
(2002) 12 AP CK 0066
In the Andhra Pradesh High Court
Case No : AS No. 287 of 1994

Kalipatnapu Atchutamma

APPELLANT

Vs

Kommana Sambamurthy (died) per LRs. and Others

RESPONDENT

Date of Decision : 23-12-2002

Acts Referred:

Hindu Succession Act, 1956 — Section 14
Partition Act, 1893 — Section 4
Specific Relief Act, 1963 — Section 12
Transfer of Property Act, 1882 — Section 41

Citation : (2003) 2 ALD 805 : (2003) 3 ALT 82

Hon'ble Judges : T. Ch. Surya Rao, J

Bench : Single Bench

Advocate : Bathula Venkateswara Rao, for the Appellant; P.V.R. Sharma, for the Respondent Nos. 4 to 11 and T.V. Someswara Rao, for the Respondent Nos. 12 to 20, for the Respondent

Final Decision : Allowed

Judgement

T. Ch. Surya Rao, J.—The unsuccessful second defendant has preferred this appeal against the judgment and decree dated 2.7.1991 passed by the learned Subordinate Judge, Anakapalle in O.S. No.259 of 1984. The first respondent herein is the plaintiff and respondents 2 and 3 are the defendants 1 and 3 respectively in the suit. It is expedient to refer the parties as they are originally arrayed in the suit to avoid confusion.

2. The plaintiff filed the suit for specific performance of the agreement of sale dated 19.2.1984 by directing the defendants 1 and 2 to execute the sale deed in favour of the plaintiff after taking the balance of sale consideration of Rs.90,000/- and for delivery of possession of the suit schedule property and in the alternative for refund of an amount of Rs.10,000/-paid as advance by the plaintiff with interest.

3. The case of the plaintiff was that the 1st defendant being the owner of the

terraced house and the appurtenant site (Suit house), offered it for sale representing that he got absolute title over the same and none-else and the plaintiff agreed to purchase the same after having made due enquiries and the bargain was settled at Rs.1,00,000/-. The 1st defendant executed the sale agreement dated 19.2.1984 in favour of the plaintiff who paid an amount of Rs. 10,000/- as advance under the said document. The 1st defendant agreed inter alia in the suit contract of sale to receive the balance of sale consideration on or before 20.6.1984 and to execute the registered sale deed in favour of the plaintiff or to his order by undertaking to get it attested by his daughters. He further undertook to deliver the possession of the suit house on the date of the execution of the sale deed. The second defendant is the wife of the 1st defendant and she knew about the execution of the sale agreement in favour of the plaintiff by the first defendant. The plaintiff made ready the balance of sale consideration and registration expenses and demanded the 1st defendant to execute the registered sale deed in his favour. However, the first defendant was postponing the execution on some pretext or the other. In the meanwhile, the 1st defendant on the instructions of the second defendant got a registered lawyer's notice dated 24.3.1984 issued to the plaintiff with all untenable allegations so as to extract more money from the plaintiff. The plaintiff through his advocate got a suitable reply issued dated 28.3.1984 to the above said notice. Simultaneously, the plaintiff got another notice dated 30.3.1984 issued to the 1st defendant through his lawyer demanding specific performance of the suit contract of sale. The first defendant having "received the same got a reply notice dated 23.4.1984 issued through his Counsel with untenable allegations. The plaintiff was always ready and willing to perform his part of contract as per the terms of the agreement.

4. The case of the first defendant inter alia in the written statement was that the suit house properly was the ancestral property of the first defendant and that he had a son by name Appala Suryanarayana Murthy who died in the month of March, 1961 and therefore, the half share in the suit property of late Appala Suryanarayana Murthy devolved on the second defendant and the first defendant and the second defendant have been thus enjoying the suit house property as tenants-in-common. Therefore the 1st defendant has no absolute title to the entire suit house. The plaintiff knew that the 1st defendant has a son and that the said son died in the month of March 1961. The first defendant admitted the execution of the suit contract of sale and received an amount of Rs.10,000/- towards advance, but denied the case of the plaintiff that he undertook to get his daughters and make them to attest the sale deed and to deliver possession of the property on the date of execution of the sale deed. He further denied the allegation of collusion between defendants 1 and 2 and getting the notice issued on behalf of the second defendant. He pleaded further that he has no authority to execute the sale deed on behalf of the second defendant.

