

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6088 OF 2003

Kammana Sambamurthy (D) By LRs. ...Appellants

Versus

Kalipatnapu Atchutamma (D) & Ors. ...Respondents

WITH

CIVIL APPEAL NO. 7265 OF 2003

JUDGEMENT

R.M. Lodha, J.

The original contesting parties are dead. They are now represented by their legal representatives. This is not unusual when litigation goes on for more than 25 years.

2. These two appeals, one by the legal representatives of Kammana Sambamurthy (original plaintiff) and the other by

legal representatives of Kalipatnapu Atchutamma (original defendant no. 2) are directed against the judgment and decree dated December 23, 2002 passed by the High Court of Judicature, Andhra Pradesh, at Hyderabad. The High Court modified the judgment and decree dated July 2, 1991 passed by the Subordinate Judge, Anakapalli in a suit for specific performance of the contract. The husband of defendant no. 2 – Kalipatnapu Kamaraju - was original defendant no. 1; he is also dead. For convenience, we shall refer to the original plaintiff, ‘the vendee’; the original defendant no. 1, ‘the vendor’ and the original defendant no. 2, ‘the vendor’s wife’. The facts, as we find them, are shortly as follow.

3. On February 19, 1984, the vendor entered into an agreement of sale (for short, ‘the agreement’) with the vendee in respect of a tiled house consisting of six rooms, verandah, three mulgis upstairs portion consisting of one room, hall and verandah inclusive of entire area pertaining to the house along with the entire vacant site situate in door no. 9.118 bearing assessment 116 at village Payakaraopet, District Visakhapatnam (for short, ‘the property’) for a consideration of Rs. 1,00,000/-. The vendee

paid Rs. 10,000/- in advance and the remaining consideration of Rs. 90,000/- was agreed to be paid at the time of execution and registration of the sale deed. The vendor in the agreement represented that he was absolute owner of the property. The agreement reads as follows :

“ SALE AGREEMENT DATED 19-2-1984

Absolute Sale Agreement for Rs. 100000/- (Rupees one lakh) in respect of the immovable property i.e. tiled house, building upon the tiled house inclusive of entire vacant site pertaining to the house got executed and delivered on 19-2-84 in favour of Kommana Samba Murthy S/o Kommana Adaiah r/o Namavaran Village, Nekkapalli Tq. Visakhapatnam District.

By

Kalipatanapu Kamaraju s/o Kalipatanapu
Suryanarayana r/o Payakaraopet Village, Ditto Tq. Ditto
District is as follows :-

II. As regards the property mentioned in para no. III in schedule hereunder wherein I have possessed absolute right and enjoyment and which fell to my share in the partition effected in respect of immovable property with my brothers about forty years back and ever since has been in my possession and enjoyment and situated in southern row of G.N.T. road of Payakaraopet village i.e. the tiled house, six rooms, verandah, 3 mulgis upstairs portion consisting of one room, hall and verandah inclusive of entire area pertaining to the house along with the entire vacant site there of belonging to me. I have settled to sell the same to you for the reason that I attained old age and did not have any male children and

with intention to spend my rest of life with any one of my daughters and thinking that it is better to augment the cash balances as you offered today higher price, then I agreed there to and settled to sell the property to you.

Having regard for a sale consideration of Rs. 100000/- (Rupees one lakh only) this agreement of sale has been executed and delivered to you. Out of the sale consideration you have paid Rs. 10000/- as advance in the presence of undersigned witnesses at the time of execution of this sale agreement and the same was received by me. Therefore starting from this date you are requested to pay by 20-6-84 the balance sale consideration of Rs. 90000/- payable to me and shall get the sale deed executed as per your plan on your name or the name chosen by you on a proper stamp paper and shall get the same registered and delivered to you at your expense. Having assured you to the effect that excepting me, none have got any right over this property and having proved that the measurements, boundaries and circumstances in respect of the property are proper and correct and that this property had not been subjected to any alienation by way of mortgages etc. and that it is an undisputed property and after making you to so believe this sale agreement has been executed and delivered to you. The say situated on the rear side of the house i.e. an extent of 3.9 feet in width and 91 feet in length happens to be the common passage to this property and also to Nudala Chekeenam Chokka Rao. As requested by you I shall obtain the witness signatures of my daughters who are near to me and those who are living in far of areas, I shall get their voluntary consent letters in your favour.

