning thereby that  
they were worried only about saving other assets. It is at that juncture  
that the Plaintiff cleared the entire liability on payment of Rs. 17 lakh on  
12.05.1993. Thus, the distress sale was averted, the mortgage was  
redeemed and the charge on the property was released

C           25. The Defendants 7 and 8 filed a writ petition before the High  
Court challenging the proceedings of the Assistant Registrar culminating  
in redemption of mortgage. The Writ Petition was disposed of by judgment  
dated 10.10 1994, stating :

D           “Respondents Nos. 4 to 10 mortgaged a property to  
respondent No.2, Bank and took certain loan. The amount  
was not paid by them. Respondent No.2, Bank, obtained  
the said certificate and started recovery proceedings in  
which the property was put to sale. At the time of the sale,  
E           respondent no.1, claiming interest in the property on the  
basis of some Agreement of Sale, allegedly executed by  
respondents Nos. 4 to 10 in their favour paid Rs. 17,00,000/  
- to the Recovery Officer, as a result of which the Recovery  
Officer stopped the sale and directed the redemption of the  
mortgage in favour of Respondent Nos. 4 to 10.

F           2. The present petitioners claimed some title to the property  
under inventory proceedings in 53/90/A. They were not  
parties to the mortgage, nor they are members of respondent  
Nos. 2 Bank. They challenged the order passed by the  
Recovery Officer on the ground that the amount tendered  
G           by the respondent No.1 could not have been accepted by  
the Recovery Officer for the purpose of passing an order  
of redemption in favour of the mortgagors. If at all such an  
order was wrongly passed by the Recovery Officer the  
person to be prejudiced would have been the Bank. The

H

mortgagors as well as the Bank did not have any grievance on the point.

A

3. Grievance is sought to be raised by a third party, who has hardly any locus standi in a proceeding under Rule 104 because the petitioners had never offered to pay any amount, nor had they ever paid anything, either to the Bank, or to the Recovery Officer. Under such circumstances, we do not think that the impugned order is against justice, equity and good conscience.

B

4. Needless to say that if the petitioners claiming mere title to the property have some rights to the property in question. They would be at liberty to pursue their rights according to law. Petition is therefore disposed of."

C

(Emphasis supplied)

26. Meanwhile, the Plaintiff's suit was dismissed for default on 18.09.1990 and was ultimately restored only on 05.02.1994. Thereafter the suit was amended and Smt. Kishori Nayak and her husband were impleaded as additional Defendants, in 1998.

D

27. Additional reliefs for compensation to the tune of Rs.12,29,030.80 and Rs.2,68,29,038.80 were added. The challenge to the inventory proceedings was also incorporated by way of the amendment.

E

28. On 14.11.1995, the 7<sup>th</sup> and 8<sup>th</sup> Defendants, viz., the sister Smt. Kishori and her husband, who had obtained the suit property in the inventory proceedings, sold the same to the 9<sup>th</sup> Defendant-Syscon Consultants Pvt. Ltd. Thereafter, the Plaintiff sought amendment for cancelling that sale also. It may be stated that the 9<sup>th</sup> Defendant purchased the suit property for a sum of Rs. 34,00,000/- knowing fully well that the said property was in litigation and the fate of some of the litigations.

F

29. Though, there were certain other factual aspects as well, it is not necessary to refer to the same. Suffice it to note that Civil Suit Nos. 88/1987 and 105/1987 were tried together as per orders of High Court of Bombay dated 19.04.1990 in Appeal from Order No. 54/89 with Civil Application No. 192/89.

G

30. By common judgment dated 31.12.2001, the Trial Court

H

A disposed of both suits upholding the right of 7<sup>th</sup> and 8<sup>th</sup> Defendants (the sister and her husband). The Defendants 1 to 6 were directed to refund the advance of Rs. 50 thousand with interest @ 21 per cent per annum from the date of institution of the suit to the Plaintiff and further Defendants 1 to 8 were directed to refund an amount of Rs.17 lakhs to the Plaintiff with interest @ 6 per cent per annum from 12.05.1993.

B

31. Aggrieved, the Plaintiff filed First Appeal No. 179/2003 before the High Court of Judicature at Bombay, Panaji Bench, Goa. During the pendency of the appeal, on 08.10.2003, the entire decree amount was deposited before the High Court.

