

### **Section 44 says- Transfer by one co-owner**

Transfer By One Co-Owner- 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, so far as is necessary to give effect to the transfer, the transferors 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.

### **Who Is A Co-Owner**

Ownership consists of innumerable number of claims, liberties, powers with regard to the thing owned. Ownership is of different kinds. There are absolute and limited, sole ownership, co-ownership, vested ownership, contingent ownership, corporeal, incorporeal. When a person owns a property in one time it is called sole ownership, but if the property is owned by more than one person then it is called joint ownership. By means of partition one can have co-ownership changed into sole ownership.

The expression co-owner is wide enough to include all kinds of ownership such as joint tenancy, Tenancy in common, Coparcenary, membership of undivided Hindu family, etc. The very fact of the reference to the property that the parties have certain shares, indicates that they are co-owners.

In Indian Law a co-owner is entitled to three essentials of ownership-

- # Right to possession
- # Right to enjoy
- # Right to dispose

Therefore, if a co-owner is deprived of his property, he has a right to be put back in possession. Such a co-owner has an interest in every portion of the property and has a right irrespective of his quantity of share, to be in possession jointly with others. This is also called joint-ownership.

**The following are the types of co-ownerships:**

### **Tenants in Common**

When the type of co-ownership is not specifically stated, by default a tenancy in common is likely to exist. Each tenant in common has a separate fractional interest in the entire property.

Although each tenant in common has a separate interest in the property, each may possess and use the whole property. Tenants in common may hold unequal interest in the property but the interests held by each tenant in common is a fractional interest in the entire property For e.g. B owns a 25% interest in the property and A owns a 75% interest. Each tenant in common may freely transfer his/her interest in the property.

Tenants in common do not have the right of survivorship. Therefore, upon the death of one tenant in common, his/her interest passes via will or through the laws of intestacy to another persons who will then become a tenant in common with the surviving co-owners.

### **Joint Tenancy**

The most attractive feature of joint tenancy is the right of survivorship. Upon the death of one joint tenant, his/her interest immediately passes to the surviving joint tenants and not to the decedents estate. Joint tenants hold a single unified interest in the entire property. Each joint tenant must have equal shares in the property For e.g. B and A each hold a 50% interest. Each joint tenant may occupy the entire property subject only to the rights of the other joint tenants.

Unlike tenants in common, joint tenancy has several requirements that must be met in order to be properly created. Massachusetts law requires that in order for a joint tenancy to be created specific language must be included in the conveyance or devise. Such language includes that the grantees take the land: "jointly"; "as joint tenants"; "in joint tenancy"; "to them and the survivor of them"; or using other language in the instrument that it was clearly intended to create an estate in joint tenancy. However, even if such language is contained in the conveying instrument, a joint tenancy may not exist. There are four additional common law requirements necessary in order to create a joint tenancy.

#### **The four unities are**

- (1) Unity of time. The interests of the joint tenants must vest at the same time
- (2) Unity of possession. The joint tenants must have undivided interests in the whole property, not divided interests in separate parts
- (3) Unity of title. The Joint tenants must derive their interest by the same instrument (e.g. a deed or will)
- (4) Unity of interest. Each joint tenant must have estates of the same type and same duration.

All four unities must exist. If one unity is missing at any time during the joint tenancy, the type of co-ownership automatically changes to a tenancy in common. A joint tenancy may be created by a will or deed but may never be created by intestacy because there has to be an instrument expressing joint tenancy. A joint tenancy is freely transferable.

#### **Tenancy by the Entirety**

This type of co-ownership is exclusively for husband and wife. Similar to joint tenancy, tenancy by the entirety provides the right of survivorship. To exist, tenancy by the entirety requires that the four unities of joint tenancy exist plus a fifth unity of marriage between the two co-owners. However, even if all five unities exist, the type of co-ownership may still be joint tenancy if the conveying instrument indicates such. Unlike joint tenancy, tenancy by the entirety does not allow one spouse to convey his interest to a third party. However, one spouse may convey his/her interest to the other spouse. A tenancy by the entirety may only be terminated by divorce, death, or mutual agreement by both spouses. A terminated tenancy by the entirety becomes a tenancy in common.