5. The case of the second defendant inter alia in her written statement was that she was not aware of the suit agreement of sale dated 19.2.1984 and it did not

bind her. She succeeded to the share of her son who died intestate and had been enjoying the property as tenant-in-common with the first defendant and she was not willing to part with her joint half share and that she was ready and willing to take the share of the first defendant also.

6. Basing on the pleadings, the following Issues were framed at the time of settlement of issues:

(1) Whether the plaintiff is entitled to ask for the specific performance against the second defendant?

(2) Whether the second defendant has got the right of pre-emption under various enactments?

(3) Whether the first defendant has got the power to manage on behalf of the second defendant?

(4) Whether the plaintiff is entitled for specific performance?

(5) To what relief?

7. At the time of trial two witnesses were examined on the side of the plaintiff including the plaintiff himself as P.W.1 and the documents Ex.A1 to Ex.A6 were got marked. The defendants 1 and 2 examined themselves as DWs.1 and 2 and got Ex.B1 to Ex.B11 marked.

8. Considering the evidence both oral and documentary, the learned Subordinate Judge, decreed the suit with costs directing the defendants 1 and 2 to execute the registered sale deed. While decreeing the suit, on Issue No.3 he held that the first defendant was looking after the affairs of the second defendant and was the manager of the house. On Issues 1 and 2, he found that the plaintiff was entitled to ask for the specific performance. Accordingly, he answered the other Issues in favour of the plaintiff. Having been aggrieved by the said judgment and decree as aforesaid, the second defendant in the suit filed the present appeal.

9. Sri B. Venkateswara Rao, the learned Counsel appearing for the appellant contends that the suit house is the ancestral property of the first defendant, that defendants 1 and 2 had a son by name Appala Narasimha Murthy who died in the month of March, 1961 and therefore half share in the suit house devolved upon the second defendant and the first defendant cannot validly enter into the sale agreement on behalf of the second defendant and therefore, she is not bound by the said agreement.

10. The learned Counsel appearing for the 1st respondent on the other hand, contends that the second defendant was aware of the suit contract of sale by the first defendant and as the first defendant being the manager of the family and that the first defendant in the capacity of the manager is competent to execute the suit contract of sale for the benefit of the joint family. The learned Counsel further contends that the transaction is not voidable as the first defendant with the consent of the second defendant executed the suit agreement of sale and

that the plaintiff after making necessary enquiries acted in good faith. Finally the learned Counsel contends that there is no bar for the plaintiff to obtain a decree in respect of the half share of the plaintiff at any rate.

11. In view of the above contentions, the points that arise for my determination in this appeal are:

- (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?

12. There has been no gain- saying about the execution of Ex.A1 agreement of sale dated 19.2.1984 by the 1st defendant in favour of the plaintiff and about receiving the advance amount of Rs. 10,000/- by the first defendant from the plaintiff. The relationship between the defendants inter se is an admitted fact.

13. Obviously the second defendant got Ex.A2 notice dated 24.3.1984 issued in the first instance. In reply thereto the plaintiff got Ex.A1 reply notice dated 28.3.1984 issued through his Counsel to the second defendant and simultaneously another notice in Ex.A4 dated 30.3.1984 to the 1st defendant calling upon him to execute the sale deed pursuant to the terms contained in Ex. A1 contract of sale. Ex.A5 is the reply dated 21.4.1984 got issued by the 1st defendant. Thus there has been no dispute regarding execution of the contract of sale and the subsequent exchange of notices between the plaintiff and the defendants. The contentious issue, having regard to the pleadings and the respective contentions of the parties is, as to whether the suit house is the ancestral property of the first defendant and as to whether the defendants has a son who died intestate.

14. Point No.1: The oral evidence on the point is that of the plaintiff, besides the attester of Ex.A1 as PW.2, qua the defendants 1 and 2 as DWs.1 and 2. There has been no whisper in the entire evidence of PW1 about the nature of the suit house. Therefore, there is no specific denial about the ancestral nature of the suit property in the entire evidence of PW1. A further suggestion has been put to this witness in the cross-examination that the suit house was the ancestral property of defendant No.1 which he denied. The plaintiff expressed his ignorance about the first defendant and his son mortgaging the suit house in favour of one Surya Rama Murthy under a mortgage deed dated 28.5.1955. He expressed his ignorance even as regards the birth of a son by name Appala Narasimha Murthy to defendants 1 and 2 and his studying SSLC and about his death in the year 1961. The evidence of DWs. 1 and 2 clearly shows that the suit house was the

ancestral property of the 1st defendant and that defendants 1 and 2 begot a son by name Appala Narasimha Murthy who died in the month of March, 1961. Having regard to the fact that there has been no specific denial on the part of the plaintiff about the ancestral nature of the suit house, the oral evidence of DWs.1 and 2 gains significance on the point.

