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Transfer by Co-owner under the Transfer of Property Act: An Analysis

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ABSTRACT

Transfer by co-owners means when two or more persons hold title to the same property and the transfer a portion of share, the transferee takes the place of transferor who has transferred his share. However, in case of co-owner of dwelling house does not give the right to joint possession to transferee. This paper deals with transfer by co-owners under Transfer of Property Act, 1882. Section 44 to 47 of transfer of property act lay down rules applicable to transfers effected by co-owners. Further it discusses about legal competency to make transfer and about its applicability. It covers the rights and liabilities of transferee and discusses about the kinds of co-ownership. It also deals with the exception part in the context of transfer by co-owner which is under section 44. Further it also covers the concept of joint transfer and transfer by co-owners in common property.

Keywords: Co-owners, Liabilities, Transfer of Property Act, etc.

I. INTRODUCTION

Here the term property in general way indicates the economic status of a person. Such property is held by any person to take out benefit from it. There are various ways in order to transfer property from one person to another like it can be inherited, can be bought by giving the full payment of it. And in India law governing transfer of property under the rules of Transfer of Property Act, 1882. This act is an Indian legislation which governs all rules and procedures regarding transfer of property. Various types of property are as movable, immovable, corporeal and incorporeal etc. Transfer of movable property mainly governed by the sales of Good Act, 1930 whereas in case of immovable which is in between living persons is governed by the Transfer of Property Act, 1882.

In general way transfers are made by owners themselves, ostensible owners and the co-owners or Joint owners. For example, in case of Coparcenary where two or more persons enjoy common ownership and enjoyment of property like all Coparcener including all male members and now even daughters have a common and an equal interest in the ancestral property, so any

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co-owner can transfer his interest in the share of property to any stranger or may be another co-owner. And after this that transferee steps in the shoes of the co-owner (transferor) and gets clothes with all his liabilities. Hence that transferee becomes new co-owner. Section 44 to 47 of transfer of property act, 1882 deals with aspect of transfer by co-owners, section 44 which specifies about transfer by one co-owner and the rights of a transferee in case of this type of property. The second part of this section lays down an exception to this rule. The object of this exception is to prevent a stranger from claiming a joint possession of a family of dwelling house. The terms Co-owner states where co-owner may be either joint tenant or tenant in common under English law.

Section 45 deals with the question as to what quantum of interest each one of the several transfers under a transfer gets in the property transferred. When a Transfer for consideration is made to two or more persons jointly, they will become co-owners transferred their interest. It lays down a presumption as to the quantity of interest taken by co-owners who have paid consideration for acquisition. Section 46 deals with the question as to what interest each of the several joint transferors gets in the consideration for the transfer.

Section 47 which lay down principle regarding transfer of property by co-owners of share in common property, in which effect of transfer is to reduce their shares proportionately. It refers to tenancy-in common and this section helps while ascertaining the shares of co-owners.

Through this paper, the researcher has specifically dealt with the concept of transfer by co-owners and subsequently in the light of rights and liabilities of transferee and also the exception rule which embodied under section 44 of this act. This paper also dealt the intricacies related to the same in the light of different judicial interpretations given time to time by different courts.

Brief Background

Earlier transfer of goods was regulated to an extent by Indian contract act, 1872 whereas in case transfer of Immovable property which governed by the principles of justice, equity and Good Conscience. But after growing the extent of trade and commerce rapidly increase the infrastructure in the late 19th century led to more conflict in business sector. There were various problems regarding pragmatic law of property and also some peculiar problems related to exchange of goods and transfer of property. Hence an immediate need was felt for clear cut law related to transfer of property and to take care of the potential economic problems. So, the enactment of this Indian legislation fell upon the First and second law commission.

Defining Co-Owners

In general way Co-Owner of a property in most cases is a member of the same family. In other way Co- Owner can be appointed by a will written in his favour. Every Co- Owner may either own equal rights to use the property like others or may have a portion of the property in his name. There is situation where more than two Co-Owners of the same property and one of the Co-Owners dies, his share automatically passes to his dependents or to other Co-Owners.² E.g., an ancestral property is inherited by three brothers, and these three will be Co-Owners of the property. In case one of them dies, then his share of the property passes on to two surviving brothers or may be his dependents along with rights. Co-Owner is entitled to three basic elements of Ownership under the Law:

- Right to possession
- Right to use, and
- Right to dispose of the Property.