In **Konchunju Nair v. Koshy Alexander** it was held that if a co-owner wants to erect a dwelling house on the land he is free to do so. If division of co-ownership of property takes place, the co-owner can claim, that, the said property be allotted to his share. The Court would ordinarily grant such an equitable right.

### **When Is A Co-Owner Legally Competent To Make A Transfer?**

Section 7 of the Transfer of Property Act, 1882 provides that every person competent to contract i.e. a major and of sound mind or is not disqualified by law for contracting. Therefore even the interest of a co-owner or co-sharer can be sold, mortgaged, leased to another co-sharer or to a stranger. The fact that the partition has not taken place by metes and bounds, does not stand in the way of the interest of a co-owner.

According to the law prevailing in some areas, a coparcener of a Hindu Joint Family can alienate his share in the Joint Family Property for consideration. Such a coparcener is a legally competent person. But in some cases of Mitakshara coparcenary, the consent of other coparceners is required before any such transfer.

Also, where one co-owner is in exclusive possession of a plot of a joint land and lets it out to a tenant without the consent of other co-sharer landlords, such a tenancy will not bind the latter. The lease in such a case will only be confined to the interest and share of the lessor. In **Baldev Singh v. Darshani Devi** it was held by the Court that a co-owner who is not in actual physical possession over a parcel of land cannot transfer a valid title of that portion of the property. 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 **Rukmini and others v. H.N T. Chettiar** it was held by the High Court of Madras that a co-sharer cannot be allowed to cause prejudice to the other co-sharers by putting up a substantial construction during the pendency of a suit for partition filed by the other co-sharers. The High Court of Punjab and Haryana in a case of **Hazara Singh v. Faqiria** where a co-owner contended 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.

### **What Are The Rights of A Transferee In Such A Transaction**

Basically this section deals with the rights of a transferee and also safeguards their rights. The transferee steps into the shoes of his transferor ie the co-owner, and is clothed with all the rights and becomes subject to all the liabilities of his transferor. In short, we can say that he becomes as much a co-owner as his transferor was before the transfer.

**Following are his rights after the transfer-**

**Right to joint possession**

Every joint owner or co-owner of property has a proprietary right in the whole estate. After the transfer, the transferee becomes the co-owner and gets all his rights. He also has the right to joint possession in property except a dwelling house. If a co-owner or his transferee is ousted from joint possession, he is entitled to joint possession by a suit, and is not necessary forced to sue for partition. A co-sharer can sue for possession either for the benefit of the entire body of co-sharers or for the partition and possession of the plaintiffs share.

### **Right to peaceful possession**

If instead of remaining in exclusive possession of his separate plot, the co-owner transfers it, his transferee cannot be disturbed by the other co-owners until and unless a final partition takes place. It was also held that where a tenant of a land who derives his title from all co-owners cannot be disturbed by one co-owner without the consent of all. But where the co-owners are enjoying the common property in separate plots for the sake of convenience, the court will not decree to one co-owner joint possession of the portion in the actual cultivation of the other.

### **Right to enforce partition**

In all cases of joint partnership, each party has a right to demand and enforce a partition; in other words a right to be placed in a position to enjoy his own right separately without interruption and interference by others. Under this section, not only a transferee of a share in the property but a transferee of any interest can sue for partition. A lessee, a mortgagee and even a life tenant is entitled to seek partition so far it is necessary to give effect to the transfer. A claim of partition will only be refused on the ground of inconvenience. Partition does not depend on the duration of right. In a celebrated case a monthly tenant was also entitled to partition just to protect the rights of the plaintiffs. But a partition effected at the instance of a person having a temporary interest, lasts only till the expiry of that interest.

