

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No. 949/2016**

% **12th October, 2018**

J. CHAWLA

..... Appellant

Through: Mr. Rajat Aneja, Mr. Shrey Chathly, Ms. Bandana Kaur Grover and Muhammad Parbhesh, Advocates (Mobile No. 9910211045).

versus

VERN KUMAR DATT AND ORS

..... Respondents

Through: Ms. Sonali Malhotra, Advocate for R-1 and R-2 (a),(b) & (c) [Mobile No. 9818024129].

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

RFA No. 949/2016 and C.M. Appl. No. 45145/2016 (for stay)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant no. 3 in the

suit impugning the Judgment of the Trial Court dated 30.07.2016 by which the trial court has decreed the suit for declaration and injunction filed by plaintiff nos. 1 and 2 and has restrained defendant no.3, being the exclusive owner of one portion of the property bearing no. 11-B, Rajendra Park, New Delhi, (hereinafter 'suit property') from, in any manner, being entitled to claim ownership or use of the other separate common portion found not to be in the exclusive ownership or entitlement of the appellant/defendant no. 3 shown in yellow colour in the site plan Ex.PW1/1. Further, the appellant was also restrained from using the front gate of the property.

2. The facts of the case are in a narrow compass. The original owner of the suit property was Smt. Kaushalya Rani, who was the mother of the respondent nos. 1 and 2/plaintiff nos. 1 and 2 and respondent no. 3/defendant no. 1. On the death of the mother, Smt. Kaushalya Rani, the ownership of the suit property, in terms of her registered Will dated 07.02.1983 vested with respondent nos. 1 and 2/plaintiff nos. 1 and 2 and defendant no. 1/respondent no. 3, whereby, the exclusive ownership was given to each son of certain portions of the property and common ownership rights in certain other areas of

the driveway, gate and staircase were given to all the three brothers. A site plan was attached to the Will of Smt. Kaushalya Rani and as per this site plan, the red/pink-coloured portion exclusively vested with respondent no. 1/ plaintiff no. 1/Sh. Vern Kumar Datt, the portion marked in green exclusively vested with the respondent no. 2/plaintiff no. 2/Sh. Ashwani Kumar Datt, and the portion shown in blue exclusively vested with respondent no. 3/defendant no. 1/Sh. Aditya Datt. Therefore, all three brothers were given exclusive ownership rights with respect to separate portions, on each floor of the property which were marked in pink, green and blue respectively in the site plan attached to the Will. In this very site plan, certain portions of the suit property were shown as being the common portion and this common portion was depicted in yellow colour in the site plan. It essentially comprises of the drive way on the ground floor, the front entrance gate therein and the staircase leading to the upper floors of the property. It may be noted that all three brothers, as already stated above, were given exclusive ownership of a certain portion on each floor of the property being the ground floor, first floor and second floor.

3. The three sons of Smt. Kaushalya Rani, being the plaintiff nos. 1 and 2 and the defendant no. 1 in the suit, thereafter, admittedly entered into a Memorandum of Understanding (hereinafter 'MOU') on 31.10.2001 whereby the three brothers agreed to a particular form of ownership and enjoyment of the common portion marked in yellow in the site plan attached to the Will. The relevant paragraphs of the MOU dated 31.10.2001, are paragraphs 1, 2 and 11, and this Court is concerned with the interpretation of the said paragraphs. The issue is that whether under the terms of the MOU, especially paras 1, 2 and 11 thereof, the rights of respondent no. 3/defendant no. 1/Sh. Aditya Datt (the exclusive owner of the blue portion in the site plan attached to the Will, adjacent to the rear lane at the back of the property), in the common portion got extinguished in any manner as such rights once being divested from respondent no. 3/defendant no. 1, cannot be thus available to the transferee. The narration of facts of the Memorandum of Understanding with Clauses 1, 2 and 11 read as under:-

“MEMORANDUM OF UNERSTANDING

This Memorandum of Understanding on this 31 day of October, 2001 between Vern Kumar Datt, Ashwani Kumar Datt and Aditya

Kumar Datt, all the three sons of Sh. R.P. Datt, R/o, 11-B, Rajinder Park, New Delhi.

WHEREAS Late Smt. Kaushlya Rani, w/o Late Sh. R.P.Datt, the mother of the three brothers hereto was the absolute and exclusive owner of house property No. 11-B, Rajindra Park, New Delhi, alongwith leasehold rights thereunder:

AND WHEREAS Late Smt. Kaushalya Rani, had executed a will during her life time on 07-02-1983 and is duly registered in the Office of Sub Registrar, New Delhi at Serial No. 373, (not legible) No.III, Volume No. 234, dated 17-02-1983 and whereas in terms of the said Will, the entire property was bequeathed to the three brothers as per the site plan annexed with the said will.