15. Coming to the documentary evidence Ex.B1 is the certified birth register extract issued by the Executive Officer of the Payakraopeta Grampanchayat. That shows the birth of a son to defendants 1 and 2. Ex.B2 is the photostat copy of the Transfer Certificate of the son of the defendants 1 and 2 by name Appala Suryanarayana Murthy. Ex.B3 is the Study certificate of the said Appala Narasimha Murthy. Ex.B4 is the endorsement given by the Executive Officer informing inter alia to the first defendant that the death of his son Appala Narasimha Murthy has not been registered. Ex.B6 and Ex.B7 are the two registered possessory and simple mortgage deeds dated 11.4.1951 and 28.5.1955 respectively. The former possessory mortgage deed pertains to the landed property and the latter simple mortgage deed pertains to the house property. As can be seen from Ex.B6 it was executed by the 1st defendant and his minor son Appala Narasimha Murthy. Similarly Ex.B7 simple mortgage deed was executed again by the 1st defendant and his minor son Appala Narasimha Murthy. Thus there has been a reference of the existence of a minor son by name Appala Narasimha Murthy to the defendants 1 and 2 in both these documents. The documentary evidence in the form of Ex.B1 to Ex.B3, Ex.B6 and Ex.B7 amply prove that the defendants 1 and 2 had a son by name Appala Narasimha Murthy and he died later. That apart in Ex.B6 and Ex.B7, inter alia, it has been recited that the properties viz., the landed property and the house property, the subject matters of mortgage both possessory as well as simple are the ancestral acquisitions of defendant No.1. In Ex.B7 it has been further recited that the house property fell to the share of the 1st defendant in the partition amongst the brothers. Both these documents being the registered documents and execution whereof having not been denied, cannot be doubted. The recitals inter alia in these documents amply show that the suit house is the ancestral property of the 1st defendant. Thus, the oral as well as documentary evidence adduced on the side of the defendants clinchingly establish that the suit house which is the subject matter of Ex.A1 contract of sale is the ancestral property of the first defendant. The evidence further establishes that defendants 1 and 2 had a son by name Appala Narasimha Murthy and he died subsequently intestate. The second defendant being the mother obviously succeeded to the share of her son who died intestate as per the provisions of Hindu Succession Act. Therefore, she has half share in the suit house having succeeded to the share of her deceased son who died intestate, Thus from the factual matrix and the overwhelming evidence adduced on the side of the defendants, it clearly emerges that the defendants 1 and 2 had a son by name Appala Narasimha Muthy who died intestate and that the suit house is the ancestral property of the first defendant, in which obviously the deceased son had a share.