II. KINDS OF OWNERSHIP UNDER CO-OWNERS

The word 'Ownership' consists of innumerable number of rights, liberties and powers with regard to thing owned. It has different kinds of Ownership as absolute, limited, sole ownership, co ownership, vested ownership, contingent ownership, Corporeal and incorporeal. When in case where a person owns a property in one time it is called sole ownership, whereas such property is owned by more than one person then in that case it is called as Joint ownership. But here Co ownership can turn into sole ownership by means of partition.

As the word 'Co-Owner' is wide enough to cover all kinds of ownership such as Joint tenancy, Tenancy in common, Coparcenaries, undivided Hindu family members, etc. Here the fact that regarding property that the parties have certain shares, indicates that they are Co-Owners. A Co-Owner is entitled to three essentials of ownership under Indian Law- Right to possession, enjoy and to dispose. Hence, in case a Co-Owner is deprived of his property, he has a right to put back in possession. In this aspect such co-owner has an interest in every part of property and has a right irrespective of his quantity of share, to be in possession jointly with others. This is also called joint-ownership.

Here these are the following types of co-ownership:

Tenants in Common: In this aspect co-ownership is not specifically stated and each tenant in

² G.P. Tripathi, THE TRANSFER OF PROPERTY ACT, 18th ed. 2016, p.222.

common has a separate fractional interest on whole property. Though each tenant in common has a separate interest in that property and possess and use the entire property. It may hold unequal interest in the property but the interest possessed by each tenant in common is a fractional interest in the entire property. So, each tenant in common may freely transfer their interest in the property.³ Here Tenants in common don't have right of survivorship. Hence after death of any tenant in common their interest passes via will or through intestate laws to another person who will become new tenants in common with the surviving co-owners.

Joint Tenants: In this aspect it has right of survivorship. That means after death of one joint tenant his share/interest immediately passes to the surviving joint tenants and not to the decedents. It basically holds a unitary interest on whole property. Here each Joint tenant must have equal share in the property. There are certain features of Joint tenancy that is also the requirements of joint tenancy are as follows:

- Unity of possession- each tenant is entitled to the possession and enjoyment of whole land.
- Unity of Interest- Each joint tenant has same type estates and same duration.
- Unity of time- joint tenancy interest must vest at the same time.
- Unity of title- Interest of joint tenancy must derive by the same instrument like will or deed.

In case if any one fails to perform their part, then joint tenants automatically convert into tenants in common.

Joint tenancy implies unity in titles as well as unity of possession whereas Tenants in common signifies only the unity of possession. In case of Joint tenancy co-owners hold property upon the death of any of them his interest goes to the survivors but in tenants in common after death shares goes to his heir or representatives. Both concepts are of English Law. Except in case of Coparcenary between members of a Hindu Undivided Family, the concepts of Joint tenancy are unknown in India.⁴

Tenancy by the Entirely: This concept of co-ownership is for Husband and wife. It provides right of survivorship. It requires all four unites like unity of time, possession, title and Interest and also fifth unity of marriage. Tenancy by entirely does not allow spouse to convey his interest to third party whereas one spouse can convey his interest to another spouse. It may be

³ H.N Tiwari, TRANSFER OF PROPERTY ACT, 5th ed. 2008, p. 190.

⁴ Jogeshwar Narain v. Ram chand Dutt, 1896 23 IA 37; Venkatakrishna v. Satyawathi, AIR 1986 SC 751.

terminated by divorce, death or mutual agreement by both spouses.

III. TRANSFER BY ONE CO-OWNER

In such a case where a property is jointly owned by two or more persons and each co-owner may have equal or unequal shares, but until partition is affected and their respective shares are separately possessed, every co-owner is entitled to common enjoyment of property. Section 44 of the Transfer of Property Act, 1882 deals with aspect of transfer by one co-owner, further it also provides the rights of transferee such type of transaction.

The principle of this section is that where a co-owner transfers his shares, the transferee is substituted in place of transferor. It substitutes in the property to the extent of share transferred to him. Here transferee too is entitled to common enjoyment of the joint property together with other Co-owners. Such transferee steps into the shoes of the transferor. It means transferee will acquire all the rights and liabilities which the co-owner [transferor] has in that Joint property at the date of transfer.

