

(2019) 07 GUJ CK 0141
In the Gujarat High Court
Case No : R/First Appeal No. 2830 Of 2010

DEVKISHAN BODARAM BHATIA SINCE DIED HIS LEGAL HEIRS	APPELLANT
Vs	
RAVIKSIHANCHAND KHESAKANI And 1 Other(S)	RESPONDENT

Date of Decision : 03-07-2019

Acts Referred:

Transfer Of Property Act, 1882 — Section 4, 44

Citation : (2019) 07 GUJ CK 0141

Hon'ble Judges : G.R.UDHWANI, J

Bench : Single Bench

Advocate : Kv Shelat, Siddharth R Kheskani

Final Decision : Disposed Of

Judgement

1. The captioned First Appeals arise out of common judgment and decree rendered in Civil Suits No.2728 of 1995 and Civil Suit No.2922 of 1995; filed in the City Civil Court, Ahmedabad. Civil Suit No.2728 of 1995 was instituted by the transferee of a disputed immovable property (for convenience 'Suit Property') seeking declaration and injunction for enjoyment of the share on the ground floor conveyed to him by one of the joint holders of disputed immovable property. Other joint holders opposed the said plea in their Civil Suit No.2922 of 1995 on the strength of Section 44 of the Transfer of Property Act, 1882 ('the Act' for short). They pleaded that the disputed property is a dwelling house belonging to a undivided family and vendee not being the member of the undivided family was not entitled to its' joint possession and enjoyment with the family members. The plaintiffs in the later suit i.e. Civil Suit No.2922 of 1995 Devikishan Bodomal Bhatia and Mohanlal Harpal Das Bhatia are cousin brothers; defendant no.2 in the said suit is their nephew. Since the plaintiffs are objectors as indicated above and the defendant no.2 is a transferee and since the plaintiffs and the defendant no.2 are related as indicated above the parties are referred to as objectors, transferee and family members respectively and wherever necessary, the defendant no.2 is individually referred to as the transferor also.

2. The plaintiffs in the first suit Ravikishanchand Khesakani is the transferee (for convenience hereinafter referred to as 'the transferee') having acquired the rights by sale deed in the portion of the disputed property from the transferor Narayandas.

The plaintiffs of Civil Suit No.2922 of 1992 are the defendants in the said suit.

3. Before appreciating the controversial facts with evidence adduced in both the suits, it would be appropriate to refer to the checkered historical background of the case as evidenced in the documentary evidence;

3.1 Exh.50 is a share certificate issued by Lokmanya Tilak Cooperative Housing Society Limited where the property in question is situated; on 01.04.1955 to Mirchumal Harpaldas Bhatia initially and admittedly after some time Bodomal was also added therein without any dispute from any of the family members. Thereafter, by declaration Exh.64, Mirchumal revealed five things being: (i) That he is a member and shareholder of Block No.18 in Lokmanya Tilak Cooperative Housing Society Limited, Tilaknagar, Vadaj, Ahmedabad (for short 'the society'). (ii) Son of Bodoram: Devikrishan is its co-owner (iii) Cost of plot and construction are contributed by him and said Shri Devikrishan in equal shares (iv) That such arrangement of sharing expenses in future would be continued (v) That it will be open for Shri Devikrishan to get his name added with him in the share certificate. Exh.51 is a bill on a letterhead of the society evidencing the sharing of expenses by Mirchumal. H and Bodomal.

3.2 The next document in sequence is Exh.105; the agreement between Mirchumal @ Jaykishandas son of Harpaldas Bhatia and Shri Devikrishan Bodomal Bhatia on one hand (first party) and Mohanlal Harpaldas Bhatia on the other (second party) which witnesses few things being (i) First party is the owner of the entire property. (ii) 87 sq.yards of rear portion of RC slab over first floor of the building is conveyed to the second party for Rs.2,000/-.

(iii) The second party is given full rights to raise construction over the portion conveyed.

(iv) That the first party authorizes the society to make suitable entries in its record evidencing the sale as above in favour of the second party. (v) The titles as regards the property conveyed are clear. (vi) That the parties declare and admit that open plot on back side, on ground floor of the bungalow belongs to both the members of first party in equal share and open plot on front side of the bungalow would be for common use of both the parties and for the owners/occupants of the whole building. (vii) Shri Mirchumal H. Bhatia is in exclusive ownership and possession of the ground floor and Devikrishan and Mohanlal will cooperate with him if he desires to make any alteration or addition in his occupancy. (viii) Shri Devikrishan Bhatia and Mohanlal Bhatia will have right to raise additional construction on first floor and second floor on their own cost. (ix) Remaining front portion over RCC slab on the first floor exclusively belongs to Devikrishan and RCC slab of the second floor would be jointly owned and

possessed by both the parties. (x) The agreement would be binding upon both the parties and their legal heirs and representatives.

