

“Analysis of Transfer of Property by co-owner under the Transfer of Property Act, 1882”

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ABSTRACT

Section 44 of the Transfer of Property Act, 1882 describes the transfer of co-owners. This act also addresses the transferee's rights. All co-owners or joint owners have equal ownership rights on the entire property under this act. If the property that is to be sold, the consent of all joint owners and co-owners must be obtained. The term "property" is commonly used to refer to a person's financial condition. If the transferee of a share of a dwelling place around an undivided family is not a family member, nothing in this section shall be understood to entitle the transferee to joint occupation or any shared or part benefit of the house. A person owns a piece of property in order to benefit from it. The types of ownership under co-ownership have been underlined by the author of this work. The paper also discusses a co-legal owner's capacity to make a transfer, as well as the transferee's rights and obligations. The role of the dwelling house and the undivided family were also discussed in the article. In addition, this study emphasises the judicial method. The purpose of the exclusion specified under section 44 in respect of a dwelling place, according to the author, is to prevent hardship caused by unknown transferees of a different caste, race, or religion.

Keywords: Rights, Joint-owners, Transferee, Property.

INTRODUCTION

In popular terminology, the phrase property refers to a person's financial situation. An individual owns a piece of property in order to profit from it. The transfers are made by the owners, ostensible owners, and co-owners, or joint owners. Any co-owner can sell his half to a stranger or another co-owner when two or more persons hold mutual title to the property, such as in a coparcenary, where the male leaders and now even girls share a shared and equitable stake in the ancestral property. And that transferee steps into the shoes of the co-transferor, owner's complete with all of his assets and liabilities. In other words, the transferee becomes a co-owner of the business. In the present paper, the researcher focused on the concept of co-ownership conveyance in context of the transferee's duties and privileges, and also the exemption rule specified in section 44 of this Act. The types of ownership under co-ownership have been underlined by the author of this work. The paper also discusses a co-legal owner's capacity to make a transfer, as well as the transferee's rights and obligations. The role of the dwelling house and the undivided family were also discussed in the article. In addition, this study emphasises the judicial method.

CO-OWNER: DEFINITION

In relation to the thing owned, ownership consists of an infinite number of claims, liberties, and powers. There are various types of ownership. There are absolute and limited ownership, solo ownership, co-ownership, vested ownership, contingent ownership, corporeal and incorporeal ownership, and corporeal and incorporeal ownership. When a single person owns a property, it is referred to as sole ownership; however, when multiple people own the property, it is referred to as joint ownership. Co-ownership can be converted to sole ownership through partition.

In most of the instances, a property's Co-Owner is a member of the same family. To designate Co-Owner, he can utilise a will made in his favour. Every Co-Owner may have both equal rights to use the property as other Co-Owners or a part of the property in his name. When one of more than two Co-Owners of a property dies, his portion of the property automatically passes to his descendants or other Co-Owners. Three brothers, for example, acquire an ancestral home by becoming Co-Owners. If one of them dies, his portion of the property and rights transfer to two surviving brothers or possibly his dependents. Under the law, a co-owner is entitled to three basic characteristics of ownership:

- the right to possession,
- the right to use, and
- the right to sell the property.

TYPES OF OWNERSHIP UNDER CO-OWNERS

Because the term "co-owner" is so broad, it can refer to any type of ownership, including joint tenancy, tenancy in common, Coparcenaries, and undivided Hindu family members. The participants are Co-Owners because they each own a certain percentage of the property. A Co-Owner is eligible to three critical facets of ownership within Indian law: the ability to possess, enjoy, and sell. As an outcome, if a Co-property Owner's is taken away from him, he has the legal right to restore it. In this case, a co-owner has a stake in every part of the estate and the right to be in common occupancy with others, irrespective of the extent of his stake. Co-ownership is another term for this.

The varieties of co-ownership that are available are as follows:

Tenants in Common: In this case, co-ownership is not clearly stated, yet each tenant in common holds a fractional part in the entire property. Despite the fact that each tenant in common owns and uses the entire property, they each have their own stake in it. It may have unequal interests in the property, but each tenant in common's interest is only a percentage of the total. As a result, each common tenant has the freedom to freely transfer his or her ownership

interest in the property.¹ Here Tenants in common do not have a right of survivorship. As a result, when a tenant in common passes away, their interest in the property passes to another person by will or intestate laws, who will become new tenants in common.