C

32. As per the impugned judgment, the High Court allowed the appeal in part, and partly reversed the trial court judgment therein. To the extent of the share of Defendants 1 to 6, in the suit property, the suit was decreed. Defendants 1 to 6 were permitted to withdraw the amount deposited in court after the decree was being fully satisfied. Thus, the appeals at the instance of the Defendants and one by the Plaintiff for the 1/4<sup>th</sup> share of Defendants 7 and 8 and another at the instance of Defendant 9, the purchaser.

D

33. Being a first appeal, the High Court has in fact dealt with the issues as framed by the Trial Court. The following were the issues framed by the Trial Court and their findings:

E

**“ISSUES****FINDINGS**

(1) Whether the plaintiff proves that the plaintiff is entitled for specific performance of contract dated 4.9.85?

Negative

F

(2) Whether the plaintiff proves that order in Inventory Proceedings No.55/90/A is liable to be vitiated as obtained by fraud and also illegal to the extent of allotment of the suit property to the defendant No.7?

Negative

G

H

(3) Whether the plaintiff proves that the defendants No. 7 and 8 lost right of preemption, even if they had the said right under law?

Negative

A

(4) Whether the plaintiff proves that the defendants No. 1 to 6 are liable to pay to the plaintiff a sum of Rs.12,29,030.80 as compensation for breach of contract in addition to the specific performance?

Negative

B

(5) Whether the plaintiff proves that defendants No.1 to 6 are also liable to pay to the plaintiff compensation of Rs.2,68,29,038.80 in lieu of specific performance?

Partly in affirmative

C

D

(6) Whether the defendants No.7 and 8 prove that they have right of preemption in respect of the suit property and that the agreement dated 4.9.85 entered between the plaintiff and the defendant nos. 1 to 6 is null and void?

Affirmative

E

(7) Whether the defendants No.7 and 8 are justified in selling the suit property to the defendant No.9 within their own rights?

Affirmative

F

(8) What relief? What order?

As per law.”

G

34. On issue no.1, the High Court took the view:

“107. ... Respondent Nos. 1 to 6 never objected *per se* to perform the agreement. They, to put it mildly, expressed

H

A their inability to perform even their part of the agreement  
on the ground that Respondent No.7 had raised a claim as  
regards her one-fourth share in the property. Their bona  
fides are, therefore, put to the test when the Appellant  
submitted that it was willing to accept at least or even the  
B share of the Respondent Nos. 1 to 6 in the suit property  
without claiming any reduction in the price. Surely,  
Respondent Nos. 1 to 6 then cannot have any objection  
whatsoever to a decree to the extent of their share in the  
suit property.”

C 35. Regarding sale of the suit property by Defendants 7 and 8 to  
Defendant 9, it was held that Defendant 9 admittedly bought the property  
with the full knowledge of the litigations, and hence, Defendant 9 was  
not entitled to any equities. Thus, issue no. 1 was answered in the  
affirmative in favour of the Plaintiff, limited to the extent of share of  
Defendants 1 to 6.

D 36. On issue no.2, the High Court was of the view that the Plaintiff  
was deliberately kept in the dark about the inventory proceedings. It  
was also noted by the High Court that despite granting time to produce  
evidence on the relinquishment of their rights by Defendants 7 and 8,  
nothing was done. It was further noted that the Inventory Court was not  
E informed of the deed of declaration or about the agreement in litigation  
or about the mortgage of the suit property to the Cooperative Bank.  
None of Defendants led any evidence. The Plaintiff was denied an  
opportunity in the inventory proceedings to protect their interest. The  
High Court further held that even assuming that the inventory proceedings  
were not conducted fraudulently, the orders passed therein could not  
F bind the Plaintiff as it was not a party thereto.

37. On issue no.3, it was held that since Defendants 7 and 8 did  
not exercise their right of preemption, they lost their right. And, on issue  
no. 6, it was held that the suit agreement dated 04.09.1985, between the  
Plaintiff and Defendants 1 to 6 was legally valid and not void.

