Syscon Consultants P.Ltd vs M/S Primella Sanitary Prod.P.Ltd.& Ors on 19 September, 2016

Equivalent citations: AIR 2016 SUPREME COURT 4564, 2016 (10) SCC 353, 2016 (6) ABR 419, 2016 (6) ADR 430, AIR 2017 SC (CIVIL) 417, (2017) 2 MAH LJ 124, (2017) 134 REVDEC 167, (2017) 1 ANDHLD 38, (2016) 9 SCALE 26, (2016) 3 ALL RENTCAS 398, (2016) 2 CLR 864 (SC), (2016) 3 CURCC 443, (2016) 4 CIVILCOURTC 743, (2016) 6 ALL WC 6091, (2016) 7 MAD LJ 820, (2017) 3 MAD LW 51, (2016) 167 ALLINDCAS 198 (SC), (2017) 1 ICC 411, (2016) 4 RECCIVR 590, (2016) 2 WLC(SC)CVL 665, (2016) 4 CIVLJ 694

Bench: Rohinton Fali Nariman, Kurian Joseph

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2910 OF 2013

SYSCON CONSULTANTS P. LTD. … APPELLANTS (S)

VERSUS

M/S PRIMELLA SANITARY PROD. P. LTD.
AND OTHERS … RESPONDENT(S)

WITH

CIVIL APPEAL NO. 2909 OF 2013
WITH

CIVIL APPEAL NO. 2911 OF 2013
WITH

CIVIL APPEAL NO. 2912 OF 2013
AND

CONTEMPT PETITION (CIVIL) NO. 89 OF 2016
IN

CIVIL APPEAL NO.2910 OF 2013

J U D G M E N T

KURIAN, J.:

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 7th Defendant was the Bank where the Defendants had mortgaged the suit property.

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 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." 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 outgoings, 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." 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.

9. 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." (Emphasis supplied) 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.

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).

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.

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.

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

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:

> "7. The Plaintiff submits that the said Agreement dated 4th 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." 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:
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> "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 4th September, 1985 as cancelled." 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 follows:
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> "Dear Shri Malhotra, In my letter dated 5.3.87, I have informed regarding my inability to sale of land at Canacona.
>
> 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.
>
> 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.
>
> 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.

> 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.
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> The suit originally maintained only the following reliefs:
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> “ That Your Honour may be pleased to pass a decree for specific performance of contract dated 4th 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, Sub-Division no. 1 of Nagarsem-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;

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;

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;

For interim injunction in terms of prayer (c);

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

For costs as Your Honour may deem fit and proper in the circumstances of the case.” 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.

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:

> 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 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." 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.
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> 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." In short, Defendants 1 to 6 wanted the suit to be dismissed in view of the objection of Smt. Kishori Nayak.
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> 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.
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> 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:

"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 4th 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 4th September 1985 declaring that the said agreement is ab-initio null and void ad hence unforceable specifically." Again, at paragraph-9, it has been averred that:

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

"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 4th 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." 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:

"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.

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

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 Cabeca de casal, he being the eldest son of the deceased." In the inventory proceedings, the auction took place on 01.12.1990. The suit property was auctioned by the 7th 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.

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 7th Defendant Smt. Kishori Nayak and her husband and for setting aside the inventory proceedings.

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:

"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)" xxx xxx xxx xxx "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." (Emphasis supplied) 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 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 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 :

> "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, 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.
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> 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 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 mortgagors as well as the Bank did not have any grievance on the point.
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> 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.
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> 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." (Emphasis supplied) 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.

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.

On 14.11.1995, the 7th and 8th Defendants, viz., the sister Smt. Kishori and her husband, who had obtained the suit property in the inventory proceedings, sold the same to the 9th Defendant-Syscon Consultants Pvt. Ltd. Thereafter, the Plaintiff sought amendment for cancelling that sale also. It may be stated that the 9th 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.

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.

By common judgment dated 31.12.2001, the Trial Court disposed of both suits upholding the right of 7th and 8th 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.

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.

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 1/4th share of Defendants 7 and 8 and another at the instance of Defendant 9, the purchaser.

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:

“ISSUES	FINDINGS
(1)Whether the plaintiff proves that the plaintiff is entitled for specific performance of contract dated 4.9.85?	Negative
(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
(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
(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
(5) Whether the plaintiff	Partly in affirmative

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?	
(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
(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
(8) What relief? What order?	As per law.”

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 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 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.” 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.

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 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 bind the Plaintiff as it was not a party thereto.

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.

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.

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 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).

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:

> “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 with you amicably on the following terms:
>
> You should pay off the entire loan outstanding with the Madgaon Urban Co- op. Bank.
>
> All the parties jointly including the bank shall take a consent decree from the Court and put an end to litigation.

> 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.
>
> 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.
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> 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 10th 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 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 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.

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 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.

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.

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.

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.

The issue of lis pendens, in any case, on facts, is clear in the 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 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:

> "....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 (14.11.1995) when Defendant 9 purchased the suit property which would also be subject to the result of the pending suits.
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> 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 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 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.

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:-

"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." 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.

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.

In Kartar Singh v. Harjinder Singh and others[1], at paragraph-6, it has been held that :

"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 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 reduced by 50% which is what the First Appellate Court has rightly done." In Sardar Singh v. Krishna Devi (Smt) and another[2], at paragraph-17, it has been held that:

"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 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 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 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 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 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." In A. Abdul Rashid Khan (Dead) and others v. P.A.K.A. Shahul Hamid and others.[3], at paragraph-14, it has been held that:

"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." In Surinder Singh v. Kapoor Singh (Dead) Through Lrs. and others[4], at paragraphs- 3 and 20, it has been held that:

"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 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 the plaintiffs filed an application for amendment of plaint. It was held:

"...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 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."

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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 court in an appropriate proceeding. We are, therefore, unable to accept the said contention of Mr Talwar." In Gajara Vishnu Gosavi v. Prakash Nanasaheb Kamble and others.[5], at paragraphs- 9 to 13, it has been held that:

"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.

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:

"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."

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.

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 embargo on fragmentation of holdings below the prescribed extent.

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." 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. Though, there are different translated versions of the provision, we may extract Article 2177 as provided by Defendants 7 and 8 in their Appeal:

"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." 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.

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 on both sides since they have no bearing on the ultimate conclusion.

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 Taherakhatoon (D) by Lrs. v. Salambin Mohammad[6].

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. 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.

There shall be no order as to costs.

……..……J. (KURIAN JOSEPH) ……..……J. (ROHINTON FALI NARIMAN) NEW DELHI;

SEPTEMBER 19, 2016.

(1990) 3 SCC 517

[2] (1994) 4 SCC 18

[3] (2000) 10 SCC 636

[4] (2005) 5 SCC 142

[5] (2009) 10 SCC 654

[6] (1999) 2 SCC 635
