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**(2004) 05 CAL CK 0020**

**Calcutta High Court**

**Case No:** C. Suit No. 804 of 1987

Nemai Basak and Others

APPELLANT

Vs

Kalyani Rakshit

RESPONDENT

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**Date of Decision:** May 14, 2004

**Acts Referred:**

- Partition Act, 1893 - Section 4
- Transfer of Property Act, 1882 - Section 109, 44, 53A

**Citation:** AIR 2005 Cal 163 : (2004) 1 ILR (Cal) 503

**Hon'ble Judges:** Narayan Chandra Sil, J

**Bench:** Single Bench

**Advocate:** S. Deb and S. Biswas, for the Appellant; Tapas Midya and A. Chakraborty, for the Respondent

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### **Judgement**

Narayan Chandra Sil, J.

This is a suit for declaration and for injunction. The plaint case in brief is that the premises No. 9A Ram Chand Ghose Lane, Calcutta originally belonged to one Mahadeb Chandra Basak (hereinafter referred to as "Mahadeb" only) who died in the year 1941 leaving behind his widow Mahamaya Basak, only son Ramesh Chandra Basak (hereinafter referred to as "Ramesh" only) and six daughters. During his lifetime Mahadeb inducted a tenant in one portion of that property. After the death of Mahadeb in the month of December, 1941 Mahamaya and Ramesh became the exclusive owners of the property left by Mahadeb in moiety according to the provisions of Dayabhaga School of Hindu Law. Ramesh being the eldest son and the only male member of the family used to look after the entire family affairs. Ramesh became ill in the year 1986 and at that time he disclosed to the plaintiff Nos. 1 and 2 who are Smt. Kamala Basak and Shri Nemai Basak, widow and son respectively of deceased Ramesh that in or about 1960 he took loan of Rs. 6,000/- from his tenant Ram Sankar Dutta (hereinafter referred to as "Ram Sankar" only) in order to arrange the marriage of his sister Smt. Reba Basak, Ram Shankar advanced the said sum of

Rs. 6,000/- in the name of his wife and Ramesh mortgaged his share in the property on condition that the interest that would be payable on the said amount of loan will be adjusted from the rent payable by "Ram Sankar" for the said tenancy held by him. Ramesh was taken to the lawyer of Ram Sankar for preparation of necessary deed of mortgage. Ramesh during his lifetime went on paying rates and taxes to the Calcutta Municipal Corporation and used to realise rents of the said premises from the other tenants. Mahamaya died in the year 1982 leaving behind Ramesh, her only son and her six daughters to inherit her share in the property. At the time of his death Ramesh disclosed the names of persons before the said loan transaction was made. Ramesh died on 10th November, 1986. After the death of Ramesh the plaintiffs became doubtful about the dealings of the defendant which prompted the plaintiffs to search at Registration Office. From the Registration Office they came to know that the defendant had procured a deed of sale on 13th December, 1960 in respect of the half share of the premises in question. Ram Sankar was the tenant in respect of the property and the agreement for lease in writing was executed on 1st March, 1960. The said agreement for lease was for 30 years in respect of the western portion of the suit premises. The said agreement for lease was executed by Ramesh only and Mahamaya was not a party to that agreement for lease. After search of the registry office the plaintiffs understood that Ram Sankar duped Ramesh by procuring a sale deed from Ramesh such sale deed was obtained by practising fraud upon Ramesh. It is also stated that although in the said purported deed of sale the consideration money was shown as Rs. 6,000/-, actually market value of that property will not be less than Rs. 1 lakh. In this background the present suit was filed.

2. The suit is contested by the defendant, Smt. Mahamaya Dutta, wife of Ram Sankar Dutta by filing a written statement in which all the material allegations are denied and it is inter alia stated that after the death of Mahadeb Basak in December, 1941, his only son Ramesh executed and registered a deed of lease in favour of Ram Sankar dated 8th March, 1960 in respect of the same property as described in the suit. Before that one agreement for lease was made between the parties on 1st March, 1960. In terms of that deed of lease Ram Sankar along with the members of his family came to the possession of the said property. Thereafter Ramesh approached Ram Sankar for selling his superior interest to the lessee and Ram Sankar agreed to purchase the said house property for valuable consideration. Thus, Ram Sankar purchased the suit property in the name of his wife, Smt. Mahamaya Dutta on 13-12-1960 and had been in peaceful possession of the same by paying municipal rates and taxes for both the owner's and occupier's share and also the defendant got her name mutated instead and place of her vendor, Ramesh. The defendant also exercised her right and ownership by constructing new roof, one asbestos shedded room on the first floor, and one bed room by altering the staircase and store room. The defendant also brought electricity connection in the suit premises and fixed new wooden staircase to her portion.

3. It is also stated that in the year 1941 when Mahadeb died the Hindu Succession Act did not come into force and so Mahamaya Basak, being the widow of Mahadeb could not inherit the property of her husband. Of course after the introduction of Hindu Succession Act in June 1956, the life interest of Mahamaya Basak was converted into absolute ownership according to Hindu Succession Act. It is further stated that Ramesh wanted to secure money for running his own business of a stationery-shop at Bagbazar in the name and style of "Kamala Stores" and with that purpose he sold his own interest in the suit property for a valuable consideration of Rs. 6,000/- which is the identical amount of the consideration money for the entire house property at 9A, Ram Chand Ghose Lane, Calcutta in the year 1933.

4. It is again stated that Ramesh died suddenly of heart attack in the house of his sister, Smt. Shefali Seth at Dankuni in the year 1986 and so the story of the plaintiffs of taking advance of money from the husband of the defendant is false and fabricated. That apart, the death of Ramesh was so sudden and unexpected that the story of telling any family affairs to anybody else during his illness was simply impossible. Again his sister's marriage took place long before the sale of the suit property to the defendant. It is further stated that the plaintiffs never demanded any accounts of adjustment towards loan because such demand is absurd when there is no loan transaction. It is also claimed that Ramesh executed and registered the sale deed with full knowledge and understanding and his wife, the plaintiff No. 1 also knew the same from the date of sale. It is also claimed that the consideration money of Rs. 6,000/- was the highest offer in the year 1960. It is also stated that from the date of mutation in the year 1962, the period of limitation started and so the suit is hopelessly barred by limitation.

5. In the additional written statement filed by the defendant it is stated that it was Ramesh alone who used to maintain the whole family consisting of his mother, wife, sisters and several children and was in want of money for which with the consent of his mother Ramesh leased out the western portion to the husband of the defendant for 30 years. It is again stated that in or about 1960-61 both Mahamaya and her son Ramesh demarcated the two separate portions, eastern and western and thereafter on a partition wall in accordance with the said demarcation the property was divided in two separate portions. It is also claimed that the entire property was divided by the partition wall into two portions eastern and western in 1966 and neither Mahamaya Basak nor her son ever protested rather accepted the benefits of the partition wall and the partition accepting the ownership of the defendant. In the premises it is prayed by the defendant that the suit be dismissed.