Joint Tenants: In this way, it has the right of survivorship. If one of the tenants in common passes away, his share/interest passes to the surviving joint owner, not to the descendants. It basically holds a 100 percent share of the property. In this instance, each joint tenant have to own an equivalent portion of the estate.² The following are some of the characteristics of joint tenancy, as well as the specifications of joint tenancy:

- Possession of the entire land—each tenant is entitled to possession and enjoyment of the entire land.
- Uniformity of Interest- Each joint tenant owns the same sort of property and for the same amount of time.
- Time unity—all joint tenancy interests must vest at the same time.
- Unification of title- Joint tenancy interests must be derived from the same instrument, such as a will or deed.

If one of the joint tenants fails to fulfil their obligations, the joint tenants automatically become tenants in common.

A tenant in common denotes simply the unity of possession, whereas joint tenancy denotes both the unity of titles and the unity of possession. When a joint tenancy co-owner dies, his stake in the property passes to the survivors, but when a tenant in common dies, his shares pass to his heirs or representatives. Both of these principles are based on English law. The concept of joint tenancy is unknown in India, save in the instance of Coparcenary between members of a Hindu Undivided Family.³

Tenancy by the Entirety: This concept of co-ownership is for married couple. It confers survivor's benefits. The four unifies of time, possession, title, and interest, as well as the fifth unity of marriage, are all required. A spouse cannot transfer his or her interest to a third party under tenancy by the entirety, although one spouse can transfer his or her interest to another spouse. It may come to an end because to divorce, death, or mutual agreement by both couples.⁴

¹ Ashish Gupta, *Joint ownership of property*, THE ECONOMIC TIMES (Nov 11, 2021), <https://economictimes.indiatimes.com/joint-ownership-of-property/articleshow/4167937.cms?from=mdr>.

² *Id.*

³ Venkatakrishna v. Satyawathi, AIR 1986 SC 751.

⁴ Shaveta Dua, All you need to know about co-ownership of property & your rights, MAKAAAN (Nov 07, 2021), <https://www.makaan.com/iq/legal-taxes-laws/all-you-need-to-know-about-co-ownership-of-property-your-rights>.

TRANSFER BY ONE CO-OWNER

“44. Where one of two or more co-owners of immoveable 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.”

When two or more persons own a property jointly, each co-owner may have equal or unequal shares, but each co-owner is entitled to common enjoyment of the property until the property is partitioned and their respective halves are separately occupied. The question of a transfer by one co-owner, as well as the rights of the transferee, are addressed in Section 44 of the Transfer of Property Act of 1882.

This section's idea is that when a co-owner transfers his shares, the transferee takes the place of the transferor. It takes the place of the property to the extent that he has a stake in it. In this case, the transferee is also entitled to share in the common enjoyment of the joint property with the other Co-owners. This transferee assumes the role of the transferor. It signifies that the transferee will inherit all of the co- owner's transferor's rights and obligations in the Joint property at the time of transfer.

The purpose of this section, as well as Section 4 of the 1893 partition act, is to discourage strangers from purchasing a co-undivided sharer's share of an immovable property, and in the case of dwelling houses, to allow a co-sharer who has not sold his portion to buy out the stranger purchaser.⁵

This provision guarantees the transferee the right to joint ownership or common enjoyment of the property, but not exclusive possession, until division is enforced.⁶

Law as to Co-Owners- According to Section 47, when many co-owners of immovable property transfer a share in the immovable property without identifying the individual share or shares of

⁵ Daral Chandra Chatterji v. gartha Behari Metra 1954 ILR 1 Cal 384.

⁶ Lalita James v. Ajit Kumar AIR 1991 MP 15.

the transferors, the transfer takes effect on all such shares equally. If the property shares are unequal, the transfer will be proportionate to the unequal shares.⁷

Principle involved- This section is founded on the subrogation and substitution concept, which provides the transferee with all of the transferor's rights upon the transfer of the immovable property. A, B, and C, for example, have mortgaged their fields to X. Following that, C sells his half of the field to D. D will have the right to joint possession with A and B as well as the right to partition in this situation, but the share bought by D will remain subject to the mortgage.⁸

LEGAL COMPETENCY TO MAKE TRANSFER BY CO-OWNER

The phrase legally competent is defined in paragraph 2 of Section 44 of the Transfer of Property Act, which states that any individual qualified to contract is an one of reasonable intelligence who is not prohibited from negotiating by statute. As a consequence, a co-interest owner's property can be sold, leased, or mortgaged to another co-sharer or a stranger. The lack of an actions carried and limits split doesn't really preclude a co-owner from advancing his or her concerns.