The object of this section as well as Section 4 of partition act 1893 is to keep off strangers who may purchase the undivided share of a co-sharer of an immovable property, so far as dwelling houses are concerned to make it possible for a co-sharer who has not sold his share to buy off the stranger purchaser.⁵

This section assures the transferee the right to joint possession or common enjoyment of the property, but does not confer on him any right to exclusive possession without enforcing partition.⁶

Law as to Co-Owners

Several Co-Owners hold any immovable property, each co-owner has interest in every portion/inch of the common property whereas his interest is qualified and limited by similar interest of the other co-owner. A co-owner by an express or implied arrangement, possess and enjoy any property exclusively and protect his possession against other co-owners.⁷

IV. LEGAL COMPETENCY TO MAKE TRANSFER BY CO-OWNER

The word “legally competent” is in paragraph 2 of section 44 of transfer of property act can be study with respect to Section 7 of the transfer of property Act, 1882 states that every person competent to contract that means a major and of sound mind or is not disqualified by law for

⁵ Daral Chandra Chatterji v. Gartha Behari Metra 1954 ILR 1 Cal 384; Bulu Sarkhel v. Kali Prasad Basu, AIR 2012 Cal 67.

⁶ Lalita James v. Ajit Kumar AIR 1991 MP 15; Ramdayal v. Maneklal AIR 1973 MP 222.

⁷ T. Lakshminpathi v. P. Nithyananda Reddy 2003 (5) ALT 44 (SC).

contracting. Hence even the interest of a co-owner can be transferred, mortgaged, leased to another co-sharer or to a stranger. Here the fact that partition has not taken place by metes and bounds does not stand in the way of the interest of a co-owner.

As per law prevails in some areas, a coparcener of a Hindu Joint family can alienate his share in the Joint family property for consideration [Section 45]. In that case such Coparcener is a legally competent person whereas in case of Mitakshara coparcenary, the consent of other coparcener is required before any such transfer. In other cases where one co-owner is in exclusive possession of a joint land plot lets it out to a tenant without the consent of co-sharer landlords, such a tenancy will not bind the latter. In such a case the Lease will only be confined to the interest and share of the lessor.

In case *Baldev Singh v. Darshan Devi*⁸ where a co-owner who is not in actual physical possession over parcel of land cannot transfer a valid title of that portion of the property. Here the remedy available to the transferee would be to get a share out from the property allotted after the partition or to get a decree for joint possession or can claim compensation from the co-owner.

In case *Rukmani and others v. H.N.T. Chettiar*⁹ where a co-sharer cannot be allowed to cause prejudice to the other co-shares by putting up a substantial construction during the pendency of a suit for partition filed by the other co-shares.

A case of Punjab and Haryana high Court *Hazara Singh v. Faqiria*¹⁰ where a co-owner contention that he had, by adverse possession, a peaceful undisturbed possession by the other co-owners had become the sole owner of a land, held that the possession of a co-owner is possession of all the co-owners. It cannot be adverse to them unless there is a denial of their right to knowledge by the person in possession. If a co-sharer is in possession of the entire property, his possession cannot be deemed to be adverse he possesses the property on behalf of all others.

V. RIGHTS AND LIABILITIES OF TRANSFEREE

As per section 44 of transfer of property act which also deals with the rights of a transferee and also safeguards their rights. Here the transferee steps into the shoes of his transferor that means the Co-Owner and further is clothed with all the rights and become subject to all the liabilities of his transferor. It basically becomes as much a co-owner as his transferor was before the

⁸ AIR 1993 HP 141.

⁹ AIR 1985 Mad 283.

¹⁰ AIR 2004 P H 353.

transfer.

Here the Transferee from a co-owner acquires rights like i.) a right to Joint possession of the property¹¹ ii.) a right to enforce partition as against other co-owners¹². Other rights include right to make improvements and right to peaceful possession.

Right to Joint Possession: Each Co-owner has proprietary right in whole estate. Here transferee becomes the co-owner and getting all rights like joint possession in property except a dwelling house. In case where a co-owner or his transferee is ousted from joint possession, then he is entitled to get joint possession by a suit, and not necessary forced to sue for partition.

Right to peaceful possession: Here co-owner transfers his separate plot and transferee gets possession on that remaining part of co-owner, his transferee cannot be disturbed by the other co-owners until and unless a final partition takes place. So, a tenant of a land who derives his title from all co-owners cannot be disturbed by one co-owner without consent of all.