III. Situated in door No. 9.118 bearing assessment 116 a tiled house consisting of six rooms, verandah, 3 mulgis, upper terrace portion consisting of a room, hall and verandah together with entire vacant site there of situated in southern row of G.N.T. road of Payakaraopet village and which has been included in Payakaraopet grama panchayat limits in Nekkapalli Tq. Visakhapatnam District and the boundaries whereof are as follows :-

East : 196 feet vacant site belonging to Venkata Ramalinga Swamy and others

South : 54 feet houses belonging to Nemmi Gouraiah and others

West : 196 feet house, site belonging to Bekivalla Bapi Raju

North : 37 feet, G.N.T. Road.

The house and vacant site comprising within the aforesaid boundaries has been sold to you. This is the absolute sale agreement get executed and delivered with my consent.”

4. On March 24, 1984, the vendor's wife sent a notice to the vendee as well as vendor calling upon them to cancel the agreement as she held half share in the property having devolved upon her on the death of her son K. Appala Suryanarayana Murthy. She stated in the notice that she was not willing to sell her share and was ready to purchase the share of the vendor (her husband).

5. On March 28, 1984, the vendee replied to the notice sent to him by the vendor's wife and asserted that the agreement was binding on her and the notice has been given in collusion with the vendor.

6. On March 30, 1984, the vendee sent a notice to the vendor calling upon him to receive the balance sale consideration of Rs. 90,000/- from him and execute the sale deed along with his wife (if she has any right in the property) as per the terms of the agreement failing which he may be constrained to initiate action for necessary reliefs.

7. On April 21, 1984, the vendor sent reply to the vendee's notice dated March 30, 1984 informing him that he was unable to execute sale deed in the vendee's favour and he may take back sum of Rs. 10,000/- that was paid in advance.

8. The vendee then filed a suit for specific performance of the agreement against the vendor and his wife. He prayed for a direction to them to execute sale deed as per the terms of the agreement and get it registered after taking the remaining sale consideration of Rs. 90,000/- and if they fail to execute the same as per the directions of the court, then court may execute the sale deed after the vendee deposits the balance sale price within time allowed by the court. In the alternative, the vendee prayed for refund of the advance amount along with interest.

9. The vendor and his wife filed separate written statements. The vendor admitted execution of agreement and receipt of advance amount of Rs. 10,000/-. The vendor averred that he had one son, K. Appala Suryanarayana Murthy who had half share in the property; he died intestate and after his death, his half share devolved upon his wife and thus he does not have absolute title to the property and unable to execute the sale deed.

10. The vendor's wife mainly set up the plea that her son died intestate and she succeeded to his share; her husband is not the absolute owner of the property; she is not willing to part with her share and she has already asked her husband to sell his share to her.

11. The Subordinate Judge, Anakapalli in light of the pleadings of the parties framed issues and after recording the evidence and hearing the parties decreed the suit in the following manner :

“In the result, the suit is decreed with costs and with a direction that the defendants 1 and 2 shall execute registered sale deed as per the terms of the sale agreement dated 19-2-84 in favour of the plaintiff after taking the remaining sale consideration of Rs. 90000/- on or before 2-9-91 at the costs of the plaintiff and the plaintiff is hereby directed to be get ready with the remaining sale consideration by Rs. 90000/- and

expenses for registration on or before 3-9-1991 by informing the defendant for its registration.....”

12. The vendor's wife being not satisfied with the judgment and decree dated July 2, 1991 passed by the Subordinate Judge, Anakapalli preferred first appeal before the High Court. The High Court in view of the contentions raised before it formulated the following points for determination :

- “1) Whether the suit house is the ancestral property of the first defendant?
- 2) Whether the suit house contract of sale binds the second defendant?
- 3) Whether the second defendant has got the right to purchase the half share of the first defendant?
- 4) Whether the suit contract of sale is not voidable having been made by the ostensible owner, the first defendant and as the plaintiff acted in good faith?
- 5) To what relief?”