G 38. On issue no.4, regarding compensation, the Court though held  
that the Plaintiff was entitled to damages, but no decree was granted  
since the Plaintiff made a statement that in case specific performance  
was granted it would not insist on a decree for compensation.

H 39. On issue no.7, it was held that Defendants 7 and 8 were

entitled to sell only one quarter interest in the suit property and not the three quarter interest of Defendants 1 to 6 and the suit was decreed accordingly. There was no separate decree in the suit filed by Defendants 7 and 8.

A

40. A suit for specific performance, being a suit for equitable relief, this Court has the duty to see what ultimately is the justice of the case. The suit property, no doubt is jointly owned by Defendants 1 to 8. But the agreement for sale was only by the Defendants 1 to 6. They not only excluded the sister and her husband but made two deliberate and wrong representations: that Defendants 1, 3 and 5 are the only children of Late Vishwanta Purshotam Sinai Gaitonde and that the suit property was the only estate left by their parents. The agreement for specific performance, no doubt, contained a clause that the sellers would make a good and marketable title of the property. Fully conscious of the fact that there was another heir namely the sister and that the property had already been mortgaged to the Cooperative Bank, a very significant clause was incorporated in the agreement to the effect that the vendors could execute a proper conveyance in favour of the purchasers and in that regard, the vendors would make any other person or persons to join them so as to convey an absolute title to the purchaser or to redeem any charge or encumbrance. This clause clearly shows that the Defendants 1 to 6, though acted ill-advisedly by not joining the sister and her husband in the agreement and by not disclosing the mortgage, had still genuinely intended to execute the sale covering both the eventualities namely, joining the sister and her husband and redeeming the mortgage (see Clause 6 of the Agreement of Sale extracted at pages 3-4).

B

C

D

E

41. At one stage, Defendants 1 to 8 apparently were sailing together, faced with the distress sale of the suit property by the bank. It was in that context that the Defendants 1 to 6 made a request to the Plaintiff that in case the Plaintiff cleared the loan liability, they would get in the sister also for the conveyance of the property and settle the whole dispute. The letter which is Exhibit- PW1/F in the suit, which is dated 14/11/1991 reads as follows:

F

G

“Sale of Property at Canacona.

Further to the discussion of the undersigned with your Shri A.A. Tandale, this is to confirm that the undersigned and all his brothers and sister are agreeable to settle the dispute

H

- A with you amicably on the following terms:
- (a) You should pay off the entire loan outstanding with the Madgaon Urban Co-op. Bank.
  - (b) All the parties jointly including the bank shall take a consent decree from the Court and put an end to litigation.
  - B (c) Upon completion of the above steps, we shall execute deed of conveyance in your favour.

We expect your co-operation in implementing this compromise with maximum expedition.

- C This is however without prejudice to our rights and contentions in the pending suits.”

Thereafter, Defendants 1 to 6 left the Plaintiff to their fate by permitting the auction sale to take place and consequently wanted the agreement to get frustrated.

- D 42. As far as Defendants 7 and 8 are concerned, they not only went back on their undertaking in Court to pay the dues to the bank so as to avert the auction sale, they have not pursued their claim if any, to the title to the property as per the liberty granted to them by judgment dated 10<sup>th</sup> October, 1994 of the High Court in Writ Petition No. 277 of
- E 1994. The High Court apparently was clear in its mind, that if at all Defendants 7 and 8 wanted to save the situation by exercising their right to preemption under the Portuguese Laws, they could still do that within six months. Yet, nothing was done. In any case, more than six months after the judgment dated 10.10.1994, they sold the suit property on
- F 14.11.1995 when as a matter of fact Defendants 1 to 8 had by their conduct forfeited all rights and interests in respect of the suit property. Thus, there is no question of right of preemption available to Defendants 7 and 8.