Right to make Improvements: In order to make construction on any part of land, co-owners can make out and he is allowed to do so. Whereas he is not entitled to do construct on any other portion of joint property or to the detriment of others co-owners.

Right to enforce Partition: As in every case of Joint partnership, each party has a right to demand partition that means a right to be placed in a position to enjoy his own right separately without any interference and interruption. As this section 44 applies all transfer including sales and mortgages or lease. Here a lessee of an undivided share can maintain a suit for partition¹³, a mortgagee¹⁴ and even a life tenant is entitled to seek partition subject to condition that it gives effect to the transfer. Now a monthly tenant was also allowed to enforce a partition there was no probability of the lease being determined.¹⁵ In a suit for partition there must be unity of possession and unity of title¹⁶. A claim for partition can be refused on the ground of inconvenience¹⁷ after fulfilling conditions.

In case of **Partial partition** that prevents the working out of equities between the co-owners is not maintainable. The purchaser of a co-owner's share in one particular item of property can file a suit for recovery of that share in the item without filing a suit for general partition.¹⁸

¹¹ Amir Mahton v. Sheopujan AIR 1946 Pat. 231; Jamunan v. Jhalli AIR 1920 All.111.

¹² Venkayya v. Venkata Subbarao, AIR 1957 AP 619.

¹³ Mohammad Jaffer v. Mazhar –ul-ashan 1906 3 All LJ 474.

¹⁴ Hariharayyar v. Ahammadunni, AIR 1940 Mad. 491.

¹⁵ RajniMohan v. Sambhunath 1930 ILR 57 Cal 715.

¹⁶ Durga Charan v. khundkar, 1918 27 Cal LJ 441.

¹⁷ Hemadri Nath Khan v. Ramani Kanta Roy 1897 ILR 24 Cal 575.

¹⁸ G. C.V Subba Rao, LAW OF TRANSFER OF PROPERTY, 7th ed. 2012, p.533.

Muslim co-heirs and partial partition: In such a case where property has devolved on several co-heirs under the Mohamedan Law, definite fraction of every part of estate entitles to all co-heirs. Then one of co-heirs can ask for recovery of his share of the common property by another co-sharer.¹⁹

Rights of purchaser of a Hindu coparcener's interest: Here this concept says the purchaser of the interest of a coparcener in a Hindu Joint Family acquires as against the other coparceners the right to institute a suit for general partition.²⁰ The Madras High Court holds that such a purchaser has no right to joint possession.²¹ His right to partition may be worked out in suitable case for recovery of possession by the non-alienating coparceners²² as well as alienating coparceners.²³

Co-sharer's suit against trespasser: Here a co-owner has right to sue a trespasser in ejectment without impleading the other co-sharers. A tenant on sufferance is on the same footing as a trespasser.²⁴

Claim to mesne profits against a co-sharer: where the possession of entirely joint property by a co-sharer is not wrongful. Thus, the co-sharers who haven't taken any action to take possession cannot claim mesne profits.

Condition and Liabilities

As per section 44, the words 'subject to the conditions and liabilities' affecting at the date of transfer, the interest transferred which save principles established by Mitakshara law, that the right of an alien is only to institute a suit for partition, to work out his equities subject to the charges and encumbrances affecting the coparcenary property at the time of transfer.

As the transferee takes subject to all the liabilities by acquiring rights and bound by any condition and liabilities affecting the interest of transferor at the date of transfer. So, a purchaser of a share is of course not liable for the damage caused to the rest of the property by the transferor after the date of transfer.²⁵ Thus the vendor's pious obligation to discharge his father's debts will attach to his interest even in the hands of the alien.²⁶

Alienation of Property by Co-owner: In that case the parties mutually divide their properties

¹⁹ Ibid

²⁰ Muthukumara v. Sivanarayana AIR 1933 Mad. 158.

²¹ Kandasamy v. Velayutha AIR 1926 Mad. 774.

²² Subba Goudan v. Krishnamachari AIR 1922 Mad. 112.

²³ Bhau v. Bhudha AIR 1926 Bom. 399.

²⁴ Dr. Poonam Pradhan Saxena, PROPERTY LAW, 2nd ed. 2011, p.208.

²⁵ Chandra Shekar v. Abidalli AIR 1925 Nag. 68.