6. It appears from the record that on the basis of such pleadings Mr. Babulal Jain, J. initially framed as many as four issues on September 21, 1989 and thereafter some additional issues were framed on 6-3-1991. On perusal of the materials on record I find that all those issues are required to be considered for the purpose of disposal of the suit. Those issues read as under :

## ISSUES :

1. (a) Was the Deed of Sale dated 13th December, 1960, obtained by fraud of the undivided one-half share of Ramesh Chandra Basak (since deceased) executed by him in favour of Smt. Mahamaya Dutta in respect of the suit property No. 9A Ramchand Ghosh Lane, or was it a sale of that property in her favour ?

(b) Is the said deed liable to be declared as void or inoperative ?

2. Was the same not intended to be given effect to ?

3. Is the claim of the plaintiff in the suit barred by Limitation ?

4. To what relief, if any, is the plaintiff entitled ?

## ADDITIONAL ISSUES

(5) Were the agreement for lease dated 1st March, 1960 and the Deed of Lease dated 8th March, 1960 null or void and/or inoperative on the ground that Mahamaya Basak (since deceased), co-owner was not a party thereto ?

(6) Was the Deed of Sale dated 13th December, 1960 null and void and/or inoperative on the ground that Mahamaya Basak (since deceased) was not a party thereto ?

(7) Is the possession of the defendant in respect of the western portion of the said premises illegal or unauthorised ?

(8) Are the plaintiffs estopped from challenging the validity of the agreement for lease and/or the lease and/or the deed of lease ?

(9) Was there any partition and separate allotment of the premises as between Mahamaya Basak and Ramesh Chandra Basak prior to the sale deed ?

(10) Is the claim of the plaintiffs barred by waiver, estoppel, acquiescence or adverse possession ?

Issue Nos. 1 (a) & (b), 2 and 6

7. All these issues are taken up together as they are interrelated with each other. In fact, the vortex of the case is based on the interpretation of the sale deed dated 13th December, 1960 and if after consideration it appears that the said sale deed is actually an ostensible sale deed and the real transaction is nothing short of a loan transaction from the facts and surrounding circumstances, the position will be different from what if it appears that it was indeed an out and out sale. At the same time if it is seen that the said deed in question was obtained by fraud all the issues will come at rest.

8. The learned Advocate for the plaintiff has drawn my attention to the parent deed of conveyance dated 29-5-1933 wherein the suit property is described as "being the

divided portion of the premises No. 9, Ramchand Ghosh Lane and also being a portion of premises No. 9A, Ramchand Ghosh Lane" and thereby tries to impress upon me that the words "being a portion of means what was purchased measured 2 Cottahs 5 sq. ft. out of a total 2 Cottahs 33 sq. ft. as shown in the document. In this connection, in the written notes on arguments filed by the plaintiff, it is stated as follows :

"Therefore the property which on Mahadeb Basak's death came into hands of Mahamaya and Ramesh Basak was 9A, Ram Chand Ghosh Lane, being the divided portion of the original premises No. 9, Ram Chand Ghosh Lane. In the premises No. 9A, both had an undivided share each in what is called western portion and the same was never divided between mother and son nor from the rest of the property."

It is the consistent argument of the learned counsel for the plaintiff that the undivided western portion of the property was leased to Ramankar Dutta and thereafter purported to have been sold to his wife Mahamaya and there is no partition or demarcation of the property. It is also the case of the plaintiff that Ramesh never represented in the transaction that he had either leased out or sold his undivided one-half share in the western portion to Ramshankar and his wife. In this connection, the learned Advocate for the plaintiff has drawn my attention to the words "common entrance" and "privy of the lessors and courtyard of the premises" in order to signify that the property was never partitioned.

9. The learned Advocate for the plaintiff has also raised the question as regards the improper dealing of Ramesh in respect of the agreement for lease of the property in favour of Ramsankar as the said agreement contained the provision for payment of municipal taxes for the entire building by the lessee. According to him, Ramesh was not entitled to lease out the entire proprietary interest in the western portion which he shared with his mother, Mahamaya and the knowledge and consent of her mother to the lease was absolutely necessary before delivery of possession of the western portion of the said property.

10. This part of the argument appearing in the written notes submitted on behalf of the plaintiff is more or less confined to the deed of lease which is in fact not directly material consideration before us. However, I do not agree with the mode of interpretation made by the learned counsel for the plaintiff as regards the position and ownership of property transferred by the deed of conveyance dated 29-5-1933, for, from the description of the property "being the divided portion of the premises No. 9 Ram Chand Ghosh Lane and also being a portion of premises No. 9A, Ram Chand Ghosh Lane" goes to simply show that both the divided portion of premises Nos. 9 and 9A both of Ram Chand Ghosh Lane was conveyed by the deed in question. It also shows that the portion of premises No. 9 was a divided portion whereas the portion of premises No. 9A of Ram Chand Ghosh lane was not a specific portion. But our main concern is as regards the purported deed of sale dated

13-12-1960.

11. In this connection, I like to make it clear at very outset that the question for determination is not only the nature of the deed that is to say as to whether it is an ostensible sale deed or indeed an out and out sale deed but it is always incumbent, in view of the pleadings, to determine whether such deed was obtained by Ram Sankar exercising fraud.

12. In the written notes on arguments filed on behalf of the plaintiff some of the recitals of the purported deed of sale find mention wherein it is stated as follows :

"Mahadev Basak died intestate leaving as his heirs and legal representatives only son Ramesh Basak (Vendor) and only widow Mahamaya Basak."

And from this recital the learned Advocate for the plaintiff argues that thereby both of them Ramesh and his mother became jointly the absolute owner of the estate in the property. It is also pointed out in the written notes on arguments that the western portion of the property "which was sold" by Ramesh Basak was represented by him "on Deed of Sale" as "his undivided half part or share." It is stated that it is not correct rather fraudulent because with the commencement of Hindu Succession Act of 1956 Mahamaya Basak became the absolute owner of the undivided one-half share in the totality of the immovable property being Premises No. 9A Ram Chand Ghosh Lane including its western portion and Ramesh was not entitled to carve out the western portion from the rest of the property and claim it as his undivided half part or share. It is also claimed in the written notes on arguments that there was no partition between mother and son demarcating the western portion as the share of Ramesh only. It is also argued that in the original deed dated 29-5-1933 a "divided portion" of 9A Ram Chand Ghosh Lane was sold to Mahadeb.

13. I am really in imbroglia to understand the confusing statement in the written notes on arguments filed by the plaintiff. Firstly, it is not correct that "a divided portion" of 9A Ram Chand Ghosh Lane was sold to Mahadeb but actually the divided portion of premises No. 9 Ram Chand Ghosh Lane was sold. This appears to be misleading. Secondly, the recitals of the deed dated 13-12-1960 as appeared in the written notes on arguments clearly shows that there was no suppression of facts as regards the partition of the property for, there it is clearly shown that the property was undivided half share of Ramesh at the time of the transaction. Not only that the term of inheritance that the property in question was equally devolved in moiety upon Ramesh and his mother Mahamaya on the death of Mahadeb Basak. I fail to understand as to how the same should be termed as either fraudulent transaction or suppression of fact in the deed in question. We shall definitely consider the legal position of the sale of undivided share of a property by one of the co-sharers to a third party subsequently at the appropriate time.