As per law in certain areas, a coparcener of a Hindu Joint Family can detach his share of the Joint Family property for value. In that case, the Coparcener is a legally competent individual, however in Mitakshara coparcenary, previous to any such transfer, the consent of other coparcenaries is essential. In other cases, if one co-owner has total control of a common land piece and rents it out to a tenant without the consent of co-sharer landlords, the tenancy will not bind co-sharer landlords. The lease will be limited to the lessor's interest and part in this case.

Section 45 addresses the amount of interest that each of the several transfers under a transfer receives in the property transferred. When a Transfer for Consideration is done jointly to two or more people, they become co-owners of the property. It establishes a presumption as to the amount of interest taken by co-owners who have paid acquisition money. Section 46 deals with the subject of how much of the consideration for the transfer go to each of the many joint transferors.

In *Baldev Singh v. Darshan Devi*⁹ a co-owner who is not in actual physical possession of a piece of land cannot transmit a legal title to that share of the property, according to the court. The transferee's options here are to obtain a share of the property given after the partition, obtain a decree of joint possession, or seek reimbursement from the co-owner.

⁷ Transfer of Property Act, 1882, Section 47.

⁸ Dhruvi Dharia, *Transfer by co-owners*, LAW TIMES JOURNAL (Nov 08, 2021, 7:00), https://lawtimesjournal.in/transfer-by-co-owners/#_edn5.

⁹ AIR 1993 HP 141.

In *Rukmani and others v. H.N.T. Chettiar*¹⁰, the court ruled that a co-sharer cannot cause prejudice to the other co-shares by erecting a substantial structure while the other co-shares are pursuing a partition litigation.

The Court in *Hazara Singh v. Faqiria*¹¹, where a co-owner claimed that he had become the only owner of land via adverse possession, the court found that a co-possession owner's is the possession of all co-owners. It cannot be harmful to them unless the person in possession denies their right to knowing. If a co-sharer owns the entire property, his ownership cannot be considered unfavourable because he owns it on behalf of all other co-sharers.

ROLE OF DWELLING HOUSE AND UNDIVIDED FAMILY

Undivided Family: This approach is essentially an exception to the regulation set forth in Section 44 of the 1882 Transfer of Property Act's first half. Any jointly owned property where the co-owners' members live together and where the co-owner has the ability to sell his portion but the transferee does not have shared enjoyment or joint use.¹² The co-owners' right to joint habitation, other shared or part benefit of the asset conveyed will not be accessible to the assignee if the asset is a dwelling place pertaining to an indissoluble household and the assignee is not a member of a family, according to Section 44. He only receives a part of a residential house that belongs to a joint family member who is not entitled to joint occupancy.

The purpose of this exception is to avoid any inconvenience that may be caused by the replacement of a random person in a joint family who may be of a different caste, religion, or nationality.

As per Westropp C.J., in Bombay case¹³, “*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.*”

Even though there is just one male member of the family occupying the family dwelling house, the restrictions included in this section for strangers apply.

Two conditions must be met in order to obtain relief under section 44 of the 1882 Transfer of Property Act:

1. The property must be a residence.
2. The transferee should not be a family member.

¹⁰ AIR 1985 Mad 283.

¹¹ AIR 2004 PH 353.

¹² Ram v. Ram Kishan, AIR 2010 All 125.

¹³ Balaji v. Ganesh, 1881 5 Bom.499.