²⁶ Venku Reddi v. Venku Reddi AIR 1927 Mad. 471.

to reach an compromise decree and coparcenary came to an end after preliminary decree, alienation of his share by one co-owner has not alienated property in excess of his share.²⁷

VI. ROLE OF DWELLING HOUSE AND UNDIVIDED FAMILY

This concept basically is an exception to the rule provided in the first part of section 44 of transfer of property act, 1882. Any co-owned property in which family members of the co-owners are living together where co-owner has right to transfer his share but transferee is not entitled to have common enjoyment or joint possession of the property.²⁸ Section 44 says that the co-owners right to joint possession, other common or part enjoyment of the property transferred will not be available to the transferee where such property is a dwelling house belonging to an undivided family and such transferee is not the member of that family. He only gets the share in a residential house belonging to a family member of a joint family not entitled to joint possession.

Object of this exception: This exception has been created in order to avoid inconvenience which may be caused by substitution of a stranger in joint family who may be of different caste, religion etc.

In the words of Westropp C.J., in Bombay case²⁹, “We deem it a far safer practice, and less likely to cause serious breaches of peace, to leave a purchaser to a suit for partition, than to place him by force in joint possession with the members of a Hindu family, who may be not be of different caste for his own, but also different in race and religion.”

Here restriction contained in this section for stranger is applicable even in that case also where there is only one male member of family in occupation of family dwelling house.

For granting relief under section 44 of transfer of property act, 1882 there must be two things satisfied:

1. The property should be a Dwelling house
2. The transferee should not be member of the family

Here transferee's (stranger) right to have the house partitioned is, subject to Section 4 of the Partition Act, 1893. Where this section provides stranger to claim partition by metes and bounds may be compelled, at the option of the other members of the family to forego his legal right to partition and accept pecuniary compensation. The Partition act 1893, gives the coo-

²⁷ Parmanand Swain v. Rabindranath Swain, AIR 2004 NOC 109 (Ori).

²⁸ Ram v. Ram Kishan AIR 2010 All 125.

²⁹ Balaji v. Ganesh, 1881 5 Bom.499.

sharer the option of buying out the transferee at a valuation to be made by the court.³⁰

Dwelling house: Taking the reference to the partition act, 1893 the term ‘Dwelling house’ means not only residential structure or building but it includes all the adjacent buildings, gardens, cartilage, Court yard, orchard and all which are necessary for the convenient use of the house.³¹

In case the dwelling house does not belong to an undivided family, section 44 of the transfer of property act, 1882 is not applicable.³² Here the word ‘undivided family’ in Section 44 is not limited to Hindus, but includes such group of people related in Blood who live in one house under one head, and that it applies if they are undivided *qua* the dwelling house which they own.³³ In this a co-owner transfers his shares by way of sale, lease, gift or mortgage, section 44 will be applicable. But partition is necessary to give effect to the mortgage if the transfer is in nature of mortgage and in case of lease where lessee of an undivided share too has right of partition.

In a case where, a share of a house is transferred by way of lease which is used by all members of family then the lessee must get his part partitioned. Further if transferee is unable to get his part partitioned then in that case other co-owner may have right to restraint the lessee from getting possession of the house with others. In case *Ashim Ranjan Das v. Bimal Ghosh*³⁴ a house was in common enjoyment for Hindu undivided family members where a co-sharer leased out his share without effecting partition then after this the stranger lessee (tenant) attempted to enter into possession jointly with members of family. In which court held that interim injunction restraining the stranger lessee can be granted.

However, in case of Delhi High Court where ‘A’ entered into premises followed by his mother and brother who joined him later on and the government first granted licence and subsequently executed lease in his favour. Court held that A’s (lessee) mother and brother were not co-tenants and A was entitled to the possession of the whole premises including the portion of his mother and brother. It was observed by the court further that filing of suit by A for possession of portion which is in his mother and brother’s possession did not means that ‘A’ was not the lessee of the whole promises.³⁵

Such house characterized as a dwelling-house belonging to undivided family is not altered by

³⁰ D.F. Mulla, THE TRANSFER OF PROPERTY ACT, 11th ed. 2013, p.257.

³¹ *Kshirode Chunder v. Saroda Prosad* 1911 12 Cal LJ 525.

³² *Ram Bilas Tewari v. Shivrani* AIR 1977 All 437.