14. The next attack is as regards the fraud to have been exercised in the transaction is on the expressions "free from all encumbrances" used in the recital of the deed of

lease dated 8th March, 1960. It is further stated that there is no whisper "in the Deed of Sale" although it was the same property that is the western portion that was purported to have been sold. It is claimed that the right of Ramesh to recover a rent of Rs. 8,700/- for the unexpired period of 29 years of lease was taken away by the deed of sale without any consideration. It is also stated that in the deed of lease it was stipulated that Ramsankar was used to pay not only both owner's and occupier's shares of municipal taxes of the western portion to which he was inducted but even both shares of municipal taxes for the entire property that is for the eastern portion as well. According to the plaintiff this was another fraudulent design to make Ramesh believe that for consideration of entering into the lease with Ramsankar entire tax liability of the property was to be borne by Ramsankar himself. It is claimed that in fact no part of taxes was paid either by Ramsankar or his wife Mahamaya Dutta but by Ramsankar himself. In this connection my attention was drawn to the provision of Section 109 of the Transfer of Property Act. The relevant portion of the said Section of the Act has also been quoted in the written notes on arguments which reads as below :

"If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee in the absence of any contract to the contrary, shall possess all the rights of the lessor as to the property.....so long as he is the owner of it.....".

15. Thus, it appears from the above arguments that the deed dated 13-12-1960 is attacked here on the ground that it is conspicuously silent as regards the existence of the deed of lease and there is no reflection in the said deed as regards the amount of rent for the unexpired period of lease. In the written notes on arguments filed on behalf of the defendant it is simply stated that the fraud was not established and Mahamaya Basak had full knowledge of both the transactions and the partition that was made subsequently by Ramsankar and so also by his wife under the very knowledge and consent of both Ramesh and his mother. I shall scan the evidence hereinafter. But before that apparently I do not find any merit at all in the statement made on behalf of the plaintiff in the written notes on arguments. Here it is necessary to hark back the facts of the case. The deed of lease was executed on 8-3-1960 by Ramesh in favour of Ramsankar and after about 9 months on 13-12-1960 the said Ramesh again executed the said purported sale deed in favour of Mahamaya Dutta, wife of the erstwhile lessee Ramsankar. Thus in both the cases the superior interest in the property was firstly leased out and thereafter within a short period of about 9 months purported to have been sold to the wife of the lessee. When the same person was transacting his superior interest in respect of the same property within a very short period firstly to the husband and then to the wife I am at quandary as to how the question of the unrealised rent for the unexpired period of lease comes and how it is expected that the said fact deserves any mention in the subsequent deed of conveyance. This has also spelt out the provisions of Section 109 of the Transfer of Property Act as quoted in the written

notes on arguments filed of behalf of the plaintiff. It appears from that Section that the provisions stands only in the absence of any contract to the contrary. Here in the instant case such contract, may be in the form of sale (let us presume for the time being the transaction to be an absolute sale) was made subsequent to the lease within a very short period of about 9 months and the erstwhile right was transferred in its entirety to the wife of the lessee. Thus, in my humble view, I do not find any legal impropriety in the deed dated 13-12-1960 so far as Section 109 of the Transfer of Property Act is concerned. This has also dispelled the question of exercising fraud by way of mentioning "free from all encumbrances" in the purported sale deed.

16. In the written notes on arguments it is further stated that the fraud was practised upon Ramesh and his mother Mahamaya by Ramsankar right from the very beginning i.e. from the date of the alleged lease. It is also stated that Ramesh was badly in need of money for giving his sister, Reba's marriage and he wanted Rs. 8,000/- as loan from Ramsankar but Ramsankar tricked him into accepting Rs. 6,000/- as consideration for the alleged sale of the same leasehold property foregoing the consideration of the rent unrealised for the unexpired period of 29 years of lease and in this connection the question and answer put and given by Ramsankar being Nos. 114 to 123 and 125 to 134 were mentioned. I am really surprised how in the written notes on arguments the plaintiff blew hot and cold in same breathe as it is stated there as follows

"However, this time Ramshankar could not help describing the Vendor Ramesh Chandra Basak as the owner of the undivided one-half part or share in the premises No. 9A, Ram Chand Ghosh Lane. The other co-owner of the dwelling house by necessary implication was his mother Sm. Mahamaya Basak."

Thus, it is admitted that there is absolutely no concealment or suppression of fact regarding the undivided and not partitioned ownership of Ramsankar in the property under transaction.

17. In the written notes on arguments the questions and answers Nos. 116 to 118, 123 to 127 and 133 put to and given by Kashinath Kumar find mention. We shall discuss those questions and answers at the time of scanning the evidence adduced on behalf of the parties.

18. The provisions of Section 44 of Transfer of Property Act also find mention in the written notes on arguments filed by the plaintiff. I shall make my discussion on this Section subsequently when the legal propriety of the transaction made on 13-12-1960 will come for discussion.

19. Much has been written in the written notes on arguments filed by the plaintiff on the terms used as "free from all encumbrances". Keeping an eye on facts and circumstances of the case it appears that in the strict sense of the term the property in question was not encumbered factually except that it was under lease at the material point of time. But the lessee was none else than the husband of the vendee



of the same property and everything was done on behalf of the vendee by her husband that is the lessee himself. Accordingly, so far the question of encumbrance on the part of the lessee does not arise because there cannot be any objection on the part of the lessee as regards his right on the property, for, the lessee was all along in the know behind the transaction. The second question of factual encumbrance may be, although not specifically mentioned in the written notes on arguments filed by the plaintiff, as regards the silence in the recital of the sale deed about the unrealised rent for the unexpired period of lease. I have already discussed on this point in the foregoing lines of the judgment that the transaction of the purported sale was made within a short period of lease and that too between Ramesh and the wife of the lessee. It would be a legal fallacy of hypertechnical nature if the unrealised rent for the unexpired period of lease is taken into consideration keeping the interest of the lessor in view of ignoring the rights of user of the said property by the lessee. So far the legal encumbrance on the property in question will be discussed at the time when we shall discuss the propriety of the transaction in view of the provision of Section 44 of the Transfer of Property Act.