- G 43. It may not also be wholly out of context to take note of the fact that the Defendants 7 and 8 chose, with the assent of Defendants 1 to 6 in the inventory proceedings, the suit property, fully knowing that the property was disputed. Normally, one would avoid a disputed property or leave a disputed property to the authors of the dispute, i.e., the brothers in this case. It would also be relevant to note that none of the Defendants 1-8 told the District Judge in the inventory proceedings that the property

H

was already in dispute, and that two civil suits were pending, in which case the District Judge would have certainly taken note of the litigation. A

44. Under the agreement, the time for performance starts within one month from the date of the vendors making out a marketable title to the property. The agreement also contained a provision to join any other person or persons to convey an absolute title to the purchasers or for redeeming any mortgage. And thus, the suit by the Plaintiffs originally had the Bank as a party Defendant, and, after clearing the loan, the Bank was deleted from the array of parties and Smt. Kishori and her husband were joined as Defendants 7 and 8. B

45. It was vehemently contended by learned Senior Counsel Shri Dhruv Mehta that it was not necessary to give notice of inventory proceedings to anybody other than the members of the family who are entitled to succeed to the estate or disclose any charge on the property. We are afraid that this submission cannot be appreciated. So long as there is no bar for transferring the undivided interest in the estate by any of the legal heirs, any charge or liability to the estate was also to be disclosed in the inventory proceedings so that the estate could be partitioned taking note of such charges, and in case of litigation, the proceedings would have awaited the outcome thereof. C D

46. Defendants 7 and 8, viz., Smt. Kishori and her husband knew very well when they instituted the inventory proceedings that there was an agreement for sale of one of the items in the estate executed by her brothers and their wives and that a suit for specific performance of that agreement had already been pending in Court. And yet, it was not disclosed. Interestingly, and if not shockingly, the Defendants 1 to 6 also did not disclose before the court in the inventory proceedings anything about the mortgage to the bank. Thus, in any case, Defendants 7 and 8 had full knowledge of the suit for specific performance and also the liability to the Cooperative Bank when they chose the disputed property as their share in the inventory proceedings and yet, they were not prepared to even clear the liability to the Cooperative Bank. It was the Plaintiff who paid the money and averted the auction sale and redeemed the property. Had the Plaintiff not cleared the dues to the Bank, the property would have been auctioned, divesting Defendants 7 and 8 of their rights and interests in the property. E F G

47. The issue of *lis pendens*, in any case, on facts, is clear in the H

A sense that even assuming for argument's sake that Civil Suit No. 88 of  
1987 stood dismissed at the time of the order in the inventory proceedings,  
Civil Suit No. 105 of 1987 in respect of the same property, wherein a  
declaration and injunction had been sought by Defendants 7 and 8  
(Plaintiffs in Suit No. 105 of 1987), was pending. Both suits were directed  
B to be tried together as well. It is significant to note that there was only  
one set of issues framed for the purpose of trial of both suits. It is also  
significant to note that even according to Defendants 1 to 6 in their  
written statement, their stand was:

C "....The plaintiffs in the said suit have inter alia challenged  
the enforceability and legality of the agreement dated 4.09.85  
which is the subject matter of this suit also..."

The inventory proceedings, thus, would have been subject to the  
result of the suits. As far as the transfer of property to Defendant 9 is  
concerned, the Plaintiff's Suit for Specific Performance No. 88 of 1987  
stood restored and its Suit No. 329 of 1992 stood pending on the date  
D (14.11.1995) when Defendant 9 purchased the suit property which would  
also be subject to the result of the pending suits.

48. In view of the conduct of the parties, which we have explained  
above, we do not think that this is a fit case to exercise our discretionary  
jurisdiction under Article 136 of the Constitution of India. Three prominent  
E features of this case stare us in the face. First and foremost, on reading  
the correspondence between the parties, we are satisfied that the Plaintiff  
has throughout been ready and willing to perform its obligations under  
the Agreement to Sell. In particular, a reference may be made to the  
letters dated 08.04.1986 and 15.04.1987 and the legal notice dated  
F 08.04.1987. The other unique feature of this case is that the suit property  
is an island off the coast of Goa which is not readily capable of valuation  
– indeed when asked to give us the present market value, both sides  
were unable to do so. This fact also shows that monetary compensation  
would not suffice and be an adequate alternative to specific performance.