13. The High Court recorded the findings namely, that on the basis of the factual matrix and the evidence adduced by the defendants, it was made out that the vendor and his wife had a son who died intestate and that the property was ancestral property in which the deceased son had half share and that share

devolved upon the vendor's wife; the vendee cannot be said to have any knowledge that the vendor's wife had half share and in the absence of any express authority from his wife, the vendor could not alienate or otherwise dispose of her share in the property. The High Court did not accept the plea of the vendee that vendor had implied authority or that vendor's wife was estopped from raising the plea that the agreement did not bind her. The High Court finally held that the agreement of sale although covered the entire property but as the vendor had only half share and interest in the property, the decree for specific performance could only be granted to the extent of the vendor's share in the property. The High Court, accordingly, allowed the appeal preferred by vendor's wife to the extent of half share in the property and the judgment and decree of the Subordinate Judge was confirmed to the extent of half share of the vendor in the property.

14. We heard Mrs. Sudha Gupta, learned counsel for the legal representatives of the vendee and Mr. A.T.M. Sampath, learned counsel for the legal representatives of the vendor's wife.

15. Mr. A.T.M. Sampath, learned counsel for the vendor's

wife would have us believe that the agreement is not an agreement of sale but an invitation to offer as it is only signed by the vendor. We are not impressed. That the agreement is an agreement of sale and there has been concluded contract in this regard between the vendor and vendee has not at all been in dispute. The vendor in his reply dated April 21, 1984 to the notice received from the vendee did not dispute the nature of the agreement. In the plaint, the vendee made the following averment with regard to the agreement:

“.....The 1st defendant offered to sell the plaintiff schedule house and site representing that he has got absolute title in them and that no others have got title in the said property. The plaintiff accepted to purchase the property after making due inquiries. After mutual deliberations the plaintiff offered to purchase the suit schedule property for one lakh rupees. The first defendant executed sale agreement on 19-2-1984 in favour of the plaintiff, agreeing to sell the suit property to plaintiff for the said sum of one lakh and also agreeing to receive the balance of consideration on or before 20-6-1984 and to execute registered sale deed at the expense of the plaintiff in favour of plaintiff or to his order and also undertaking to get his daughters and make them attest the sale deed. The plaintiff paid Rs. 10000/- (Rupees ten thousand only) as advance at the time of the said sale agreement. The first defendant undertook to deliver possession of the suit schedule property on the date of sale deed.....”

The vendor filed written statement and therein he admitted execution of the agreement in the following words :

“.....The averments that this defendant executed a sale agreement on 19-2-1984 in favour of plaintiff offering to sell the schedule house and site for a sale consideration of Rs. 100000/- (one lakh) agreeing to receive the balance of sale consideration on or before 20-6-1984 and to execute a sale deed at the expense of the plaintiff and that on the date of sale agreement received an amount of Rs. 10000/- towards sale consideration are true.....”

16. As a matter of fact, in view of the admitted position between the parties, particularly, the vendor and vendee about the agreement, no issue was struck by the trial court in this regard nor any argument was advanced on behalf of the vendor before the trial court that the agreement was not an agreement of sale or that the same did not tantamount to concluded contract. Insofar as vendor is concerned, he did not challenge the judgment and decree passed by the trial court. It was only vendor's wife who filed appeal being not satisfied with the judgment and decree dated July 2, 1991 passed by the Subordinate Judge before the High Court. Even before the High Court, no plea was raised by the vendor's wife or the vendor that

the agreement is not a concluded contract for sale of the property. The submission of Mr. A.T.M. Sampath that the agreement is not an agreement of sale but an invitation to offer is afterthought and does not merit further consideration.

17. As to whether the property is ancestral property or not, the finding of the two courts is divergent. The trial court held that the property was not the ancestral property but the High Court on reappraisal of the evidence did not agree with that finding. The High Court considered the matter thus :

“.....Whatever may be the reason behind in getting Ex.A2 notice issued while seeking to avoid Ex.A2 transaction, the legal position cannot be doubted that half share in the suit house was devolved upon the second defendant on account of the death of her son, in as much as by birth, the son got half share along with his father in the ancestral property and the mother succeeded to the same as Class I heir. It is also clear that under section 14 of the Hindu Succession Act, the share devolved upon the mother would become the Streedhana property. The husband under such circumstances, in the absence of any express authority from the wife cannot alienate or otherwise dispose of the Streedhana property of his wife.....”

In our view, the High Court has considered this aspect in the right perspective and we find no justifiable reason to take a view different from the High Court.