³³ *Kshirode Chunder v. Saroda Prosad* 7 IC 436.

³⁴ AIR 1992 Cal. 45.

³⁵ *Hari Singh v. Madan Lal*, AIR 2001 Delhi 231.

the mere fact that an undivided share is transferred to a stranger who comes into possession and collects rents from the portion of the tenants.³⁶

This section affords defence to the members of a joint family but it does not create a positive right in them.

Effect of Partition Act, 1983: Section 4 of this act plays a vital role in transfer by co-owner and to give rights and liabilities. Object of this section 4 of this act is to keep off strangers who may purchase the undivided share of a co-sharer of an immovable property, so far as dwelling houses are concerned to make it possible for a co-sharer who has not sold his share to buy off the stranger purchaser.³⁷

Here co-sharer has right of pre-emption under section 4 of partition act not under section 44 of transfer of property act, 1882. There is a case where such question was raised like “where co-sharer has right of pre-emption? In the case *P.C. Mallik v. Renuka Jain*³⁸ there is no law which stipulates that a co-sharer must sell his property to another co-sharer. Hence Strangers and outsiders can purchase share of a co-sharer even in a dwelling house but he gets no right to joint possession or common enjoyment of the portion of the house so purchased. He has to file a suit for demarcation of his share and also delivery of possession.

Thus section 4 of partition act also would defend Joint so-sharers, that means it gives liberty to repurchase the share sold to stranger or outsiders. Here right of pre-emption is there but with subject to conditions of this act. A co-owner who has transferred his interest to outsider does not have right of pre-emption. He can't re-purchase the share sold, then in that case where court shall evaluate the share in money value and shall ask the person claiming pre-emption to pay it to the outsider.

VII. CONCEPT OF JOINT TRANSFERS

Concept of Joint transfer aspect deal in section 45-46 of transfer of property act, 1882. Such transfer for consideration to two or more persons jointly makes them co-owners of the property. In case the consideration is paid out of a common fund their shares would be same as their interest in common fund.

Section 45 which deals with quantum of interest of each transferee and its determination, where there are several joint purchasers of immovable property. This section is not applicable to gifts and bequests but applicable to involuntary transfers and revenue sales. As per this section 45

³⁶ Nirupama Basak v. Baidyanath Paramanik, AIR 1985 Cal 406.

³⁷ Daral Chandra Chatterjee v. Gartha Behari Metra, 1954 1 Cal 384.

³⁸ AIR 2007 Ori. 65.

which is made applicable to the involuntary transfer on the ground of justice, equity and good conscience.³⁹ Presumption of equality is there in that case where absence of any evidence to be contrary, then shall be presumed to be equally interested in the property. this section does not specify about property shares like whether they take as joint tenants or tenants in common, should be determined by reference to their personal law.

Section 46 which lays down that the transferors of property entitled to share in the consideration as per their respective interests in the property transferred. Hence, this section is the converse of section 45, due to the concept of transfer by persons with distinct interests. Thus, it basically deals with the question as to what interests each of the several joint transferors gets in the consideration for the transfer.

Transfer by co-owners

Section 47 incorporates with such concept where several co-owners transfer without specifying then the share of each co-owner is reduced proportionately. This section is thus helpful in ascertaining the shares of the co-owners in the property retained after the transfer. This section is an application of the principle of equity that equality is equity.

As this section helps by predicting a possible difference in quantum of the interests of the co-owners, it is clear that it deals with tenants in common.

In *Mir Ali Nawaj v. Mir Ali Asghar*⁴⁰, two zamindars had equal shares in a property, one holding absolute interests and the other, life interest only. Half of the entire property was transferred by them. On the death of life interest holder his heir sued for partition. Court held that the vendee had taken 1/4th from each Zamindar so that the heirs were entitled to 1/4th only.

VIII. JUDICIAL APPROACH

*Dorab Cawasji Warden v. Coomi Sorab Warden*⁴¹

Facts: a property was purchased by father and mother of Plaintiff. Later on mother became died then appellant and his father became joint owner of the entire property. Further they converted joint tenancy into a tenancy in common. Later on father transfer his undivided share into the property to his another son. Hence the appellant and his brother became tenant in common in respect of the property but on the death of the brother, his widow and two minor sons sold their undivided share in the property. The appellant instituted a suit against his brother's wife and children on the ground that the suit property was a dwelling-house belonging to an undivided

³⁹ Balai Chandra v. Raisuddin Naskar, AIR 1956 Cal. 58.