G 49. The third unique feature of this case is that, as has been pointed  
out hereinabove, the Plaintiff went to the extent of discharging the  
mortgage with the Bank by paying a sum of Rs. 17 lakhs which was  
almost three times the amount of the consideration mentioned in the  
agreement, i.e., Rs. 6,50,000/-. Clause 9 of the Agreement to Sell is set  
out hereunder:-

H

“If the Vendor fails and or neglects to complete the sale after the title being made out as aforesaid or otherwise to carry out any one or more of the obligations on his part as herein contained or enjoyed upon by any law for the time being in force the Purchaser shall be at liberty to enforce specific performance of this Agreement or recover the earnest money with interest at 21% per annum.”

A

B

50. It is clear that Defendants 1 to 6 failed or neglected to complete the sale even after clear title was made out when the obstacle of the mortgage was removed. Clause 9 specifically states that if after the title is made out, the vendor fails and neglects to complete the sale, and/or to carry out any of the obligations on his part as contained in the Agreement, the purchaser shall be at liberty to enforce specific performance of the Agreement or recover the earnest money with interest at 21 per cent per annum at their option. Having clearly opted throughout to enforce specific performance, we are of the view that justice of the case requires that Clause 9 must be applied in favour of the Plaintiff. After inducing the plaintiff as per PW-1/F letter to pay Rs.17 lakhs to the cooperative bank to clear the dues on the clear understanding that the defendants 1 to 8 would thereafter execute the sale deed, they cannot go back. The clear title stood made out at that stage and the agreement was enforceable thereafter.

C

D

E

51. There is also a long line of judgments based on the equitable principle which states that even if the undivided share of one of the other heirs of the property cannot be transferred, the remaining share of the other heirs certainly can be transferred.

52. In Kartar Singh v. Harjinder Singh and others<sup>1</sup>, at paragraph-6, it has been held that :

F

“6. As regards the difficulty pointed out by the High Court, namely, that the decree of specific performance cannot be granted since the property will have to be partitioned, we are of the view that this is not a legal difficulty. Whenever a share in the property is sold the vendee has a right to apply for the partition of the property and get the share demarcated. We also do not see any difficulty in granting specific performance merely because

G

<sup>1</sup> (1990) 3 SCC 517

H

A the properties are scattered at different places. There is no  
law that the properties to be sold must be situated at one  
place. As regards the apportionment of consideration, since  
admittedly the appellant and respondent's sister each have  
half share in the properties, the consideration can easily be  
B reduced by 50% which is what the First Appellate Court  
has rightly done."

53. In Sardar Singh v. Krishna Devi (Smt) and another<sup>2</sup>, at  
paragraph-17, it has been held that:

C "17. In view of the finding that the appellant had half  
share in the property contracted to be sold by Kartar Lal,  
his brother, the agreement of sale does not bind the appellant.  
The decree for specific performance as against Kartar Lal  
became final. Admittedly the respondent and her husband  
are neighbours. The appellant and his brother being  
D coparceners or co-owners and the appellant after getting  
the tenant ejected both the brothers started living in the  
house. As a prudent purchaser Joginder Nath ought to have  
made enquiries whether Kartar Lal had exclusive title to  
the property. Evidence of mutation of names in the Municipal  
Register establishes that the property was mutated in the  
E joint names of the appellant and Kartar Lal and was in joint  
possession and enjoyment. The courts below, therefore, have  
committed manifest error of law in exercising their discretion  
directing specific performance of the contract of the entire  
property. The house being divisible and the appellant being  
not a consenting party to the contract, equity and justice  
F demand partial enforcement of the contract, instead of  
refusing specific performance in its entirety, which would  
meet the ends of justice. Accordingly we hold that Joginder  
Nath having contracted to purchase the property, it must  
be referable only in respect of half the right, title and interest  
G held by Kartar Lal, his vendor. The first respondent being  
successor in interest, becomes entitled to the enforcement  
of the contract of the half share by specific performance.  
The decree of the trial court is confirmed only to the extent  
of half share in the aforestated property. The appeal is

H <sup>2</sup> (1994) 4 SCC 18

accordingly allowed and the decree of the High Court is set aside and that of the trial court is modified to the above extent. The parties are directed to bear their own costs throughout.”