AND WHEREAS Sh. Vern Kumar Datt became the absolute and exclusive owner of the portion shown in pink colour in the said plan, Sh. Ashwani Kumar Datt became the exclusive and absolute owner of the portion shown in the Green colour in the said plan and Sh. Aditya Kumar Datt became exclusive and absolute owner of the portion shown in the blue color in the said site plan provided always that the portion shown in yellow colour in the site plan shall remain common and shall be useable for convenience of all the three sons, having inherited by virtue of the said will executed by Smt. Kaushlaya Rani.

AND WHEREAS anyone of the three brothers to this Memorandum is desirous of disposing of/alienating/transferring selling his portion as per the site plan annexed with the said Will of which all the three brothers are the lawful, true, absolute owner;

AND WHEREAS the abovesaid Will has been accepted and acted upon by all the three brothers to this Memorandum and accordingly mutation in the records of the Office of the L&DO, Nirman Bhawan, New Delhi, has been recorded in the names of the three brothers to this Memorandum in respect of the said property subject to the conditions that sub-division of the land underneath the property shall not be permissible.

AND WHEREAS anyone of the brothers intends to sell/dispose of/alienate/transfer his exclusive share in the property and wants NOC from each other enabling him to effectively negotiate with the intending purchaser(s) for the sale of his exclusive and absolute divided share in the said property.

AND WHEREAS all the three brothers be agreed to accord/grant/issue 'No Objection' to each other to that effect with terms and conditions mutually and amicably agreed upon and

incorporated in the Memorandum of Understanding which are as under:

That all the three brothers have agreed to accord/grant/issue 'No Objection' to each other to that effect with terms and conditions mutually and amicably agreed upon and incorporated in the Memorandum of Understanding which are as under:

1. That all the three brothers shall not dispose of/alienate his share in the common portion shown yellow in this plan attached with the Will and as mentioned in the said Will.

2. That all the three brothers shall not negotiate with the intending purchaser(s) or permit any third party to use, occupy or claim any right, interest or title in the said portion in any manner or circumstances, nor they permit the intending purchaser(s) or any third party entry from the front gate for the rear portion.

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11. That Mr. Vern Kumar Datt and Mr. Ashwani Kumar Datt will sell their shares in the property together alongwith the common place and shall pay to the third brother for his share of the front drive way as calculated and determined by mutual consents as per market value. In case they sell their shares individually, the common place shall be retained by the other brother who shall keeps the common place for his use. And when he sells his share, the common place shall be sold and all the brothers shall divide the sale proceeds in equal shares. However, all the parties to this agreement shall intimate each other before negotiating sale or entering into an agreement to sale in writing for his respective share of the property.”

4. At this stage, it may be noted that the third brother i.e. respondent no. 3/defendant no. 1, transferred his rights in his exclusively owned blue portion and also those rights in the common yellow portion, which rights in the common portion, the respondent no. 3/defendant no. 1/Sh. Aditya Datt was not capable of transferring under the terms of the MOU dated 31.10.2001, to the defendant no.2

in the suit. Defendant no. 2, thereafter, transferred/sold these rights, which he purchased from the third brother, Sh. Aditya Datt, to the present appellant/defendant no. 3. The transfer of rights by the respondent no. 3/defendant no. 1 to respondent no. 4/defendant no. 2 was made vide a Sale Deed dated 13.09.2005. The respondent no. 4/defendant no. 2 transferred the rights purchased by him from respondent no. 3/defendant no. 1 to the appellant/defendant no. 3 vide Sale Deed dated 25.11.2005. At this stage, it is reiterated that it is an undisputed fact that when the respondent no. 3/defendant no. 1 transferred his exclusive ownership rights in the blue portion of the suit property, he, however, despite the limitations put upon him under the MOU dated 31.10.2001, transferred the non-transferable rights to use the common portion, as shown in yellow in the site plan to respondent no. 4/defendant no. 2, and such rights were also further conveyed by respondent no. 4/defendant no. 2 to the appellant/defendant no. 3.