16. Points No.2 & 4: The whole case of the plaintiff as can be seen from the pleadings as well as his evidence was that the second defendant was present at the time of execution of Ex.A1 sale agreement by the 1st defendant, pleading implied consent thereby. The evidence of PW.2 shows that the second defendant was present at the time of execution and passing of consideration under the suit contact of sale in Ex.A1. Nothing has been elicited in the cross-examination of this witness which can shake his credibility although he stated that the first defendant had no son at anytime. At one stage in the cross-examination he expressed his ignorance about the son of defendants 1 and 2 by name Appala Narasimha Murthy. Except this, the other cogent evidence of the witness cannot be in my considered view be nullified. As against this evidence as discussed hereinabove, there is the testimony of DWs.1 and 2 who are defendants 1 and 2 respectively. Their evidence shows that on the date of execution of Ex.A1, DW.1 while taking meals is said to have informed DW2 about the execution thereof. Although DW.1 claims in his evidence that his wife did not agree for selling of the suit house and immediately thereafter, she got issued a notice to him, through her advocate, there has been a clear 35 days gap in between. Ex.A2 is the said notice got issued by the second defendant and a perusal of the same shows that she had no knowledge about the execution of Ex.A1 and that she was not willing to sell her share and instead was ready to purchase the share of the first defendant. In other words she was against the sale transaction as it was done without her consent and authority. It is not discernible from the evidence of DWs.1 and 2 that DW.2 opposed the transaction, as the transaction entered into between the first defendant and the plaintiff is without the consent and authority of DW.2. On the other hand the evidence of these witnesses shows that the second defendant was not willing to sell the suit house to the plaintiff. The reason there for has not been assigned, but certainly it was not on account of the reason mentioned inter alia in Ex.A2 notice. Perhaps the parties might have thought over the matter leisurely and decided to propound that ground as a ground to avoid E.A1 sale transaction. Therefore, it is nothing but an after thought which prompted the defendants to get Ex.A2 notice issued nearly 35 days after Ex.A1 transaction. It can also be attributed that because initially they were unaware of the legal position that on account of the death of their son intestate, his share would devolve upon the mother and the property would therefore, become the Streedhana property of the mother, and later might have ascertained the legal position which appeared to have promoted them to issue Ex.A2 notice. 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 has devolved upon the second defendant on account of the death of her son, inasmuch 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 u/s 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 this context the learned Counsel appearing for the respondent seeks to rightly place reliance upon a judgment of our High Court in *Jawaharlal Daima and Co. v. Ch. Chittemma and Anr.* 1989 (1) APLJ 333. A learned Single Judge of this Court held thus:

"If the wife has her own property the presumption is that she acts on her own authority. The ancient doctrine that the husband and wife are one person is not true in modern times. The wife cannot be reduced to a subordinate position in respect of her property matters by the application of the doctrine of implied agency. The obligation on the part of the husband to meet the requirement of his wife stems from the fact of cohabitation in a domestic establishment. By implied authority the wife acts as the agent of the husband making the latter liable for the expenditure incurred by her in respect of necessities of life. There cannot be any such implied authority in a case where the wife owns separate properties. Marriage will not make the husband an agent of the wife to deal with her property matters without her authority. By virtue of marriage a husband has no authority to contract on behalf of his wife."

17. The legal position is thus obvious that there is no implied authority in favour of the husband in respect of the separate properties of the wife. Having regard to the clear legal position, the theory propounded that there has been implied authority, cannot be countenanced. Even the plea of estoppel as pleaded in the plaint cannot be sustained, since it is the case of the plaintiff in the plaint *inter alia* that the second defendant also knew about the execution of the sale agreement, but it has not been specifically pleaded either expressly or by her conduct that she made the plaintiff to believe and act upon that she was agreeable for such a transaction. Therefore, in my considered view, neither the plea of implied authority nor the plea of estoppel can be validly taken by the plaintiff in this case. The learned Counsel for the appellant seeks to place very much reliance upon Section 41 of the Transfer of Property Act. Section 41 of the Transfer of Property Act reads as follows:

"41. Transfer by ostensible owner:--Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it: Provided that the transferee; after taking reasonable care to ascertain that the transferor had power to make the transfer, as acted in good faith".

18. A glance at the above provision shows apparently that if the transfer is made by one of the persons interested in the immovable property among others with the consent of latter either express or implied and the transferee acts *bona fide* after having made reasonable enquiries, such a transfer cannot be void on the ground of want of authorisation to make the transfer. But, a careful examination of the said provision, shows that the Section requires the following essential ingredients for the application of the said provision; viz.,

(1) a person becoming the ostensible owner with the express or implied consent of the person interested in the immovable property;

(2) he transfers (he same for consideration;

(3) the transferee acts in good faith after making reasonable enquiries that the transferor had the power to make the transfer.

19. The first and foremost ingredient being the ostensible ownership by one among the persons interested in the immovable property with the express or implied authority of others has not been satisfied in this case. No express or implied authority that can be attributed to the wife in favour of the husband is discernible in this case from the facts and evidence, a fortiori having regard to the situation obtaining in this case, that half share in the suit house is the Streedhana property of the second defendant. It is apt here to refer a ruling of the Apex Court in Suraj Ratan Thirani and Others Vs. The Azamabad Tea Co. and Others, . In para-16, the Apex Court held thus:

"In order that Section 41 of the Transfer of Property Act could be attracted, the respondents should prove that Ismail was the ostensible owner of the property with the consent of his co-sharers and besides that they took reasonable care to ascertain whether Ismail had the power to make a transfer of the full 16 as interest (sic interest). Now the facts however were that except the property being entered in the revenue records in Ismail's name, and that the management of the property was left by the co-sharers with Ismail, there is not an iota of evidence to establish that Ismail was put forward by them as the ostensible owner of the property. It is manifest that the conduct of co-sharers in permitting one of them to manage the common property does not by itself raise any estoppel precluding them from asserting their rights."