The transferee's right to have the house partitioned is governed by Section 4 of the Partition Act of 1893. When a stranger can claim division by metes and bounds under this provision, he may be obliged to give up his legal right to partition and accept monetary compensation at the request of the other family members. The 1893 Partition Act gives the coo-sharer the option to buy out the transferee at a court-determined price.¹⁴

Dwelling house: According to the 1893 partition statute, the word "dwelling house" refers to not only a residential structure or building, but also all neighbouring buildings, gardens, cartilage, Court yard, orchard, and everything else that is required for the home's convenient usage.¹⁵

Section 44 of the 1882 Transfer of Property Act does not apply if the living place does not belong to an undivided family.¹⁶ The term "undivided family" is used in Section 44 to refer to a group of persons who are related by blood and reside in one house under one roof, and it applies if they are undivided qua the dwelling house they own.¹⁷ Section 44 will apply if a co-owner transfers his shares through a sale, lease, gift, or mortgage. However, if the transfer is in the nature of a mortgage, partition is required to give effect to the mortgage, as well as in the event of a lease where the lessee of an undivided portion has the right to partition.

When a share of a house is transferred by way of lease and is used by all members of the family, the lessee must have his portion partitioned. Furthermore, if the transferee is unable to partition his portion of the house, the other co-owners may be able to prevent the lessee from taking possession of the house with others. In case *Ashim Ranjan Das v. Bimal Ghosh*¹⁸ A residence was in common enjoyment for Hindu undivided family members until a co-sharer leased out his share without partitioning it, and then a stranger lessee (tenant) attempted to take joint ownership with family members. In this court it was decided that an interim injunction against the stranger lessee could be obtained.

Nevertheless, in the case of the Delhi High Court, where 'A' entered the premises first, followed by his mother and brother, who joined him later, and the government first granted a licence and then executed a lease in his favour, the government first granted a licence and then executed a lease in his favour. The court determined that A's (lessee) mother and brother were not co-tenants, and that A was entitled to possession of the entire property, including his mother and brother's half. The court further stated that A's filing of a suit for possession of a portion of the

¹⁴ D.F. MULLA, THE TRANSFER OF PROPERTY ACT 257 (Lexisnexis, 2013)

¹⁵ Kshirode Chunder v. Saroda Prosad 1911 12 Cal LJ 525.

¹⁶ Ram Bilas Tewari v. Shivrani AIR 1977 All 437.

¹⁷ Kshirode Chunder v. Saroda Prosad 7 IC 436.

¹⁸ AIR 1992 Cal 45.

promises that is in his mother and brother's possession did not suggest that 'A' was not the lessee of the entire promises.¹⁹

The fact that an undivided share of a dwelling-house belonging to an undivided family is transferred to a stranger who takes possession and collects rents from the fraction of the tenants does not change its status as a dwelling-house belonging to an undivided family.²⁰ This provision provides protection to individuals of a joint family, but it does not grant individuals a positive right.

JUDICIAL APPROACH

In *Balaji v. Ganesh*²¹, the concept of the second paragraph has been stated as follows:

“It is a far safer practice and less likely to lead to serious breaches of peace, to leave a purchaser to a suit for transition 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.”

In *Rajeshwari v. Balchand Jain*²², individuals of a Hindu joint family who live in a house and perform family business. In this domain, there's been no separation. The funds came from 'shared profits,' thus a block of property was acquired. Section 45 does not apply because the court found there is no expectation of parity. There really is no likelihood that asset pertains to a family group, according to the court. The individual claiming joint ownership then bears the burden of evidence.

Section 45 exclusively deals with the quantum of value and how it's computed when many joint buyers of immovable property are involved. In this scenario, it does not provide for a method of determining shared ownership.

CONCLUSION

As a result, whenever one of the numerous co-owners passes his part, the assignee obtains the relevant rights with respect to that portion and to the extent required to complete the allocation: The transferors' right to shared ownership or other mutual or partial benefit of the estate, as well as their ability to execute a piece of it. However, it must be noted that these entitlements would've been subject to the terms and conditions that applied to the share at the time of transfer.

¹⁹ Hari Singh v. Madan Lal, AIR 2001 Delhi 231.

²⁰ Nirupama Basak v. Baidyanath Paramanik, Air 1985 Cal 406.

²¹ AIR 1976 Bom.342.

²² AIR 2001 Mad 179.

The second paragraph of the section does give an exemption. The transferee does not have the right to joint possession if the portion conveyed is a share of a dwelling house owned by an intact family and the assignee is not a component of that household. However, there is no explanation why the transferee must not seize control of the house if it has been totally separated and the transferors' portion has been designated off so that it can be enjoyed separately.

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