18. Having regard to the conclusion that the vendor's wife has got half share in the property and that she is not executant to the agreement, what needs to be considered is, whether the agreement binds the vendor's wife. According to vendee, the vendor had implied authority to enter into agreement of the property and the vendor's wife was clearly aware of that agreement and, therefore, she is estopped from raising the plea that she is not bound by that agreement. The High Court considered the evidence on record and held that no express or implied authority by the wife in favour of her husband is discernible from the facts and evidence. We agree. As regards applicability of Section 41 of the Transfer of Property Act, 1882 (T.P. Act), the High Court observed that it was not even the case of the vendee that the vendor was the ostensible owner of the property and, therefore, Section 41 has no application. We think that High Court is right and in view of the aforementioned findings of the High Court, the conclusion that vendee is not entitled to seek specific performance of the agreement to the extent of half share of vendor's wife cannot be faulted.

19. The crucial question in the case is whether the agreement could be enforced against the vendor to the extent of his half share in the property. The terms of the agreement show that the vendor represented to the vendee that he was absolute owner of the property that fell to his share in the partition effected with his brothers and he did not have any male child. The vendor assured the vendee that excepting him none has got any right over the property and he would obtain the witness signatures of his daughters and get their voluntary consent letters in his favour. It is clear from the evidence that the vendee had no knowledge that vendor's wife has half share in the property which devolved upon her on the death of her son intestate.

20. Section 12 of the Specific Relief Act, 1963 reads as follows :

“S.- 12. Specific performance of part of contract.-

(1) Except as otherwise hereinafter provided in this section, the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed by only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be

performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either-

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money;

he is not entitled to obtain a decree for specific performance; but the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party-

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and a case falling under clause (b), pays or had paid the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part."

21. Section 12 prohibits specific performance of a part of a contract except in the circumstances under sub-sections (2), (3)

and (4). The circumstances mentioned in these sub-sections are exhaustive. Is Section 12 attracted in the facts and circumstances of the present case? We do not think so. The present case is not a case of the performance of a part of the contract but the whole of the contract insofar as the vendor is concerned since he had agreed to sell the property in its entirety but it later turned out that vendor had only half share in the property and his wife held the remaining half. The agreement is binding on the vendor as it is without being fractured. As regards him, there is neither segregation or separation of contract nor creation of a new contract. In *Kartar Singh v. Harjinder Singh & Ors.*¹, this Court was concerned with a case where vendor—brother and a sister had each half share in the suit properties. The agreement for the sale was executed by the brother concerning the suit properties in which the sister had half share. The sister was not executant to the agreement; rather she refused to accept the agreement. The question for consideration before this Court was whether agreement could be enforced against the vendor—brother to the extent of his half share. This Court considered Section 12 and held as under :

¹ (1990) 3 SCC 517

“5. We are, therefore, of the view that this is not a case which is covered by Section 12 of the Act. It is clear from Section 12 that it relates to the specific performance of a part of a contract. The present is not a case of the performance of a part of the contract but of the whole of the contract so far as the contracting party, namely, the respondent is concerned. Under the agreement, he had contracted to sell whole of his property. The two contracts, viz. for the sale of his share and of his sister's share were separate and were severable from each other although they were incorporated in one agreement. In fact, there was no contract between the appellant and the respondent's sister and the only valid contract was with respondent in respect of his share in the property.

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 per cent which is what the first appellate court has rightly done.”

22. *Kartar Singh*¹ has been followed by this Court in *Manzoor Ahmed Magray v. Ghulam Hassan Aram & Ors*². In *Manzoor Ahmed Magray*², this Court considered the matter in the context of Section 15 of J & K Specific Relief Act, 1977 which is

² (1999) 7 SCC 703

pari materia to Section 12 of Specific Relief Act, 1963. This Court said :

“.....Hence, there is no bar for passing the decree for specific relief with regard to 1/3rd or 2/3rds share owned by the contracting party for which he can execute the sale deed. For the share of Ghulam Rasool (brother of Defendant 1) admittedly, no decree is passed by the High Court. Dealing with the similar contention where agreement was for sale of property belonging to a brother and sister each having a half share, the Court in *Kartar Singh v. Harjinder Singh* held that when the absentee vendor, for some reason or the other refused to accept the agreement, there is no reason why the agreement should not be enforced against the vendor who had signed and his property is identifiable by specific share. The Court further held that such case is not covered by Section 12 of the Specific Relief Act, 1963 which relates to specific performance of a part of a contract. Such type of case would be the case of specific performance of the whole of the contract so far as the contracting party is concerned. Further, whenever a share in the property is sold the vendee has the right to apply for the partition of the property and get the share demarcated. Hence there would not be any difficulty in granting specific performance of the contract to the extent to which it is binding between the parties.”