20. Although that was a Court sale, the essential requisites which attract the provisions of Section 41 of the Transfer of Property Act have been laid down by the Apex Court. It is not the case of the plaintiff herein that the first defendant was the ostensible owner of the property in dispute with the consent either express or implied of the second defendant inasmuch as the plaintiff pleaded ignorance of the existence of a son to them and his demise later intestate. On the other hand, the plea appears to be that the second defendant being present has impliedly acquired the knowledge of the transaction. It is not discernible from the averments made in the plaint that the plaintiff knew by then that the second defendant had a share on account of the death of her son intestate. Therefore, the plaintiff, I am afraid, cannot validly invoke Section 41 of the Transfer of Property Act.

21. Point No. 3 :--The second defendant pleaded inter alia in her written statement that she was ready and willing to purchase the half share of her husband. During the course of arguments, the learned Counsel for the defendants seeks to contend that she has got a right of preemption in view of Section 4 of the Partition Act. This contention appears to be preposterous.

Section 4 of the Partition Act can be invoked only when the property was sought to be divided and on account of the nature of the property, it is not reasonable to divide the same. Section reads as under:

"4. Partition suit by transferee of share in dwelling house :--(1) Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

(2) In any case described in Sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by Sub-section (2) of the last foregoing Section."

22. It is too premature for the defendant to have invoked the provisions of Section 4 of the Partition Act. The plaintiffs right has not been crystallised 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 the 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 pre-emption by undertaking to buy out the share of such transferee and,

(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 the 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 affectively deny entry in any part of such family dwelling house.

23. 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 (2002) 5 SCC 662. The Apex Court placing reliance upon its earlier judgment in Ghantesher Ghosh Vs. Madan Mohan Ghosh and Others, , reiterated the five essential requisites. For the foregoing reasons, the contention of the learned Counsel merits no consideration. It is also appropriate here to refer Section 44 of the Transfer of Property Act.

"44. Transfer by one co-owner :--Where one or two or more co-owners of Immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquired, as to such shares or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred. Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this Section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house."

24. These provisions are incorporated obviously with the avowed object to preserve the privacy of the joint owners or the co-owners and not to allow a stranger in their midst to claim joint possession to the detriment of other joint family members or co-owners.

25. For the foregoing reasons, the case of the second defendant cannot be accepted. That apart, it is counter productive, since the right of the plaintiff to claim specific performance of suit contract of sale under Ex.A1 has not been conceded by both the defendants as is being resisted on the other hand totally.

26. This then takes me to the other consideration about the entitlement of the plaintiff to the relief of specific performance, although the suit contract of sale Ex.A1 covers the whole suit house. But from the above discussion, it so transpires that the executant has only half share and interest therein. From the discussion made by me hereinabove, the first defendant cannot validly bind the second defendant under Ex.A1 contract. The only point that crops up in the context is whether the plaintiff is entitled to the relief of specific performance in respect of a part of the suit house. Before advertng to the same, it may be mentioned here that no laches whatsoever and no conduct whatsoever that disentitles the plaintiff to claim specific relief can be attributed legitimately in this case. The facts and evidence discloses that the plaintiff was ready and willing to perform his part of the contract. Not being aware of the fact that the defendants had a son and that son died and that since he died intestate, under law his share in the ancestral property devolved upon the mother, I am of the view that the 1st defendant being the Kartha of the family and as he had only daughters, the plaintiff proceeded to have the transaction with him. It transpired only later that on account of the notice got issued by the second defendant that she had a share in the suit house. Therefore, in ordinary course, there can be no legal bar for granting the relief of specific performance as claimed by the plaintiff, regardless

of the fact that at this stage, it was in part or in whole of the property. Coming to the other question, now that Ex.A1 transaction is valid only to the extent of the share of the first defendant in the suit house, viz., half share, it is to be seen whether the relief could be granted in favour of the plaintiff.

27. Section 12 of the Specific Relief Act, the provision germane in the context for consideration reads as under:

"Section 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 bears 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 in a case falling under Clause (b), pays or has 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.