3.3 Exh.86 is the document from Devikrishan Bodomal Bhatia and Harpal Das Bhatia conceding to the transfer of ground floor of the property which was in the name of late Shri Mirchumal Harpal Das Bhatia to his son Narayandas.

3.4 Exh.85 is the resolution of mutation of Narayandas Mirchumal Bhatia substituting Shri Mirchumal H. Bhatia as his heir, on the application of Narayandas on the strength of will and succession, by the society with written no objection from Shri Devikrishan Bodomal Bhatia and Harpal Das Bhatia, to the above effect.

3.5 Exh.87 is a certificate summarizing the existing construction, the manner of its' expenditure; the extent of occupancy by each of the parties.

3.6 Exh.89 is the letter by Vijay Cooperative Bank Ltd. to the society seeking registration of the first charge in connection with the loan taken by Shri Devikrishan by mortgaging half of 562.12 sq.yards (281.06 sq. yards) of the plot and half of 119.08 sq. yards (57.88 sq.yards) of the first floor.

4. The title to the suit property, the manner, the nature and the extent of its' holding by the family members, the conduct of the family members in dealing with the property in the matter of its' occupancy, ownership, construction, encumbrances and cost as indicated in para 3 above is sought to be relied upon by the rival sides to buttress their respective cases.

4.1 In addition to the above documents, the public notice and the sale deed transferring the share of the transferor in the disputed property were also relied upon by the parties.

4.2 The case is pitched by the learned counsel Mr.Shelat appearing for the objectors on Section 44 of the T.P. Act with the submission that the disputed property is a dwelling house on the ground floor belonging to an undivided family wherein, the stranger even while holding valid title to the portion of such dwelling house, having been precluded entering the possession and enjoyment of such portion by Section 44 of the T.P. Act, would not get any such rights in absence of partition by metes and bounds by decree of competent Court and findings to the contrary by the Trial Court may not be sustained. Learned counsel also invited the attention of this Court to the relevant pleadings, the findings, the documents and the facts emerging therefrom as indicated in para 3 above to buttress the submission that the disputed property was all the while treated as the joint holding of the family members. Additionally the learned counsel also relied upon the admissions by the transferor to the above effect in his pleadings.

4.3 Per-contra, the submission is that in absence of required evidence, the factum of house being a dwelling house and it's belonging to an undivided family was not proved in absence of the personal knowledge to that effect with the witnesses examined by the objectors who abstained themselves offering the

testimonies despite the personal knowledge on the subject with them. The learned counsel Mr.Kheskani while relying upon the material as discussed in para 3 above, submitted that the factors like exclusivity of possession and enjoyment of the specified portions without intervention from the other family members, the assertions by the family members as to their ownership over the specified portions, the encumbrance by Devikrishan created through mortgage on certain portion of the property with no objections from the family members, separate electric meters etc., would lead to the inference of division of property by metes and bounds and as such no decree of the Court for the said purpose was necessary.

5. Before dealing with the rival submissions and appreciating the evidence on record, it would be appropriate to glance through the scheme of Section 44 of the T. P. Act. The provision is reproduced for convenience:-

"44. 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, 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."

5.1 The concept of co-ownership and right to joint possession and joint enjoyment of the immovable property envisaged in section 44 of the T. P. Act is required to be understood in the context of relevant provisions in the T. P. Act and the Contract Act. Having regard to the scheme of said two legislations, it cannot be disputed that immovable property can be co-owned by two or more persons otherwise legally competent to do so. Such co-owners may be family members or strangers. Competence to transfer of the share by one or more co-owners to other or to a stranger also cannot be disputed. Right to lawful enjoyment of the immovable property by the transferee with the existing co-owner/s also cannot be disputed. The right of a transferee to seek partition in order to remove the obstructions for enjoyment of the property or for possession of the share transferred also cannot be disputed. That is what exactly first para of section 44 contemplates.

5.2 Where there is a partition of a dwelling house belonging to undivided family by metes and bounds; the bar under para 2 of section 44 would not apply. Where such dwelling house is not the disputed property, the co-owners of the property may be family members or strangers or both and in such cases para 2 of Section 44 would not obstruct the way of the stranger to the enjoyment and possession of the property and for all purposes, the transferee would substitute the

transferor subject to the circumspections in the later's title on the date of transfer. The difficulty for the stranger co-owner would arise only when the share transferred to him consist of a dwelling house belonging to an undivided family. In such a case, he would have no right to joint possession or joint enjoyment of the dwelling house in absence of partition by metes and bounds. The phrase "undivided family" appearing in the second para of section 44 comprehends the family irrespective of its community. Therefore, the concepts like undivided Hindu family or joint Hindu family or joint property as is understood under the Hindu law would not be germane for interpreting the said second part of Section 44 (supra). The family here would not necessarily be joint Hindu family and the principles of 'coparcenary' cannot be imported to para 2 (supra). The expression "undivided family" therefore must be understood in its' wider scope and sphere comprehending all the families who are undivided.