23. In the case of *A. Abdul Rashid Khan (Dead) & Ors. v. P.A.K.A. Shahul Hamid & Ors.*³, this Court held that even where any property is held jointly and once any party to the contract has agreed to sell such joint property by agreement, then, even if the other co-sharer has not joined, at least to the extent of his share, the party to the contract is bound to execute the sale deed. In that

³ (2000) 10 SCC 636

case, the suit property originally belonged to one Aziz Khan. On his death, his heirs under the Muslim law—nine sons and two daughters inherited that property. The sons agreed to sell that property to the first respondent therein. However, some dispute arose between the parties and that necessitated the first respondent therein to file the suit for specific performance in which the executants of the agreement as well as the two daughters of Aziz Khan were impleaded as defendants. It was admitted case that the daughters of Aziz Khan had not joined in the agreement of sale. The trial court dismissed the suit by holding that the agreement was indivisible and could only be enforced if the daughters of Aziz Khan agreed. The first respondent therein preferred an appeal before the High Court against the judgment and decree of the trial court. The High Court held that he had not pleaded and proved that the daughters of Aziz Khan had agreed to sell the suit property and hence, it cannot be held that the said agreement was by all the heirs of Aziz Khan. The two daughters of Aziz Khan were held not bound by the agreement. However, the High Court held that insofar as the executants of the agreement (sons of Aziz Khan) were

concerned they were bound by it and valid and enforceable contract existed between the first respondent and the sons of Aziz Khan. The High Court, accordingly, granted decree for specific performance to the extent of 5/6th shares which Aziz Khan's sons had in the property. This Court affirmed the decree of the High Court and it was held that plaintiff's suit for specific performance to the extent of 5/6th share was rightly decreed by the High Court warranting no interference. While holding so, this Court relied upon earlier decision in the case of *Manzoor Ahmed Magray*².

24. In view of the above decisions of this Court and the facts and circumstances which have already been noticed by us, in our opinion, there is no impediment for enforcement of the agreement against the vendor to the extent of his half share in the property. However, Mr. A.T.M. Sampath, learned counsel for the vendor's wife placed great reliance upon *HPA International v. Bhagwandas Fateh Chand Daswani & Ors.*⁴ and, particularly, the following paragraphs of the report.

“67. If the vendee intended to seek conveyance separately of the life interest of the vendor, the earliest opportunity for him was when he had received notice

⁴ (2004) 6 SCC 537

dated 11-9-1979 sent through the lawyer by the vendor cancelling the contract. Assuming that at that time he could not opt for lesser relief as the suit for sanction was pending, he could have, in any case, opted for conveyance of life interest of the vendor soon after he came to know of the negotiations for sale with Bob Daswani, which took place in the presence of one of the partners of the plaintiff vendee. Even after deriving the knowledge of the execution of the sale deed dated 29-12-1979 Ext. D-1, the option to obtain lesser relief of transfer of life interest was not exercised. It was exercised as late as on 25-11-1986 by filing an affidavit and at the time when pleadings of the parties were completed and the joint trial in the two suits had already commenced. During long pendency of the suits between 1979 to 1986, the parties interested in the property changed their positions. The vendor by executing a registered sale deed in favour of the subsequent vendee got his public dues paid to relieve the pressure on the property and obtained market price of the property. After obtaining possession of the property pursuant to the sale deed, the subsequent vendee has raised construction and inducted tenants. Accepting the legal stand based on Sections 90, 91 and 92 of the Indian Trusts Act that the subsequent vendee, being a purchaser with knowledge of prior agreement, is holding the property as a trustee for the benefit of the prior vendee, the vendor, who changed his position by effecting a subsequent sale cannot be compelled to convey his life interest when such lesser relief was not claimed at the earliest opportunity and the terms of the contract did not contemplate transfer of life interest alone.”