5. The issue requiring determination is the interpretation of Clauses 1, 2 and 11 of the MOU, which have been reproduced above, read with the provisions of Section 10 and 11 of the Transfer of

Property Act which are relied upon by the appellant/defendant no.3. It is argued on behalf of the appellant/defendant no. 3 that once respondent no. 3/defendant no. 1 was the co-owner of the portion marked in yellow in the site plan, he cannot be legally prevented, despite of Clauses 1, 2 and 11 of the MOU dated 31.10.2001, from transferring rights to use the common portion to respondent no. 4/defendant no. 2 and who thereafter validly transferred such rights to the appellant/defendant no. 3. Respondent nos. 1 and 2/Plaintiff nos. 1 and 2 argued to the contrary and contended that once the respondent no. 3/defendant no. 1 was bound by the terms of the MOU dated 31.10.2001, and the terms of the MOU prohibited the respondent no. 3/defendant no. 1 from transferring right of use of the common portion to any third-party purchaser, such third-party purchaser could not have received rights to use the common portion marked in yellow in the site plan. Sections 10 and 11 of the Transfer of Property Act, relied upon by the appellant/defendant no.3, are reproduced as under:-

“Section 10. Condition restraining alienation.-Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition of limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him:

Provided that property may be transferred to or for the benefit of a women (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

Section 11. Restriction repugnant to interest created.-Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

[Where any such direction has been made in respect of one piece of immoveable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.]”

6. It is also relevant at this stage to reproduce herein the definition of the ‘Transfer of Property’ as defined under the Transfer of Property Act, and the same is provided in Section 5 of the Act, which reads as under:-

“Section 5. “Transfer of Property” defined.-In the following sections “transfer of property” means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, [or to himself] and one or more other living persons; and “to transfer property” is to perform such act.

[In this section “living person” includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.]”

7. It is trite in law that whenever a person owns a property, he actually owns a bundle of rights. Ownership of property is a sum total of various smaller rights in the property. A person can transfer property with all its rights or he can transfer one or more smaller interest out of the 100% ownership rights in the property. The ownership of a property is the ownership of a bundle of rights and the same is made clear by various judgments of the Supreme Court including the judgment in the case of *Mohd. Noor and Others v. Mohd. Ibrahim and Others*, (1994) 5 SCC 562. The relevant paras of this judgment are paras 4 and 5 and these paras, which observe that ownership of a property is an ownership of bundle of rights, read as under:-

“4. To determine this it is necessary to examine the nature of khatedari rights and if a transfer of such right amounts to transfer of ownership. A khatedar tenant is one of the tenants mentioned in clause (a) of Section 14 of the Rajasthan Tenancy Act, 1955 (hereinafter referred to as 'the Tenancy Act') and clause (c) defines the circumstances in which a person may become a khatedar tenant. Such a tenant has a right to bequeath his interest under Section 59 of the Tenancy Act and transfer his interest under Section 41 of the same Act on conditions specified in Sections 42 and 43. His interest is heritable under Section 40 as well. Is that sufficient in law to make him owner of the property? Is the transfer made by a khatedar tenant a transfer of ownership? A khatedar tenant, admittedly, is a person by whom rent is payable under Section 43 of the Tenancy Act. The effect of it in law is that such a person cannot be deemed to be an absolute or unlimited owner which is necessary before the right of pre-emption can be exercised. In Butterworth's Words and Phrases Legally

Defined, 2nd Edn., Vol. 4, page 61, 'ownership' has been defined as under:

"Ownership consists of innumerable rights over property, for example, the rights of exclusive enjoyment, of destruction, alteration, and alienation, and of maintaining and recovering possession of the property from all other persons. Such rights are conceived not as separately existing, but as merged in one general right of ownership."

Salmond summed up the concept of ownership as under:

"Summing up the conclusion to which we have attained, we may define the rights of ownership in a material thing as the general, permanent and inheritable right to the uses of that thing."

5. Austin in his book Jurisprudence, 3rd Edn., page 817, defines the "right of ownership" as-

"a right indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration over a determinate thing."

The theoretical concept of 'ownership', therefore, appears to be that a person can be considered to be owner if he has absolute dominion over it in all respects and is capable of transferring such ownership. Heritability and transferability are no doubt some of the many and may be most important ingredients of ownership. But they by themselves cannot be considered as sufficient for clothing a person with absolute ownership. Their absence may establish lack of ownership but their presence by itself is not sufficient to establish it. The ownership concept does not accord with the status of a person who is paying the rent. A tenant under various legislations either urban or rural property, agricultural or otherwise, enjoys right of heritability and transferability. At the same time, he does not become owner of the property. Transfer of ownership is distinct and different from transfer of interest in the property. A licensee or even a tenant may be entitled by law to transfer his interest in the property but that is not a transfer of ownership. For instance, a lessee from a corporation or a local body or even State Government to raise building may have heritable and transferable right but such a person is not an owner and the transfer in such a case is of his interest in the property and not the ownership. In *Inder Sen v. Naubat Singh*² it was held that absolute ownership is an aggregate of compendium of rights such as right of possession, the right of enjoying usufruct of the land