20. The plaintiff in the written notes on arguments has referred to a number of case laws on the provisions of Section 44 of the Transfer of Property Act. Thus, it was held in the case of [Lal Behari Samanta and Others Vs. Gourhari Dawn and Others](#), that co-sharers of joint Hindu family residence who are affected by the sale of a share to a stranger have been given a right u/s 44, para 2 of the Transfer of Property Act to ask for an injunction restraining the stranger purchaser from exercising any act of joint possession in respect of the joint family residence. It was also held in that case that the language of Section 53A of the said Act and that of Section 44 of the Act are not analogous. But it was held in that case that a purchaser of an undivided share of a dwelling house has certainly a title to a portion of the house but his remedy lies in a suit for partition and he can possess his own share by instituting a suit for partition unless, of course, he is pre-empted u/s 4 of the Partition Act.

21. To my dismay I found mention of some other case laws in the written notes on arguments filed by the plaintiff but unfortunately the learned Advocate for the plaintiff has supplied the other case laws not covering all the case laws cited in the written notes on arguments. However, it appears from decision made in [Baldev Singh Vs. Smt. Darshani Devi and Another](#), that a co-owner who is not in actual physical or exclusive occupation over a parcel of land cannot transfer a valid title to that portion of the property. The remedy of the transferee, in case the transfer is made, would be to get a share from out of the property to be allotted to that co-sharer in partition or to get a decree for joint possession or claim compensation from the co-sharer as the case may be. The instant suit was not filed by the defendant purchaser but by a co-sharer claiming that the property was joined at the time of the alleged transaction. Moreover legal possession of the suit property was with Ramesh through his lessee, Ramsankar at the time of transaction.

22. The decision made in the case of [Udayanath Sahu Vs. Ratnakar Bej and Others](#), in which the ratio decided in the case of [Paresh Nath Biswas Vs. Kamal Krishna Choudhury and Others](#), has also been referred to in the written notes on arguments filed by the plaintiff. It was held in that case that Court can record a finding as to severance of status if the materials on record justify it and absence of a plea to that effect is no bar to such a finding. It was further held in that case following the ratio decided in the case of [Addagada Raghavamma and Another Vs. Addagada Chenchamma and Another](#), as below :

"It is so for the reason that though certain materials may not be sufficient to prove a completed partition, may be enough to support a finding as to severance of joint status."

23. In a Division Bench judgment of our High Court in the case of [Sm. Nirupoma Basak and Others Vs. Baidyanath Pramanick](#), while interpreting the provisions of Section 4 109 of the Partition Act it was held as below :

"The expression "dwelling house belonging to an undivided family" in Section 4 means family not divided qua dwelling house. The essence of the matter is that the house itself should be undivided even though the co-sharers have defined shares. As long as there is a dwelling house which has not been divided qua the family it might be said to be a dwelling house belonging to an undivided family for the purpose of Section 4.

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If some of the co-sharers of the undivided dwelling house have transferred their interest to strangers that will not by itself change the nature and character of the house and take the case out of operation of Section 4. Until the dwelling house is completely alienated to strangers it will still be an undivided dwelling house within the meaning of Section 4. The position of the character of the dwelling house is to be considered by reference to the date of purchase by the stranger purchaser and not the date of the partition suit. The right of the members of the family who are share holders to pre-empt u/s 4 accrues as soon as suit for partition is filed by the stranger to the family and subsists during the pendency of the suit until it is terminated by an effective final decree. The mere fact that the purchaser has obtained possession is not sufficient to defeat the claim of a member of the family u/s 4 unless it can be shown that the purchaser's possession was such that he could be regarded as having become a member of the undivided family at the date of sale. Therefore, the purchase of an undivided share in the property by the stranger and his possession thereof and collection of rent in respect of the portion from the tenants without any objection by the other co-sharers will not change the nature and character of the property even though the possession of the stranger purchaser may not be wrongful u/s 44. T.P. Act and it would not cease to be a dwelling house belonging to an undivided family. The mere symbolic possession of

the stranger purchaser and his collection of a share of rent will not make him a member of the family and demolish the right of pre-emption of the co-sharers u/s 4 (Case Law discussed).

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Waiver means an intentional relinquishment of a known right. Since the right of pre-emption u/s 4 accrues to a co-sharer of the undivided dwelling house only after a partition suit is filed by the stranger purchaser, it cannot be said to have waived after a sale of a share to a stranger purchaser. Therefore, where a co-sharer transferred his undivided share in the dwelling house to a stranger purchaser and the other co-sharers declined to purchase the said share though it was offered to them before it was purchased by the stranger and they did not object to the possession of the said share by the stranger the disinclination on the part of the other co-sharers to purchase the share of the co-sharer and their non-objection to the possession of the same by the stranger purchaser, which were earlier to the filing of the partition suit by the stranger purchaser, do not amount to a waiver of the right of pre-emption u/s 4 by the other co-sharers which arose upon filing of the partition suit by the stranger purchaser."

24. In the written notes on arguments filed by the plaintiff the decision made by the Division Bench of our High Court in the case of *Girija Kanta Chakrabarty v. Mohim Chandra Acharya* (20 CWN 675 : AIR 1916 Calcutta 170) finds mention. In that case A and B, two out of three brothers, A, B and C, members of a joint mitakshara family, executed a mortgage of their whole property, and the mortgagee on the death of A sued to enforce the mortgage against B as mortgagor and also as the legal representative of A and against C, describing him only as as legal representative and it was held that the decree and the sale could not affect C's original one-third share in the mortgaged property, since the question of the validity of the mortgage as against C who was not a party thereto could not be raised and decided in the mortgage suit. It was also held in that case that the plaintiff as purchaser of an undivided two-thirds share in huts used as residence by a joint Hindu family could not be given a decree for joint possession in view of the provisions of Section 44 of the Transfer of Property Act and the proper course is to follow either to direct delivery of possession by partition in execution proceedings or to leave the purchaser to his remedy by a separate suit for partition. The facts of the instant case are different from the facts of the case of *Girija Kanta* but the principle enunciated on the interpretation of Section 44 of the Transfer of Property Act is the same as has been followed subsequently in many of the judgments of our High Courts and the Apex Court. There in the case of *Girija Kanta* it is contemplated as to what is the

remedy of the plaintiff purchaser and not of the co-sharers.