⁴⁰ AIR 1927 Sind. 62.

⁴¹ AIR 1990 SC 867.

family wherein they all lived in their respective portions. Here after sale, the buyer had no right to live as a tenant in common with the appellant.

Decision: the court held that this transfer would come under the other second paragraph of section 44; therefore, the buyer has no right to live in dwelling house. Here court also observed that irreparable injury is likely to be caused by the entry of transferee and balance of convenience was in favour of appellant, interim injunction against vendors and vendees regarding possession can be issued.

Here basically happens a particular part of share is transferred without partition and the transferee does not maintain suit for partition whereas attempts to take possession of his share, then in that case other co-owners may restraint that person from taking possession. Section 44 second paragraph which lays down exception rule for transfer of co-owners under this act, the object of this part is basically to avoid inconvenience for other co-owners which may be caused by substitution of a stranger. That stranger may be from different caste, religion and race, and then other co-owners of transferor's family have a right to live in dwelling house.

*Rukmani v. H.N.T Chettiar*⁴²

Facts: Here transferee had purchased only 2/3rd share in the suit property from one of the co-owners then that transferee further proceeded to put up huge constructions on property without having partition by metes and bounds. The plaintiffs, means other co-owners wanted an injunction for restraining the transferee from doing so then Single judge of court refused to grant injunction. But when the matter came up before the Division bench overruled the above judgment it didn't approve above view and grant injunction.

Issue: whether a co-sharer (the transferee) having 2/3rd share in property could be allowed to put up constructions or not...?

Decision: Madras High Court held that transferee, being a co-sharer, cannot be allowed to cause prejudice to the other co-sharers by putting up constructions during the pendency of a suit for partition filed by the co-owners.

Court also observed here certain situation like if transferee claims to have acquired full title to the suit property, then in such case court can *prima facie* on that basis of his full title court can permit him to put up the constructions at his own risk whereas if transferee has not full title the court cannot permit him to put up construction on the suit property.

Here in case where if transferee has acquired title to the property only partly means not full

⁴² AIR 1985 Mad. 283.

owner and can't exercise exclusive ownership to the detriment of other co-shares unless and until partition has happened, so here before partition he can't put up constructions either on the entire or on portion of property.

*Balaji v. Ganesh*⁴³

In this case the principle of second paragraph has been laid down in the following words:

“It is a far safer practice and less likely to lead to serious breaches of peace, to leave a purchaser to a suit for partition than to place him by force in joint possession with the members of a Hindu family, who may be, not only of a different caste from his own, but also different in race and religion.”

*Rajeshwari v. Balchand Jain*⁴⁴

Facts: Members of Hindu Joint family residing in a house and carrying on business of the family. Here no partition had taken place. Plot of land was purchased and the source of money was appeared to 'joint earnings.

Decision: Court held that presumption of equality is not there, so section 45 is not attracted. Here court observed there is no presumption about property that it is a joint family property. Then Burden of proof lies on the person who is asserting it to be joint property.

Section 45 deals merely with the quantum of interest and its determination where there are several joint purchasers of immovable property. In this context it doesn't provide for the method of creating common ownership that means several so-owners can't exist.

IX. CONCLUSION

After having research, researcher can conclude as transfer by co-owners means the transferee steps into the shoes of his transferor and is clothed with all the rights and liabilities of his transferor. So, transferee becomes as much a co-owner as his transferor was before the transfer. However, there is an exception to this rule which states that transferee happens to be stranger can't claim for joint possession of a family dwelling house unless and until partition happens. Here the term 'co-owner' means either a joint tenant or tenant in common under English law. Joint transfer where property is transferred to two or more persons without specifying their respective shares and consideration is paid as common fund or may be advanced separately. Transfer by co-owners of share in common property which says transfer of shares without specifying from common property the transfer has made, and then the share of each co-owner

⁴³ 51 Bom. 499; AIR 1976 Bom. 342.

⁴⁴ AIR 2001 Mad. 179.

is reduced proportionately. This is also an application of the principles of equity that equality is equity.

Apart from this researcher can conclude as the exception provide under section 44 in respect of dwelling house is to avoid inconvenience from stranger transferee who may not only of a different caste but also of different race and religion.