and so on and so forth. The ownership, therefore, is a sum total of various subordinate rights. The right to transfer the subordinate right either under general law or statutory law does not make it transfer of ownership. Section 6 of the Transfer of Property Act, 1882 permits transfer of any property. It may be transfer of absolute or subordinate right. The Tenancy Act permits transfer of agricultural land, therefore, a khatedar tenant is entitled to transfer his tenancy land. But a co-sharer can claim the right of pre-emption only if it is a sale of ownership. In other words the tenancy legislation visualizes transfer of subordinate right but the Act recognises transfer of absolute right only. Transfer of khatedari rights being transfer of subordinate right only no right of pre-emption exists in such transfer. It is true that after abolition of zamindari in various States the tiller of the soil has become owner of the land. But it cannot be disputed that the proprietorship of the land vests in the State to whom the rent is payable. It is not uncommon that a person in possession of an agricultural holding even as an owner cannot put his land to any use as he desires. For instance, if the land has to be converted from agricultural use to non-agricultural use then the tenure-holder is required to obtain permission of the State Government or the appropriate authority appointed by it. All these indicate that even though a khatedar tenant is an owner for all practical purposes but his ownership is limited and, therefore, the transfer by a khatedar tenant of an agricultural holding does not give right to a co-sharer to claim right of pre-emption. The submission that the ownership of the State was a mere fiction cannot be accepted. Right of preemption is a right of substitution in ownership either of land or house. It is not available in transfer of tenancy.”

(Underlining Added)

8. Section 10 of the Transfer of Property Act provides that when a property or an interest in a property is transferred with a condition thereon, that such a transfer shall not be transferred further, then such a condition preventing further alienation/parting with/disposing of is void. Sections 10 and 11 of the Transfer of

Property Act provide that when a person transfers a property or an interest in a property, then no restrictions can be placed upon the transferee for the enjoyment of property in a particular manner. However, it is noted that both Sections 10 and 11 pertain to a person owning a property or interest therein and transferring such ownership of the property or interest therein to a transferee, and on the transaction of such a transfer, restrictions are put on further transfer/alienation or only of enjoyment in a particular manner, and such restrictions are therefore legally provided as being void. What is being stated is that a transferee of property gets a right to enjoy the interest transferred in a complete manner despite restrictions to the contrary, and which are those as stated in Sections 10 and 11 of the Transfer of Property Act, Sections 10 and 11, however, do not state that a person can transfer something which is not owned by him and he is not entitled to transfer. If a person is not entitled to something, then obviously the transferee will not get a particular right which the transferor was not entitled to transfer. This is contained in the well known principle of law, *nemo dat quod non habet*, and the indication of this principle is contained in Section 8 of the Transfer of Property

Act which provides that on the transfer of a property, a transferor transfers only all that he is capable of transferring i.e. not more than what he is capable of transferring.

9. In view of this aforesaid position of law, let us now see as to whether Clauses 1, 2 and 11 of the MOU dated 31.10.2001 can in any manner be violative of the provisions of Sections 10 and 11 of the Transfer of Property Act as is contended on behalf of the appellant/defendant no. 3.

10. In my opinion, it cannot be successfully argued by the appellant/defendant no. 3 that in view of Sections 10 and 11 of the Transfer of Property Act, the Clauses 1, 2 and 11 of the MOU dated 31.10.2001, could not have prevented the respondent no. 3/defendant no. 1 from transferring his rights to use the common areas in yellow portion in favour of respondent no. 4/defendant no. 2, (and thereafter, by the respondent no. 4/defendant no.2 to the present transferee being appellant/defendant no. 3). This is so because once the three brothers, being respondent nos. 1 and 2/plaintiff nos. 1 and 2 and respondent no. 3/ defendant no. 1, were the joint owners of the area falling in the yellow portion of the plan, then surely one or more of the brothers

legally could have, by virtue of an agreement, given up their 100% co-ownership rights in the yellow portion, so as to make him less than a 100% co-owner of the portion in the yellow colour, in case of transfer by the third brother to a third party purchaser. Thus, a 100% co-owner will have a 100% right in the common portion, being the yellow portion, but such 100% ownership right, can always be restricted to a lesser ownership right i.e. of ownership of an interest lesser than 100% ownership interest in the commonly owned portion in case of transfer to a transferee.