The transferee also gets the liabilities with all the benefits. The rights of the transferee are subject to the conditions and liabilities that attach at the date of the transfer to the share or interest so transferred.

### **Lalitha James and others v. Ajit Kumar and others**

#### **Facts:**

P.S. Chouhan held vast properties. He died unmarried and issueless and he decided to give away the said properties to his 2 sisters (Mrs. Dayabai and Gracebai) and executed a gift deed in 1935. There had been no partition between them. Mrs. Dayabai was survived by appellants 2,3 and 4. Gracebai is survived by appellant 1, Mrs Lalita Jaems and respondent no. 3. Mrs. Park. The 5.74 acres of land was divided between the survivors of Gracebai. Respondent no. 3 sold her share to Respondent no. 2 for Rs. 14,000/-. After the purchase, the transferee started digging on the land to raise a structure, it was objected by appellant no.1. A suit was filed by the Respondent 2.

At the Trial Court the suit was dismissed as the vendor was not in possession and the sale did not confer any right or title on them and they can get their money refunded. In the First Appeal Court it was held that the respondent no 3 was in exclusive possession of the land and rightfully sold it to the respondent no 2.

### **Final Judgment :**

The Madhya Pradesh High Court emphasized that it is the strength of the plaintiffs title and not the absence of title of the defendant that matters. A purchaser from a co-owner of a portion of undivided property is not entitled to possession of any particular part of the joint property. His right would be for joint ownership and not for exclusive ownership of any particular part of the joint property. A transferee is not in a better position than the co-owner himself. Section 44 gives sanction to this principle. The Respondents will be only entitled to enforce partition of the joint estate. The sale of the exclusive property cannot be accepted. Therefore, the appeal was allowed.

### **Second part of the Section 44- exception to the rule in para 1**

This is an exception to the rule provided in the first part. Where a share in a dwelling house belonging to an undivided family is transferred to a stranger; the transferee cannot claim joint possession or any common part or enjoyment of the house. He can enforce his right over the property by a suit for partition. The principle underlying the provision is that it is inequitable to permit a stranger to intrude himself upon the privacy of an undivided family residence. Restriction contained in this part is applicable even if there is only one male member of family in occupation of family dwelling house.

### **In Balaji Anant v. Ganesh Janarthan, Westropp C.J, observed as follows:**

We deem it a far safer practice to leave a purchaser to a suit for partition than to place him by force in joint possession in the Hindu Family, which may be not only of a different caste from his own, but also different in race and religion.

### **In order to grant relief under section 44 there should be two things satisfied-**

1) the property transferred should be a dwelling house 2) the transferee should not be a member of the family.

In other words he should be a stranger. The right of a stranger transferee to have the house partitioned is, subject to Section 4 of the Partition Act, 1893. Under this section, a stranger claiming 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.

### **Explanation of Dwelling House**

In the case of **Durga v. Debidas**, the members of the family were separated in mess and were residing in different places. They stayed in the house in the village for attending kali pooja. The house was otherwise used for collection of paddy. The court said that the stray use of the property for a short residence for a specific purpose will not turn it into a dwelling house. There must be ancestral dwelling in existence on the suit land. The members of the family must not have abandoned the property.

### **Aahim Ranjan Das v. Smt. Bimla Ghosh**

#### **Facts:**

The disputed property belonged to 4 brothers A, B, C, D. A purchased 1/5th share of D by a deed in 1969. A died in 1975 leaving behind him the plaintiffs as his legal heirs. B died leaving four sons and daughters. C is alive and the property is an undivided family dwelling

house of the plaintiffs and co-sharers. C and B transferred their interest to the defendants. A monthly tenancy was created in favour of the lessee-defendant and he was also delivered the possession of the same.