98. The above argument has no merit and the aforesaid decision is hardly of any help to the vendee. This is not a case where the vendor had only right of spes successionis and after execution of agreement of sale, he subsequently acquired full interest in the property to be held bound by Section 43 of the Transfer of Property Act. In the case before us, the reversioners were not parties to the agreement of sale. When in the suit for sanction to transfer their interest they were made parties and were noticed, they expressly objected to the

proposed transfer. No principle of estoppel or provisions of Section 43 of the Transfer of Property Act can, therefore, operate against them. So far as the subsequent vendee is concerned, in the course of suit, he was pushed to a position in which he could not take a stand that he had no knowledge of the prior agreement with the vendee but he has separately purchased life interest from the vendor and obtained separate release deeds, on payment of consideration, from the reversioners. The reversioners being not parties to the sale agreement, Ext. P-1 entered into with the vendee, the latter could not enforce the contract, Ext. P-1 against the former.”

It is sufficient to say that the agreement of sale and the facts which their Lordships had to consider in the case of *HPA International*⁴ were in many respects different from the agreement in the present case. In that case vide agreement of sale (Exhibit P1) therein, full interest in the property, i.e. life interest of the vendor and *spes successionis* of reversioners with sanction of the court was agreed to be sold. The reversioners were not parties to the sale agreement that was entered with the vendee therein. The parties were conscious that the vendor had only life interest in the property and he could not convey more than his own interest. The court found that vendee entered into a speculative deal for obtaining full interest in the property depending upon the sanction to be granted by the court. In the backdrop of these

facts, this Court observed in paragraphs 68, 69 and 70 of the report thus :

“68. On duly appreciating the evidence on record, construing specific terms of the contract and considering the conduct of the parties, we have arrived at the conclusion that the rescission of the contract, due to non-grant of sanction by the Court within two years after execution of the contract and filing of the suit for sanction, was not an act of breach of contract on the part of the vendor to justify grant of relief of specific performance of the contract to the prior vendee.

69. We are also of the view that the plaintiff vendee, by his own act in the pending suits, was responsible for rendering the suit for sanction as infructuous. He was guilty of lapse in not seeking conveyance of life interest of the vendor at the earliest opportunity when notice of rescission of the contract was received by him and later when he derived the knowledge of execution of registered sale deed in favour of the subsequent vendee. The option was exercised conditionally in the midst of the joint trial of the two suits.

70. There was one integrated and indivisible contract by the vendor to convey full interest in the property i.e. his own life interest and the interest of the reversioners with sanction of the Court. As the Court had not granted the sanction, the contract could not be specifically enforced. The lesser relief of transfer of life interest was not claimed within a reasonable time after the vendor had intimated that the contract, as agreed for full interest, was not possible of performance. We find that neither equity nor law is in favour of the plaintiff vendee.”

The Court further observed in paragraph 100 of the report as follows :

“100. In the case before us, we have not found that the vendor was guilty of rendering the suit for sanction infructuous. It did terminate the contract pending the suit for sanction but never withdrew that suit. The vendee himself prosecuted it and rendered it infructuous by his own filing of an affidavit giving up his claim for the interest of reversioners. In such a situation where the vendor was not in any manner guilty of not obtaining the sanction and the clause of the contract requiring the Court’s sanction for conveyance of full interest, being for the benefit of both the parties, the contract had been rendered unenforceable with the dismissal of the sanction suit.”

*HPA International*⁴ , thus, have no considerable bearing on the case in hand.

25. Mr. A.T.M. Sampath, learned counsel for vendor’s wife also argued that she had offered as joint owner to the undivided entire property to purchase the half share of her husband under the Partition Act, 1893 and Hindu Succession Act, 1956. He would submit that at the earliest point of time both in a notice as well as in the written statement she has raised the plea of pre-emption to buy her husband’s share and demanded the vendee as well as her husband to sell undivided half share to her. In this regard, he further submitted that the property is an undivided dwelling house and the court should not grant specific performance against the co-owners of the family dwelling house.

He relied upon *Ghantesher Ghosh v. Madan Mohan Ghosh & Ors.*⁵, *Pramod Kumar Jaiswal and Ors. v. Bibi Husn Bano and Ors.*⁶ and *Shanmughasundaram & Ors. v. Diravia Nadar (Dead) By LRs. & Anr.*⁷.