25. The learned Advocate for the plaintiff has also referred to the ratio decided in the case of [Dorab Cawasji Warden Vs. Coomi Sorab Warden and others](#), . In the said suit the property was purchased originally by the father and mother of the appellant/ plaintiff. The superstructure on the land was constructed subsequent to the purchase. After the death of the mother the appellant and his father as surviving joint tenants came to own the entire property. Under an agreement the appellant and his father, agreed to hold the same as tenants in common, each having an equal undivided share therein so that each can dispose of his undivided share in the property. Subsequently the appellant's father transferred his undivided half share in the suit property in favour of his another son. Thus, the appellant and his brother came to hold an equal undivided one-half share each as tenants in common in respect of the said property. Appellant's brother died intestate. His widow and two minor sons sold their undivided one-half share in the said property to the vendee. The appellant filed a suit against the vendors i.e. his brother's wife and her sons u/s 44 of the Transfer of Property Act. The suit was filed on the ground that the suit property was a dwelling house belonging to an undivided family, that there had not been any division of the said property at any time that the appellant/plaintiff and his deceased brother during his lifetime were for convenience occupying different portions, the plaintiff occupying the first floor while the deceased brother was occupying the ground floor. After the death of brother, his wife and sons continue to be in occupation of that portion which was in occupation of his brother. In the circumstances, the vendee, a stranger to the family has no right to have joint possession or common enjoyment of the property along with the plaintiff on the basis of the purchase of undivided share. Thus, the plaintiff/appellant claimed the suit property and also the interim injunction restraining the vendors from parting with possession of the said property or any part thereof and/or inducting the vendee into the suit property and a similar injunction restraining the vendee from entering into or taking possession of the suit property. In such background it was held as below :

"That some notions of coparcenary property of a Hindu joint family which may not be quite accurate in considering Section 44; but what is relevant for the purpose of these proceedings was whether the dwelling house belonged to an undivided family. Even if the family is divided in status in the sense that they were holding the property as tenants in common but undivided qua the property that is the property had not been divided by metes and bounds it would be within the provisions of Section 44 of the Act. In the absence of a document evidencing partition of the suit house by metes and bounds and on the documentary evidence showing that the property was held by the appellant and his brother in equal undivided shares, it could be said that the plaintiff-appellant has shown a prima facie case that the dwelling house belonged to an undivided family consisting of himself and his brother. Prima facie, therefore, the transfer by the vendee would come within the

mischievous of second paragraph of Section 44.

While Section 44 does not give a transferee of a dwelling house belonging to an undivided family a right to joint possession and confer a corresponding right on the other members of the family to deny the right to joint possession to a stranger transferee, Section 4 of the Partition Act gives a right to a member of the family who has not transferred his share to purchase the transferee's share on a value to be fixed in accordance with law when the transferee filed a suit for partition. Both these are valuable rights to the members of the undivided family whatever may be the object of purpose for which they were conferred on such members. In some cases it is stated that the right to joint possession is denied to a transferee in order to prevent a transferee who is an outsider from forcing his way into a dwelling house in which the other members of his transferee's family have a right to live. In some other cases giving joint possession was considered to be illegal and the only right of the stranger purchaser is to sue for partition. All these considerations would go only to show that denying an injunction against a transferee in such cases would prima facie cause irreparable injury to the other members of the family.

In this case the said sale was itself hurriedly executed in a hush-hush manner keeping the entire transaction secret from the appellant. The purchasers were also inducted in the premises in a manner which clearly suggests that the vendors were attempting to forestall the situation and to gain an undue advantage in a hurried and clandestine manner, defeating the appellant's attempt to go to Court for appropriate relief. Therefore the vendees in such circumstances could, not be permitted to take advantage of their own acts and defeat the claim of the appellant in the suit by saying that old cause of action u/s 44 of T. P. Act no longer survived in view of their taking possession. In such circumstances it is but just and necessary that a direction should go to the vendees to undo what they have done with knowledge of the appellant's rights to compel the purchaser or to deny joint possession".

26. In the background the facts of the case it seems to me that the question of knowledge of Mahamaya Basak, the mother of Ramesh Chandra Basak as regards the purported sale and the purported partition of the property plays a very vital role in the determination of the suit and in order to explore the same, I am left with the evidence adduced /produced by the parties. I shall first examine the oral evidence in this regard.

27. In this connection I like to make it clear that initially the suit was filed by Smt. Kamala Basak, the widow of Ramesh and four sons and four daughters of Ramesh. Subsequently, Kamala Basak died and her name was deleted. Probably as all her successors were already made parties as plaintiffs there was no necessity for making any substitution. It further appears from the record that initially the sole defendant was Mrs. Mahamaya Dutta who subsequently died and her legal heirs had been substituted as defendants.

28. The plaint case as regards the knowledge of alleged sale and partition is that Kamala Basak came to learn from her dying husband before a few days of the death of her husband that Ramesh did not sale but mortgaged the property in favour of Mahamaya Dutta. The question is very clear as to how far this stand of the plaintiffs could be relied upon. Kamala Basak stated in her evidence in chief that in 1960 her husband was facing financial problem and the press business was closed down. She also claimed that the marriage of Reba Basak, the sister of her husband was fixed in the year 1960. She further stated in her chief that sometime in November, 1986 the physical condition of her husband was good but since 10 days before his death her husband had been affected "by Stroke" and was admitted in the Medical College Hospital. After 2/3 days he was brought back home though he had not recovered fully and only when he became better he disclosed the facts about the house. Thus, she further stated in her evidence : ,

"I was told by him that when the marriage of his sister was fixed they were insisting for money and then they were asked to sign the document, "(vide the answer to question No. 59).

She made it clear in her subsequent question that one Gokul Chandra Kar at the relevant time insisted her husband for money as her husband was having acute financial problem and Gokul was the brother of Mahamaya Dutta. It is also stated by her that her husband had intimate relationship with Gokul. She further stated that Gokul Chandra Kar and Ramasankar Dutta agreed to lend her husband money on condition that her husband agreed to sign on the deed of sale with respect to the house. But her husband did not accept that proposal. It is also clear from her evidence that after 2/3 days of giving the information her husband died in the house of his sister. It is also clear from her evidence that her husband went to his sister's place on the occasion of Durgapuja with a sound mind having total mental fitness. In her cross-examination the witness stated the reason as to why her husband did not disclose the fact earlier and thus it is stated:

"Perhaps my husband would have felt shy to have disclosed to have obtained a loan of a meagre sum of Rs.6,000/- from the defendant and as such, did not disclose it either to me or to any of his relatives or even to his neighbours because he had a strong sense of self respect." (vide answer to the question No. 108)

She further stated that it was only 7 days prior to the death of her husband when her husband recovered a little from the stroke he had suffered, he narrated to her the fact. In one place she stated that her husband sold her ornaments to meet the expenses of the marriage of his sister.

It is admitted by her that she narrated to her mother-in-law as regards the selling of her ornaments by her husband to meet the expenses of her husband's sister but her mother-in-law was only happy because she was having a real good bridegroom. It further appears from her evidence that her husband discussed everything with

her as regards the expenses to be incurred for the marriage of his sister and her husband collected the money by depositing her ornaments and her husband further disclosed that he was in need of 6/7 thousands more but in another place the witness stated that her ornaments were used for opening the press. It is also curious to note that it is admitted in her evidence that at the time of the marriage of her husband's sister neither Gokul nor any other tenant was there in the house and this leads me to believe that such marriage had taken place before Gokul Kar and even Ramsankar were inducted as tenants in the suit premises. It may be mentioned here that it was in the year 1960 that Ramsankar was inducted as tenant in the suit premises. In another place of her evidence she stated that the first tenant in the house was inducted in the year 1961. It is also admitted by her that in view of a very close relation between her husband and Ramsankar her husband did never issue any rent receipt in favour of Ramsankar. In another place she stated :

"Some of my ornaments were sold in creating the press and my ornaments were also sold for the marriage of my sister-in-law."