The Plaintiffs filed a suit under Section 44 to restrain the lessee from interfering with their possession. The Judgment of the court was that the plaintiffs can very well ask for a protection. There is no controversy that the defendant is a stranger to the family. The co-sharer is entitled to protection under section 44. There was enough evidence to show that the house was a dwelling house and that the family was undivided and even the defendant was a stranger. The court relied on various judgments where it was held that upon a transfer of an undivided share of a dwelling house by a co-sharer, the other co-sharer may maintain a suit for injunction to restrain the transferee from getting into possession. Moreover it was said that a stranger purchaser is reduced to a trespasser. Section 4 of the Partition Act spells out the right to partition of such a stranger. Thus the appeal was dismissed.

#### **In the case of Gautam Paul v. Debi Rani Paul the facts were-**

There were three sons A, B, C. they received the property via gift deed. D, Son of C, purchased the share of A. The share of B also came to soc of C by partition. The appellants who were the heirs of A still occupied a room in the suit property and also purchased certain share from the heirs of D. The other heirs filed a suit for partition and also challenged the sale. The Court opined that undoubtedly it is the undivided family of D who holds the dwelling. The appellant cannot be said to be the member of the joint family of D. Merely because he is related by blood to D will not make him a member of the family.

#### **Conclusion**

Therefore, where one of the several co-owners transfers his share, the transferee acquires as to such share and so far as necessary to give effect to the transfer:

1. The transferors' right to joint possession or other common or part enjoyment of the property, and
2. the transferors' right to enforce a portion of the same.

It should, however, be noted that these rights would be subject to the conditions and liabilities affecting the share so transferred as on the date of the transfer.

There is one exception provided by the second paragraph to the section. The exception is that where the share transferred is a share of a dwelling house belonging to an undivided family and the transferee is not a member of such family, the transferee shall not be entitled to joint possession. But if the dwelling house has been completely divided and if the transferors' share has been marked off, so as to be capable of a separate enjoyment, there is no reason why the transferee should not have possession of it.

### **Section 45 in The Transfer of Property Act, 1882**

**45. Joint transfer for consideration.**—Where immovable property is transferred for consideration to two or more persons and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration

which they respectively advanced. In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

## **Section 48 –Priority of rights created by transfer**

This doctrine is embodied in Section 48 of the Transfer of Property Act, 1882. The need for the doctrine is, there arises the situation where the transferor of property deals with the same property or transfers or creates rights in the same property, to different people subsequently.

The question as to who will have the right over the others in cases where the rights of subsequent transferees are clashing and there is no contract between the parties to deal with the same would be determined by Section 48 of TPA.

### **I. Essentials of Section 48**

The transferor transfers the rights in the same immovable property  
At different times – one interest created should be prior in time and another should be subsequent.

Such rights created cannot coexist or cannot be enjoyed in full extent together  
Then, each later right created is subject to the previously created rights.  
Provided that there is no contract to the contrary or reservation binding the earlier transferee.

Note: the property in question must be the same and the rights created in favour of different transferees must be in conflict in order to attract this principle.

### **Qui prior est tempore potior est jure – Basis of the principle**

This rule is based on the maxim *Qui prior est tempore potior est jure* which stands for: he who is prior in time is better in law, meaning that the subsequent dealings by the transferor of the same property cannot prejudice the rights of the transferee of the same property (prior transferee).

When a transferor transfers the same property in favour of several transferees, each transferee will take the property with the rights of the former transferee. It is also based upon the principle that no man can transfer the title other than which he's entitled to. The subsequent lease cannot prejudice the rights of the old tenant.

### **Examples:**

X mortgages his property to Y for Rs. 90,000/-. And then sells the property to Z. Here two transfers have taken place. Now Z owns the property but according to the law, the property is still subject to the mortgage and in case of default of payment of the loan, the mortgagee can cause the property to be sold. As the later transfer is subject to the prior transfer.

X grants a lease of his house to Y for 2 years. After the execution of the lease deed for 1 year, he sells the property to Z. Here X has transferred the same property to two people. The rights of the parties cannot be enjoyed together as the owner and the lessee both have the right to possession over the property. According to the rule laid out in Section 48 of TPA, the subsequent transferee will take the property with the right of the former transferee.