A

54. In A. Abdul Rashid Khan (Dead) and others v. P.A.K.A. Shahul Hamid and others.<sup>3</sup>, at paragraph-14, it has been held that:

B

“14. Thus we have no hesitation to hold, even where any property is held jointly, and once any party to the contract has agreed to sell such joint property agreement, then, even if other co-sharer has not joined at least to the extent of his share, he is bound to execute, the sale deed. However, in the absence of other co-sharer there could not be any decree of any specified part of the property to be partitioned and possession given. The decree could only be to the extent of transferring the share of the Appellants in such property to other such contracting party. In the present case, it is not in dispute that the Appellants have 5/6 share in the property. So, the Plaintiffs suit for specific performance to the extent of this 5/6th share was rightly decreed by the High Court which requires no interference.”

C

D

55. In Surinder Singh v. Kapoor Singh (Dead) Through Lrs. and others<sup>4</sup>, at paragraphs- 3 and 20, it has been held that:

E

“3. A Letters Patent Appeal filed by the Plaintiffs-Respondents herein against the said judgment and decree came to be allowed by a Division Bench of the High Court by reason of the impugned judgment holding that as the property was owned by the Appellant and the said Tajinder Kaur in equal share, in view of Kartar Singh (supra), a decree for specific performance could be granted in favour of the Plaintiffs-Respondents herein in respect of the share of the Appellant subject to his right to apply for partition of the property for getting his share demarcated. As regard apportionment of the sale consideration, it was directed that the same would be reduced by 50% as the Appellant would only be entitled thereto. As regard the objection of the

F

G

<sup>3</sup> (2000) 10 SCC 636

<sup>4</sup> (2005) 5 SCC 142

H

A Appellant herein that no relief could be granted as the  
 plaintiffs-Respondents failed to mention Khasra Nos. 39/4  
 and 39/3/2 in the plaint, the Division Bench held that such  
 omission was inadvertent. It was pointed out that such an  
 objection was raised only at the time of argument whereupon  
 B the plaintiffs filed an application for amendment of plaint. It  
 was held:

C “...We are of the view that the trial court was not  
 justified in dismissing the application on technical  
 grounds. Decree was sought for the entire land  
 i.e. 153 K 19M. Copies of the agreement as well  
 as jamabandi for the relevant year were also  
 attached with the plaint. Agreement as well as  
 jamabandi clearly indicate that relief sought was  
 with regard to the land measuring 153 K 19M which  
 also includes Khasra Nos. 39/4 and 39/3/2. In this  
 D view of the matter, prayer of the plaintiffs for  
 amendment of the plaintiff is allowed. Plaint would  
 be deemed to have included Khasra Nos. 39/4 and  
 39/3/2 apart from other Khasra numbers mentioned  
 in the plaint.”

E xxx xxx xxx xxx

F 20. The Appellant furthermore misled the plaintiffs-  
 respondents by representing that he had the requisite  
 authority to enter into an agreement for sale on behalf  
 of his sister, which was found to be incorrect. In this  
 situation, we are of the view that the equity lies in favour  
 of grant of decree for specific performance of the  
 contract in respect of the share of the Appellant rather  
 than refusing the same. In any event if the Appellant  
 and/or his sister have claim as regard the arrears of  
 rent, the same can be adjudicated upon by the appropriate  
 G court in an appropriate proceeding. We are, therefore,  
 unable to accept the said contention of Mr Talwar.”

56. In Gajara Vishnu Gosavi v. Prakash Nanasaheb Kamble  
 and others.<sup>5</sup>, at paragraphs- 9 to 13, it has been held that:

H <sup>5</sup> (2009) 10 SCC 654

“9. Be that as it may, three courts have recorded the concurrent findings of fact that partition had never been given effect to in respect of the suit property. Therefore, Housabai could transfer her share. But the question does arise as to whether without partition by metes and bounds, she could put her vendee Anjirabai in possession.

A

10. In *Kartar Singh v. Harjinder Singh* (1990) 3 SCC 517 : AIR 1990 SC 854, this Court held that where the shares are separable and a party enters into an agreement even for sale of share belonging to other co-sharer, a suit for specific performance was maintainable at least for the share of the executor of the agreement, if not for the share of other co-sharers. It was further observed:

B

C

“6. As regards the difficulty pointed out by the High Court, namely, that the decree of specific performance cannot be granted since the property will have to be partitioned, we are of the view that this is not a legal difficulty. Whenever a share in the property is sold, the vendee has a right to apply for the partition of the property and get the share demarcated.”