29. Nema Basak, the plaintiff No. 2 and son of Ramesh Chandra Basak had been examined as a witness for the plaintiff. The nature of the evidence adduced by him is somewhat peculiar and thus when he stated that after his enquiry from his mother as to whether the defendant was a tenant or not, "my mother told me that it is not possible" and only thereafter he went to enquire from the Registry Office and obtained the certified copy of the purported sale deed. It appears from his evidence that his father died of a stroke all of a sudden although seven days before his death he was taken to the hospital after an attack of stroke and thereafter he was brought home and he was in rest. But in the next breath it is stated by him that his father died at his sister's place. It further appears from the evidence of Nema and that of his mother that both of them very carefully avoided to answer the question as to when Reba Basak was married. It is also a pointer to note that admittedly Reba Basak is alive but she has not come forward to depose in this case.

30. It appears from Paragraph 5 of the plaint that the plaintiffs claimed that the suit property was mortgaged after taking loan in order to meet the expenses for the marriage of Smt. Bela Basak although the evidence of the plaintiffs is that it was for the marriage of Reba Basak. The attention of the witness, Nema Basak was drawn in his cross-examination to Paragraph 11 which reads as under :

"Thereafter the death of Ramesh Chandra Basak the plaintiffs became doubtful about the dealings of the defendant who started various disputes with the plaintiffs. This caused to the plaintiff to search at the Registration Office (and) came to know from the searches that the defendant has procured by a Deed of Sale on 13th day of December, 1960 the half share of the premises No. 9A, Ram Chand Ghosh Lane."

The witness admitted the said averment made in the plaint as correct. If that be so then the story told by the witnesses that before 2/3 days of the death of Ramesh he

disclosed about the facts to his wife stands in contradiction with the averment made in Paragraph 11 of the plaint. In Paragraph 5 of the plaint it is clearly stated that during his illness in 1986 Ramesh stated to the plaintiff Nos. 1 and 2 that Ramsankar advanced a sum of Rs. 6,000/- as loan to Ramesh in order to meet the marriage expenses of Bela Basak. But it is the consistent case of the plaintiff that Ramesh narrated the incident to his wife who is the plaintiff No. 1 and not to any other persons including that of the plaintiff No. 2 who is Nemai Basak, the witness examined in this case. Nemai Basak as witness and as plaintiff No. 2 has also not claimed in his evidence that Ramesh narrated the incident during his illness to his mother and to him as well but it is stated, by him in his evidence that on enquiry from his mother he came to learn about the transaction.

31. Apart from all this what has been stated above the evidence of the witnesses for the plaintiff goes to show that within a period of 7/8 days Ramesh sustained two heart attacks and he could not survive the second attack. I cannot satisfy myself as to what prompted Ramesh to go to a far; off place at Dankuni from Kolkata to his sister's place on the occasion of Durgapuja particularly when Ramesh sustained a heart attack a few days before that for which he was even hospitalised was it then that Ramesh was not at all ill before his death? In fact the evidence of Kamala Basak and that of her son Nemai Basak sharply contradicts to each other as regards the state of affairs of health of Ramesh at the time when he was going to Dankuni in order to distribute the puja gifts to his sister; Kamala Basak specifically stated that his physical and mental condition was absolutely fit at that time but Nemai Basak stated that despite their objections his father went to Dankuni and that too all alone. This leads one to be sceptical as to whether Ramesh was at all ill at the relevant point of time, for, had his physical condition been not good he was not expected to bear the journey upto Dankuni all alone and conversely in that case at least somebody was expected to accompany him. If Ramesh was not at all ill before his death there is no question of his narrating the incident to his wife.

32. Nemai was repeatedly asked even in his examination-in-chief as to what exactly did his mother say as regards the nature of transaction and he replied that his mother told that it could never be possible that the property was sold to Mahamaya Dutta. The next question was put to this witness by his own advocate in examination-in-chief in the form that why his mother was so definite that the suit property was not sold to the defendant and he replied in the following manner :

"My father never told to my mother regarding the sale of the premises and my mother was given to understand that due to need of money mortgage deed was made of Rs. 6,000/-."

Why his mother was given to understand? Why his mother was not specific as regards the terms she heard from her husband when he stated the same to her son? All these questions remain unanswered. And the witness Nemai Basak was ultimately very specific contradicting the averment made in Paragraph 5 of the



plaint that his father never told anything regarding the mortgage of the suit property to him nor did he want to know the same from his father.

33. It is claimed by Smt. Kamala Basak in her evidence that her husband was a man of strong self respect which is why he did not disclose the fact of mortgage of the suit property of taking loan from the defendant. But this claim of Kamala Basak stands in sharp contrast with the facts coming in her evidence that her husband took her ornaments to sell to arrange the marriage ceremony of his sister. Her husband even disclosed to Kamala Basak that he was running in financial stringency to run his press business. Thus the person who could disclose and discuss so many matters with his wife it is hardly believable that he after long lapse of about 26 years disclosed the fact of mortgage only before a few days of his death to his wife. All this leads me only to brush aside the claim of the plaintiff that Kamala Basak came to learn about the real nature of the transaction only few days before the death of her husband.

34. As regards the knowledge of the nature of transaction in question the evidence of Nemai Basak, the son of Ramesh Chandra Basak is also noteworthy. Thus from the answers given by him to question Nos. 163, 168, 173, 178, 182 and 183 it appears that his mother was never beside his father either at the time of his father's admission in the hospital or at Dankuni where actually his father died. It is clear from his evidence that Dankuni is at a considerable distance from their residence. It is again in his evidence that his father went all alone to Dankuni to his sister's place despite the objection raised by them. I fail to understand as to why Ramesh was permitted to go all alone to Dankuni although before a few days of that Ramesh had a heart attack for which he was hospitalised. It is very clear from the evidence of Nemai Basak that his mother had no opportunity to talk to her father either in the hospital or at the time of his death in Dankuni.

35. It is the consistent case of the defence that though there is no partition by metes and bounds, there is sufficient physical demarcation between the portion of the plaintiffs and that of the defendant. In this regard it appears from the answer of Nemai Basak to question No. 155 that there is a partition wall dividing the portion of the house which he found since his birth and in the answer to the next question Nemai Basak had firmly confirmed that "there was always a partition wall in the premises" dividing the premises into front portion and back portion.

36. It appears further from the evidence of both mother and son namely Kamala Basak and Nemai Basak that Ramsankar Dutta constructed a wooden staircase and a room with asbestos shed on the roof. I am tempted to quote the answer to question No. 33 given by Nemai which reads as under :

"During the year 1965 they were in possession of the ground floor rooms and the kitchen and bath and privy only. At about 1970 they constructed forcibly the first floor room which has the asbestos shed. Since then they are occupying the room."

Both Kamala Basak and her son Nemai Basak stated in their evidence that Ramsankar made the said construction despite objection raised by the plaintiff party but it is admitted by them that there was no written complaint made by them for such forcible construction.