Hence, in this case, Z, who is the subsequent transferee, will take the property with the rights of the prior transferee i.e. Y's right would be given priority over Z's right. And Z would not be able to take the possession of the property with the immediate effect of the transfer but would have to wait till the determination of the lease.

In case of subsequent mortgages, the subsequent mortgagee merely gets equity of redemption and if he sues for the sale on his mortgage, it will be sold subject to the prior mortgage.

## **II. Exceptions to the rule of Priority**

1. Where in prior transfer, the procedure laid out by the law which is compulsory is not followed

Hence, where the prior transfer is incomplete in the eyes of the law, there doesn't arise any question of conflict of rights or interest in the property. Example: A executed a lease deed of immovable property in favor of B for 5 but didn't get it registered. Registration of lease deed which is for one or more than one year is compulsory.

A subsequently sold the same property to C. Here C can have the immediate possession of the property if he wishes so. The rights of C would be given preference over the rights of B. And the rule of Priority would not be attracted here. When the conflict is between two registered documents, the earlier document but registered later would be preferred over the later document but registered earlier.

2. Where the subsequent transfer or the second transfer takes place by the virtue of the court  
If the court has ordered for the subsequent transfer, then the subsequent transfer would be preferred over the prior transfer and the rights of the subsequent transferee would be given preference over the prior transferee. Hence, in this case, the Doctrine of priority will not apply.

3. Estoppel

Here, if the prior transferee is aware of the subsequent transfer taking place, i.e. the subsequent transfer is taking place and the same is within the knowledge of the prior transferee, the subsequent transferee would be given preference. And the rule of priority would not be attracted. It is not needed for the prior transferee to be familiar with the exact details of the transfer.

4. Salvage charges

The salvage charges are the amount paid to protect the encumbered property from the loss or destruction. Such amounts are recoverable/payable in priority to all other charges.

5. Notice / Section 78

Because of the fraud, misrepresentation or negligence of the prior mortgagee, a person gets induced and advances money on the security of the mortgaged property, then that person (the subsequent mortgagee) would be given the priority over the prior mortgagee.

Having notice means either being familiar with the fact or the person is unaware of the fact because of his own gross negligence; if there were no negligence on his part he would be familiar with the facts.

So where a bona fide contract, is made for the sale of property, and a third party, afterwards buys the property with notice of the prior contract, the title of the party claiming under the prior

contract prevails against the subsequent purchaser, although the latter's purchase may have been registered, and although he has obtained possession under this purchase. But the transfer that has been made prior in time must be bona fide.

### III. Section 50 of the Registration Act, 1908

Section 50 of the Registration Act provides for the categories of the registered documents relating to the land to take effect against unregistered documents. Hence, it gives the holder of a subsequently registered deed priority in respect of his deed over the holder of an earlier unregistered deed not being compulsorily registrable, if, in fact, the holder of the registered deed had, at the time of its execution, a notice of the earlier unregistered deed.

Other than those categories mentioned, where the parties execute a registered deed in any point of time which is subsequent to prior but an unregistered deed, is subject to the doctrine of notice i.e. the parties executing the registered deed after the unregistered deed did not have the notice of it.

### **In ICICI Bank Ltd. v. SIDCO Leathers Ltd. And Ors.,**

The applicability of Section 48 in cases of Companies was questioned. It was held that there doesn't exist any provision in the Companies Act which provides that the provisions of Section 48 of the Transfer of Property Act would not be applicable in relation to the affairs of a company.

Unless, expressly or by necessary implication, such a provision contrary to or inconsistent which shows a different intent can be found in Companies Act, Section 48 of the Transfer of Properties Act, cannot be held to be inapplicable. This case further provides with the exceptions to Section 48 of TPA / Doctrine of priority.