26. The above submission was also canvassed before the High Court. The High Court considered this aspect in the following manner :

“It is too premature for the defendant to have invoked the provisions of section 4 of the Partition Act. The plaintiff’s right has not been crystallized yet and he cannot at this stage be considered as a purchaser of the undivided interest of the first defendant. In order to validly invoke section 4 of the Partition Act, the following five conditions have to be satisfied :

1. A co-owner having undivided share in the family dwelling house should effect transfer of his undivided interest therein;
2. The transferee of such undivided interest of co-owner should be an outsider or stranger to the family;
3. Such transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned;
4. As against such a claim of the stranger transferee, any member of the family having undivided share in the dwelling house should put forward his claim of preemption by undertaking to buy out the share of such transferee and;

⁵ (1996) 11 SCC 446

⁶ (2005) 5 SCC 492

⁷ (2005) 10 SCC 728

5. While accepting such a claim for preemption by the existing co-owners of the dwelling house belonging to the undivided family, the Court should make a valuation of the transferred share belonging to the stranger transferee and made the claimant co-owner pay the value of the share of the transferee so as to enable the claimant co-owner to purchase by way of pre-emption and said transferred share of the stranger transferee in the dwelling house belonging to the undivided family so that the stranger-transferee can have no more claim left for partition and separate possession of his share in the dwelling house and accordingly can he effectively deny entry in any part of such family dwelling house.

The whole object seems to be to preserve the privacy of the family members by not allowing a stranger to enter in a part of the family dwelling house. Such is not the situation obtaining in this case having regard to the context. I am reinforced in my above view by the judgment of the Apex Court in Babulal V. Habibnoor Khan, 2000 (5) SCC 662. The apex Court placing reliance upon its earlier judgment in Ghantesher Ghosh V. Madan Mohan Ghosh, 1996 (11) SCC 446 reiterated the five essential requisites. For the foregoing reasons, the contention of the learned counsel merits no consideration.”

In our opinion, the High Court has rightly concluded that at the present stage, Section 4 of the Partition Act, 1893 is not attracted. It is only after the sale deed is executed in favour of the vendee that right under Section 4 of the Partition Act, 1893 may be available. Similarly, insofar as vendee is concerned, he has right to apply for partition of the property and get the share demarcated

only after sale deed is executed in his favour. Section 44 of the T.P. Act is also of no help to the case of vendor's wife.

27. There are two other points raised by Mr. A.T.M. Sampath. Learned counsel for the vendor's wife would contend that it has not been proved that vendee has been ready and willing to purchase the property all along; the vendee did not produce passbook showing that he had sufficient funds and the vendee did not deposit the remaining consideration of Rs. 90,000/- within three months of the decree granted by the trial court. The argument of Mr. A.T.M. Sampath has no merit at all and seems to have been raised in desperation. As a matter of fact, as early as on March 30, 1984, the vendee sent a notice to the vendor calling upon him to receive the balance sale consideration of Rs. 90,000/- from him and execute the sale deed. In the plaint, a specific averment with regard to readiness and willingness has been made by the vendee which was not even controverted by the vendor in the written statement. No such issue has been raised nor it was pressed by the vendor before the trial court. Even the vendor's wife in the appeal before the High Court did not raise any argument in this regard. At the

time of hearing of these appeals, we were informed by the counsel for the vendee that the balance sale consideration of Rs. 90,000/- has been deposited by the vendee on July 18, 1991 vide T.R. Challan No. 1159 before the trial court and has been lying there for more than 19 years. This argument of Mr. A.T.M. Sampath is, therefore, rejected.

28. The other point argued by Mr. A.T.M. Sampath is that the decree granted by the High Court would result in hardship since the vendor and vendor's wife are dead and their 10 daughters are residing in the property. We are afraid these facts hardly constitute hardship justifying denial of decree for specific performance to the extent of vendor's half share in the property.

29. In all fairness to Mr. A.T.M. Sampath, it must be said that he cited some English decisions but, in our view, these decisions have no bearing at all in the present case and it is for this reason that we have not burdened this judgment by referring to those decisions.

30. In view of the above, we agree that the decision of the High Court is right and, consequently, both the appeals must be dismissed and are dismissed with no order as to costs.

.....J.
(P. Sathasivam)

..... J.
(R.M. Lodha)

NEW DELHI,
OCTOBER 8, 2010