37. It is the case of the plaintiff that the Corporation taxes, rates etc. were paid by them whereas it is the claim of the defendant that the plaintiff party never paid such taxes and only before filing of the suit they paid the same at a time for the purpose of the suit whereas the defendant all along paid the rates and taxes of the corporation after having mutated the name of the vendee. Several receipts issued in respect of Premises No. 9A Ram Chand Ghosh Lane by the Calcutta Municipal Corporation have been filed from the side of the defendant (vide Ext. 4 series) and it appears therefrom that the Bills were in the names of Mahamaya Dutta and Mahamaya Basak both and it appears that the payments were made from time to time initially in the year 1960, thereafter in the year 1962, 1964, 1977 and so on. Similarly, it appears from Ext. 5 series that Ramsankar Dutta paid the electric Bills right from 1976. On the other hand it appears from Ext. "B" series that two cheques amounting to Rs. 3405.88 and Rs. 812/68 were issued by Kamala Basak in favour of the Calcutta Municipal Corporation dated 22-1-1986 and 24-1-1986 respectively in order to establish the claim of the plaintiff that they had been paying Corporation rates and taxes regularly. Except those two cheques there is no proof established by the plaintiff that they had any occasion to pay the rates and taxes of the Corporation.

38. Much has been argued by the learned Advocate for the plaintiff that the price shown in the purported sale deed as Rs. 6,000/- for the premises in question is not at all compatible in comparison with the market prices of the surrounding premises at the relevant point of time. But no document like the deed of conveyance of similar nature of the relevant time of the same locality has been filed on behalf of the plaintiff. It has of course come in the evidence that Mahadeb, the original predecessor-in-interest of the plaintiff purchased the entire premises at the price of Rs. 6,000/- in the year 1933. It has also come in that evidence that the premises is within a very close vicinity of the notorious red light area of the city and it is the back portion of the premises which was purportedly sold to the defendant. However, there appears some evidence from the valuer of the parties adduced before this Court. Thus, one Dilip Kumar Bose was examined on behalf of the plaintiff who was the valuer of the suit properties. It appears from his evidence that his valuation relates to the year 1960 in respect of the undivided half western portion of the property of 9A Ram Chand Ghosh Lane. According to him the valuation came to Rs. 42,700/- but then in his answer given to question No. 42 to the learned Advocate for the plaintiff himself he made it clear that in December, 1960 the valuation of the western portion of the premises was Rs. 32,027/-. It appears from his cross-examination that this witness prepared two reports within a gap of about one month. When the witness was asked as to what promoted him to submit two

reports he could not give any plausible explanation and it was stated by him as below :

"At first I was given to understand that I had to submit a report for undivided half share of the property at premises No, 9A, Ramchand Ghosh Lane, Calcutta-6. After that I was pointed out that I need not do that. I had to submit a report only on the portion occupied by the defendant. These two are completely different."

(Vide answer to question 56.)

And from his answer to the next question it appears that he admitted that his second report is the improvement of the first one. In his evidence adduced In the year 1990 it is stated by this witness that the age of the building in question was about 80 years and so now the building has completed the century. It is also admitted by him that in the year 1960 the building was about 60 years old. I do not (sic) why at one place this witness affirmed the question put to him in his cross-examination that the house was for the purpose of sale. May be considering the physical situation of the house having a distinct partition as it is evident from the evidence of Nemai Basak the witness Mr. Bose said the same. This witness also admitted that he made the valuation on the basis of the market value of the property.

39. One Kashi Nath Kumar, another valuer was examined from the side of the defendant in the year 1990. He has proved his report (Ext.7). It appears from his evidence that the valuation of the total building in 1960 was Rs. 8,409.78 and the western portion of the building measures 540 sq.ft. This witness in answering a question in his cross-examination stated that considering all facts, the locality, the red light area, the price of the land would be Rs. 50,000/- to Rs. 60,000/- per katha as on date. Neither of the parties has filed any documents like deeds of other conveyance of the locality in or around of the year 1960.

40. It is argued on behalf of the plaintiff that Ramesh was got to make his signature on the deed in question or knowing the same to be a deed of mortgage and for that purpose the plaintiff has relied much on the evidence of Ramsankar Dutta and tries to impress upon me that the scribe who is an Advocate of Ramsankar Dutta. It appears from the evidence of Ramsankar that the lease deed was prepared by the learned Advocate for Ramesh Chandra Basak. Ramsankar narrated the incident in his evidence as to how the registration was made in respect of the deed of conveyance. Thus, it is stated by him that he along with Ramesh went to the registry office with a copy of the conveyance of his father where Mr. N. C. Sengupta, the learned Advocate was present. Mr. Sengupta read the deed of conveyance and opined that purchase could be made. Thereafter it was agreed that Ramesh would go home taking the copy of the conveyance and-will prepare the sale deed. Subsequently, Mr. Sengupta who was known to Ramesh prepared the sale deed. It is admitted by him that the deed was prepared in the name of his wife under his

instruction. Here it is heavily relied upon by the learned Advocate for the plain tiff that there was no hand of Ramesh in preparation of the sale deed as it was admitted in answer to question No. 134 by Ramsankar that deed was prepared\* "under my instruction". But if question Nos. 133 and 134 are read together it will be very clear that the instruction of Ramsankar was made in respect of incorporating the name of Mahamaya Dutta as vendee and nothing more than-that. This Mr. N. C. Sengupta was engaged by both Ramesh and Ramsankar. This witness also stated that he constructed a wall 6 1/2 ft. in height and 10" width dividing the premises equally into east and west. This witness also stated in his cross-examination that a partition wall was erected in the presence of Mahamaya Basak and Ramesh Chandra Basak and the arrangement was accepted by both of them since 1966.

41. Now from the above discussion the enigma centred round the fate of the suit is gradually getting cleared. If we sum up the facts based on the evidence as discussed in the foregoing lines it appears that the story of telling the nature of the deed in question to Kamala Basak by her husband at the time of his death can hardly be believed. It is also very difficult to place any reliance on the case of the plaintiff that Mahamaya Basak was totally in obfuscation as regards the purported sale of her share by Ramesh himself to Ramsankar. It is in the evidence of Ramsankar that he constructed the partition wall in presence of Mahamaya Basak without any objection. It is true that the surveyor's report is silent as regards the existence of such partition wall but it is quite obvious because the surveyors were not supposed to make something like local inspection. Evidence is also there that admittedly Ramsankar constructed a room on the first floor with asbestos shed long back during the lifetime of Mahamaya Basak against which the plaintiff party did not move to any authority and this goes to support the case of the defendant. Corporation rates and taxes had been continuously paid by the defendant whereas just before filing of the suit the plaintiff party paid the Corporation tax by issuing cheques twice within a gap of very few days. All this only suggests that the payment of Corporation tax by the plaintiff party is only for the purpose of filing of the suit. The plaintiffs do not appear to have furnished satisfactory evidence in order to substantiate their claim that the price of the suit property shown in the purported sale deed is miserably low and the report of the surveyor of the plaintiff party, as discussed, does not give any clear impression.