D

11. In a recent judgment in *Ramdas v. Sitabai and Ors.* (2009) 7 SCC 444 : JT (2009) 8 SC 224 to which one of us (Dr. B.S. Chauhan J.) was a party placing reliance upon two earlier judgments of this Court in *M.V.S. Manikayala Rao v. M. Narasimhaswami and Ors.* AIR 1966 SC 470; and *Sidheshwar Mukherjee v. Bhubneshwar Prasad Narain Singh and Ors.* AIR 1953 SC 487 this Court came to the conclusion that a purchaser of a coparcener's undivided interest in the joint family property is not entitled to possession of what he had purchased. He has a right only to sue for partition of the property and ask for allotment of his share in the suit property.

E

F

G

12. There is another aspect of the matter. An agricultural land belonging to the coparceners/co-sharers may be in their joint possession. The sale of undivided share by one co-sharer may be unlawful/ illegal as various statutes put an

H

A embargo on fragmentation of holdings below the prescribed extent.

B 13. Thus, in view of the above, the law emerges to the effect that in a given case an undivided share of a coparcener can be a subject matter of sale/transfer, but possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds, either by the decree of a Court in a partition suit, or by settlement among the co-sharers.”

C 57. The vehement contention, advanced by learned Senior Counsel Shri Dhruv Mehta, based on Article 2177 of the Portuguese Civil Code, 1867 that there was an absolute bar for transfer of any portion of the estate or a specific item of the estate, need not detain us both on account of factual matrix and on law. As we have already noted hereinabove, Defendants 1-8 had already given up on their right in the suit property by not taking steps to avoid the distress sale at the instance of the Bank. D Though, there are different translated versions of the provision, we may extract Article 2177 as provided by Defendants 7 and 8 in their Appeal:

E “It is not lawful to a co-owner, however, to dispose a specific part of the thing held indivisibly, without the same being allotted to him in partition; and a transfer of the right, which he has to the share belonging to him, may be restricted in accordance with the law.”

F Suffice it to say, Article 2177 does not prohibit alienation of undivided interest, which is in tune with the principle underlying Section 44 of the Transfer of Property Act, 1882.

G 58. The conduct of the Defendants 7 and 8 also needs to be specifically commented on. Despite specifically getting reserved a liberty to proceed further after the redemption of the property by the Plaintiff, nothing was done by them. They also did not exercise their right of preemption available under the Portuguese Law. Conspicuously, none of the defendants entered the witness box despite the voluminous and clinching evidence tendered by the Plaintiff, obviously to avoid inconvenient questions, particularly, based on PW-1/F extracted hereinabove. In that view of the matter, it is also not necessary to deal with the various other contentions advanced by learned Senior Counsel H on both sides since they have no bearing on the ultimate conclusion.

59. In our view, no substantial or grave injustice is caused to the Defendants: on the contrary, the justice of the case, on facts, is in favour of the Plaintiff, and therefore, no interference under Article 136 of the Constitution of India is required. Once, it is found that justice of the case on facts does not require interference, this Court, even at the appellate stage, is well within its discretion to stay its hands off, as held in Taherakhaton (D) by Lrs. v. Salambin Mohammad<sup>6</sup>.

60. Thus, viewed from any angle, justice was done to the Plaintiff as per the decree granted to them by the High Court and no injustice is caused to the Defendants, in particular, Defendant No. 9, who, with open eyes, purchased litigation. As we have decided not to interfere with the judgment of the High Court in favour of the Plaintiff, we also dismiss the Plaintiff's appeal against the impugned judgment seeking the entire property.

61. We, however, find it difficult to agree with the reasoning of the impugned judgment on many aspects, and hence, while dismissing all the appeals, including the appeal of M/s Primella Sanitary Products Private Limited, we leave the questions of law open. The Contempt Petition (Civil) No. 89 of 2016 also stands dismissed as we see no contemptuous conduct on part of the alleged contemnors.

62. There shall be no order as to costs.

Kalpana K. Tripathy

Appeals dismissed.

---

<sup>6</sup> (1999) 2 SCC 635