11(i) An ownership of a property is ownership of a bundle of rights. Even *qua* each subordinate or smaller right in the bundle of rights, there can be a further sub-classification or sub-division. Therefore, the ownership interest of an interest in a property, in law, can only be a limited specific type of interest i.e. not necessarily a complete smaller interest/smaller subordinate right than the 100% ownership right in the property as a whole, but even a smaller sub-classification of the smaller interest/smaller subordinate right is to be a limited specific interest/ownership right in a property.

(ii) No doubt, by virtue of being a co-owner of the common rights vested in the yellow portion, originally the respondent no. 3/defendant no. 1 had 100% rights as a co-owner in the said common portion, but thereafter, by virtue of the MOU dated 31.10.2001, (the relevant paras being paras 1, 2 and 11), the 100% of the co-ownership rights including the 100% use of the common portion was in terms of the agreement between the three brothers, reduced to a restricted ownership interest of the common ownership right in the yellow portion, that the respondent no. 3/defendant no. 1 though continued to be the 100% common owner of the common ownership right, but in case and when the respondent no. 3/defendant no.1 would transfer his exclusively owned portion shown in the blue colour, then in such eventuality, the right of the user of the common yellow portion shall not be available to respondent no. 3/defendant no.1 for being transferred to the transferee. Putting it in other words, the ownership right of respondent no. 3/defendant no.1 in the common portion did continue, but when the issue of transferring the exclusively owned blue portion comes up, then the right to use the yellow portion, (and which is a smaller interest than the 100% common ownership interest

in the yellow portion), did not vest with the respondent no. 3/defendant no.1 for being transferred ahead to a transferee. Once the right of user of the yellow portion, including the front gate, did not vest in respondent no. 3/defendant no.1 for being transferred ahead to the transferee, then there does not arise an issue of applicability of Sections 10 and 11 of the Transfer of Property Act because the provisions of Sections 10 and 11 of the Transfer of Property Act only apply when what is transferred, is capable of being transferred and the effect of MOU dated 31.10.2001 is that the right to use the yellow portion could not be transferred to the transferee.

(iii) Sections 10 and 11 of the Transfer of Property Act do not apply when a person is not entitled to transfer a particular ownership interest or a sub-ownership interest or a sub-subordinate right to a third person itself. Thus, there is nothing illegal in an agreement between the co-owners, whereby the co-ownership interest limited to the usage of this common ownership interest, is not available for a co-owner for transferring such right to the user of common portions to a transferee.

(iv) Besides Sections 10 and 11 of the Transfer of Property Act there is no other provision of law which is pointed out to this Court that a person who owns a property, cannot by agreement with the other co-owners restrict his ownership right in a particular manner. The fact that respondent no. 3/defendant no.1 continued to otherwise remain the owner of the common yellow portion does not militate against the position, that the right to use the common ownership right in the yellow portion could not be transferred to the transferee. There is no law which mandates that an owner of an interest or a 100% ownership in a property is bound to continue to have or is bound to transfer only the complete 100% interest or 100% ownership interest. Therefore, there is no illegality in Clauses 1, 2 and 11 of the MOU dated 31.10.2001 by which though respondent no. 3/defendant no.1 remained co-owner of the yellow portion, though it was also agreed that on transfer of the exclusively owned blue portion belonging to respondent no. 3/defendant no.1, he would continue to remain owner of the common yellow portion. It is pertinent to note that the lesser right of the user of the common portion would not be available for transfer to a transferee from respondent no. 3/defendant no.1.

(v) This Court therefore rejects the argument urged on behalf of the appellant/defendant no. 3 that Clauses 1, 2 and 11 of the MOU dated 31.10.2001 are illegal in view of Sections 10 and 11 of the Transfer of Property Act.

12. Learned counsel for the appellant/defendant no. 3 then finally argued that if the appellant/defendant no. 3 is not given access to the yellow portion, then the appellant/defendant no. 3 will not be able to enjoy his ownership interest in the blue portion. This Court, however, fails to understand this argument because the blue portion can always be independently and separately used by the appellant/defendant no. 3, inasmuch as the blue portion is not in the middle of the suit property. This blue portion adjoins a service lane and the same is neither disputed, nor can it be disputed because the appellant/defendant no. 3 or for that matter his predecessors-in-interest, respondent no. 3/defendant no. 1, could always enjoy the blue portion independently, by having ingress and egress from the service lane adjoining the blue portion. Once it is so, it cannot be a valid argument by the appellant/defendant no. 3 that he necessarily requires to use the yellow portion for ingress and egress to the blue portion which falls to the

exclusive ownership of the respondent no. 3/defendant no. 1 and thereafter, ultimately upon the appellant/defendant no. 3.

13. There is no merit in the appeal and the same is hereby dismissed.

OCTOBER 12, 2018

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VALMIKI J. MEHTA, J