42. I shall now discuss the legal position of the transfer of the suit property by one of the co-sharers, Ramesh without any partition by metes and bounds keeping the provisions of Section 44 of the Transfer of Property Act and the case laws cited by the learned Advocate for the plaintiff and discussed hereinbefore in view. Section 44 of the Transfer of Property Act reads as below:

"Where one of 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 acquires, as to such share 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."

43. Thus, this Section has not barred the transfer of the property by a co-sharer ipso facto. On scrutiny it appears that the said Section has dealt with the restriction on the rights of the transferee on the share of the co-sharer and there is a special provision in the second part of the Section as regards the right of the transferee in respect of the share of dwelling house belonging to the undivided family. Here, this Section has the similarity with Section 4 of the Partition Act. There appears some restriction on the transferee in seeking or in entitling him to joint possession or other common or part enjoyment of the house. Admittedly, Ramsankar is not the member of the joint family of the vendor and he has not come forward here to claim any joint or common possession or part enjoyment of the house. The house is divided in two parts since decades past without any objection from the side of the plaintiff party. That being the position if we now cast our look back to the different case laws cited by the learned counsel for the plaintiff it would be clear that all those case laws more or less have dealt with the right of the transferor where the transfer has been made in respect of the joint property by co-sharer. In this connection, we may consider what is exactly the prayers of the plaintiffs in the instant suit and it appears that the plaintiff prayed in the suit for a declaration that the alleged deed of sale is Void and invalid and be declared cancelled or to treat the same as a deed of mortgage and also for permanent injunction restraining the defendant or her agents from interfering with the possession of the plaintiffs and also for possession of the western portion of the premises etc. But here in the instant case the defendant is already in possession of the suit property and the name of the defendant has been mutated in the records of the Corporation and tax and rates of the Corporation had been paid by the defendants.

44. Let us now sum up the situation. We have already seen that the suit premises was properly demarcated and even for that purpose Ramsankar constructed a wall. Not only that he constructed a room on the roof of his portion and had been paying rents to the municipality regularly after having mutated the name of the vendee. The story of taking loan for the purpose of sister's marriage by Ramesh is overshadowed with enigma casting every doubt to believe the same. It is specifically challenged by the defence that the marriage of Reba was not held at the material point as claimed by the plaintiffs but much earlier. None of the witnesses for the plaintiffs could give the date of marriage of Reba and Reba has not come forward to depose before this Court although she is very well alive. There is no convincing

evidence as regards the actual price of the land in question and the plaintiffs failed to discharge their onus in this regard. The provisions of Section 44 of the Transfer of Property Act do not ipso facto make the transfer of a property, by a co-sharer, may be in respect of dwelling house, to a third person bad and ineffective. Moreover Section 44 of the Transfer of Property Act is applicable only when there is a question of transfer of an immovable property and not in case of a loan transaction. The main prayer of the plaintiffs in the suit in the prayer portion of the plaint is a declaration that the alleged deed of sale procured on 13th December, 1960 by the defendant from the husband of the plaintiff No. 1 is void and/or invalid and the same be treated as mortgaged transaction. Throughout the plaint the plaintiffs tried to establish their case as of loan/mortgage transaction for the purpose of marriage of the sister of vendor. It is very candid from our foregoing discussions that the plaintiffs failed to establish any fraud or misrepresentation in execution of the deed in question. Our considered conclusion as regards the payment of municipal tax for the plaintiffs is nothing short of a legal gimmick for the purpose of creation of this suit as from the facts and circumstances of the case as discussed above it is highly pre-posterous to believe that the transaction in question was not within the knowledge of others including Mahamaya Basak. Accordingly, it is held that the transaction in question was not a loan/mortgage transaction but an out and out sale. Neither in the plaint nor in the evidence of the witnesses for the plaintiffs there is anything as to the time limit for repayment of loan amount.

45. True, there is no partition of the suit property amongst the co-sharers. But Court cannot keep its eyes shut as regards what happened during past long about 27 years from the date of transaction till the time of filing of the suit. It was only in the year 1986 that within a gap of very short time the plaintiff parties paid the municipal taxes by two cheques and that apart there appears no reaction in them since the time of transaction in 1960. It was decided in the case of Raghavamma (supra) that there may not be sufficient proof for partition by metes and bounds but if the joint status of the co-sharers appear to have been severed that cannot be ignored. There was no mere symbolic possession of the defendant as contemplated in the case of Nirupoma Basak (supra), but here the possession was made by partition and specific demarcation from the very beginning and subsequently by raising walls by the defendant dividing the entire premises into two parts immediately being followed by mutation in the records of the municipal corporation. It is true that there is no stamp of partition in strict legal "parlance but at the same time it cannot be said that there was no supporting document to find such partition since last 26/27 years. As regards separate living, this case stands on a peculiar footing. Here in the instant case Mahamaya, the mother and her only son, Ramesh were the original co-sharer. Admittedly Mahamaya was dependant on her only son, Ramesh who used to look after the family affairs. That being the position separate living of the co-sharers can not be conceivable.

46. Accordingly, all these issues are decided against the plaintiffs and the deed in question dated 13th December, 1960 is held to be an out and out sale. Issue Nos. 7, 8, 9 and 10.

47. All these issues are taken up together for the sake of convenience. In view of what has been discussed in the foregoing lines in determining the other issues these issues are also decided against the plaintiffs. Issue Nos. 3, 4, and 5.

48. All these issues are taken up together for the sake of convenience.

49. We have already discussed as regards the impact of the lease on the deed dated 13th December, 1960 when it was made absolutely clear that our concentration was mainly on the deed of sale dated 13th December, 1960. There is no dispute that Mahamaya Basak was not a party in any either of the deed of lease or of the deed of sale in legal sense of the term but we have arrived at this decision in the foregoing lines that Mahamaya Basak had full knowledge about the deeds and it is only a gimmick at the instance of the successors thereafter to file the instant suit. We have also decided that not only Mahamaya Basak but subsequently her successors had also knowledge of all the transactions and as such the suit itself is badly barred by limitation.

50. In the different case laws as discussed earlier in connection with the provisions of Section 44 of the Transfer of Property Act it is indicated as to what is the proper course for a co-sharer and it appears therefrom that the proper course for a co-sharer of the undivided dwelling house is to go for a pre-emption suit, of course keeping the question of limitation intact. But what we have seen in the instant suit? From the very beginning upto the end the plaintiffs claimed the transaction in question as one of loan/mortgage transaction and accordingly the prayer was made. That being the position I hold that the plaintiffs are not entitled to any relief as claimed. And from the facts and circumstances of this case I am inclined to announce the result of the suit hereinunder imposing cost against the losing party.

51. All these issues are accordingly decided against the plaintiffs.

52. The suit is therefore dismissed with costs to be paid to the defendants.