Explanation :--For the purposes of this Section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject-matter existing at the date of the contract has ceased to exist at the time of its performance,"

28. The learned Counsel for the defendants seeks to place reliance upon a judgment of the Gujarat High Court in this regard in Ashwinkumar Manilal Shah

and others v. Chhotabhai Jethabhai Patel AIR 2001 Guj. 90. A Division Bench of the Gujarat High Court in para-19 held thus:

"One of the grounds is that where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract though not voidable gives the plaintiffs unfair advantage over the defendant In the case before us, the contract certainly gave undue advantage to the plaintiffs and this undue advantage was certainly clear inasmuch as there is cogent evidence on record that the land which is subject matter of the agreement to sell was ancestral land in which all the defendants had a share and not that it was sole property of the defendants Nos.1 and 2. Consequently, if by such agreement the plaintiffs got a right to get the sale deed executed in respect of shares of the defendants Nos. 3 to 9, who are not signatories to the agreement to sell, it can safely be said that the plaintiffs had got an undue advantage at least over the defendants Nos. 3 to 9 and as such the decree for specific performance can be refused on this ground."

29. The expression "undue advantage" is a relative term. The plaintiff shall not be put to any unfair advantage over the defendant and at the same time, it shall not result in hardship on the defendants. Equally it is true the non-performance of the contract shall not involve any such hardship on the plaintiff. No equity can be invoked validly by the defendants particularly by the second defendant having regard to the fact that it was only 35 days after the knowledge, she got a notice issued to the plaintiff conveniently, which was not her case at the earliest point of time. That apart having regard to the discussion hereinabove made, the agreement is not binding upon her to the extent of her half share and therefore, no specific relief could be granted validly in favour of the plaintiff in respect of her half share and interest in the suit house.

30. In Kartar Singh v. Harjinder Singh AIR 1990 SC 8554, the Apex Court held thus:

"We are afraid that the very foundation of the reasoning of the Division Bench of the High Court is defective. It was never disputed that the respondent and his sister had each half share in the said properties. Hence a mere failure to mention in the agreement that they had such share in the property would not entitle one to come to the conclusion that they did not have that share. When the property is owned jointly, unless it is shown to the contrary, it has to be held that each one of the joint owners owns a moiety of the property. In the present case, there is neither a pleading nor a contention that the respondent and his sister did not own the property in equal shares. Secondly, the agreement of sale clearly mentions that respondent was entering into the agreement both on behalf of himself and his sister, and that he was, under the agreement, selling the whole of his share and also the whole of the share of his sister in the property. Further in the agreement itself he had stated that he was responsible to get the sale deed executed by his sister and that he would persuade her to do so. This being

the case, the properties agreed to be sold were clearly distinguishable by the shares of the respective vendors. In the circumstances 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 it and whose property is identifiable by his specific share.

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".

31. Very recently the Apex Court in *A. Abdul Rashid Khan (Dead) and others v. P.A.K.A. Shahul Humid and others* 2000 (6) ALT 5 (SC). In para-15, the Apex Court held thus:

"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 5/6th 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".

32. The Apex Court relied upon its another judgment in *Mazoor Ahmad Magray v. Ghulam Hussan Aram and Ors.* (1997) 7 SCC 703. There has been no divergence of opinion in the first and latter two Judgments of the Apex Court. While in the former case the properties of the joint owners are distinguishable clearly, in the latter two cases the situation is not such. Nevertheless, they have a joint interest in the property. It is of no consequence as to whether the properties are clearly distinguishable or it is one property where the parties have joint interest. The relief of specific performance can be granted in respect of the share of the executant of the contract of sale while denying the same in respect of the share of the non-executant notwithstanding the fact that the shares of the executants of the contract of sale are separate and distinguishable or not. Having regard to the authoritative pronouncements of the Apex Court, there can be no legal bar for decreeing the suit for specific performance in respect of the half share of the 1st defendant in the suit house is concerned.

33. For the reasons hereinabove discussed, the judgment and decree passed by the Court below in respect of the whole of the property cannot be sustained. The appeal having been filed by the second defendant shall have to be allowed. The judgment and decree of the Court below remains valid under the circumstances to the extent of the half share of the first defendant is concerned.

34. In the result, the appeal is allowed and the judgment and the decree of the Trial Court to the extent of the half share of the appellant-second defendant is concerned is set aside. Under the circumstances, no order as to costs.