5.3 Insofar as dwelling house is concerned, the undivided family may continue to occupy such house purchased or inherited by their predecessors without dividing it by metes and bounds. As the undivided family grows, there may arise a need to demarcate separate individual portions in the dwelling house for convenience. The families may also arrive at an understanding to own and use such separate portions by one family member to the exclusion of other family members without actually partitioning it by metes and bounds. Therefore evidence as to separate residence in a dwelling house of Undivided Family or their conduct or behavior; assertions and reassertions or emphasis or reemphasis on the separate living or their claim as to separate ownership of specified portions of the dwelling house would not amount to partition by metes and bounds and they would continue to be undivided family qua the dwelling house in absence of partition by metes and bounds. Only partition by metes and bounds qua the dwelling house would bring out their clear intention to own and enjoy the divided shares separately to the exclusion of other family members.

5.3 The concept of 'partition by metes and bounds' can better be understood by coming out of the obsession of 'family'. In other words the concept can be better understood by ignoring the expression 'family' and conceiving the manner of partition amongst strangers. Would the strangers conceive a partition by mere arrangements or usage or understandings as to ownership of immovable property. Needless to say that the answer to the question should be in negation inasmuch as to secure their respective rights in the immovable property the strangers would better execute specific documents demarcating their shares under the legal advise. The partition of the immovable property can be inferred amongst the family members if such a conduct is demonstrated by them and not otherwise.

5.4 From the judicial pronouncements being *Dorab Cawasji Warden v. Coomi Sorab Warden and others*; [(1990) 2 SCC 117]; *Bhim Singh and another v. Ratnakar Singh and others*; [AIR 1971 Orissa 198] *Mahipatsinh Himatsinh Jadeja v. Pannalal Khemchand Modi & Ors.*; [(1998) 1 GLR 398] as are discussed in

greater detail hereinafter, it is amply clear that to come out of second para of section 44, it must be shown that such property was divided by metes and bounds so that the co-owners became the exclusive owners of their respective share. Mere arrangements to live separately even in a separate residence unconnected with each other would not be determinative of partition by metes and bounds. Arrangements or conduct inter-se amongst the members of the family would not make any difference to the status of the dwelling house belonging to their undivided family.

5.5 Section 44 of T.P. Act came up for consideration in Dorab (supra) albeit during the challenge to the interim order; nonetheless, since section 44 of the T. P. Act was interpreted, it would be relevant to consider the same. After explaining that the expression 'family' is wide enough to comprehend the families irrespective of their religion and after referring to section 44 of the T. P. Act, the pronouncement referred to Bhim Singh (supra). In Bhim Singh the facts as found by the Trial Courts were that by an amicable arrangement the family members were living separately for a long time, had separated their residencies and were living in different houses unconnected with each other but all situate in one homestead and one of the family members had alienated his separate portion to the stranger and thereby the stranger was put in possession. Bhim Singh's case referred to several judgments which are referred to in Dorab Cawasji (supra) and following observations made therein found approval in Dorab Cawasji:

"If in this state of things, a member of the family transfers his share in the dwelling house to a stranger paragraph 2 of Section 44 of the Transfer of Property Act comes into play and the transferee does not become entitled to joint possession or any joint enjoyment of the dwelling house although he would have the right to enforce a partition of his share. The object of the provision in Section 44 is to prevent the intrusion of the strangers into the family residence which is allowed to be possessed and enjoyed by the members of the family alone in spite of the transfer of a share therein in favour of a stranger. The factual position as has been determined is that the property is still an undivided dwelling house, possession and enjoyment whereof are confined to the members of the family. The stranger-transferees being debarred by law from exercising right of joint possession which is one of the main incidences of co-ownership of the property should be kept out."

5.6 Dorab Cawasji (supra) further observed:

"On the question whether the enjoyment of ascertained separate portions of the common dwelling house and the alienee taking possession made any difference the learned Judge quoted the following passage from Udayanath Sahu v. Ratnakar Bej":-

"If the transferee (stranger) get into possession of a share in the dwelling house, the possession becomes a joint possession and is illegal. Courts cannot countenance or foster illegal possession. The possession of the defendant-

transferee in such a case becomes illegal. Plaintiff's co-owners are entitled to get a decree for eviction or even for injunction where the transferee threatens to get possession by force. If there had been a finding that there was severance of joint status but no partition by metes and bounds, defendant 1 was liable to be evicted from the residential houses and Bari under Section 44 of the T.P. Act."

5.7 It is evident from para 24 of the Dorab Cawasji (supra) that there was a declaration of alteration of the status of joint tenants to tenants in common in equal undivided half shares. Disapproving that such alteration would amount to partition, it was observed thus:

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"We are afraid that some notions of coparcenary property of a Hindu joint family have been brought in which may not be quite accurate in considering Section 44; but what is relevant for the purpose of these proceedings was whether the selling house belonged to an undivided family. We have already pointed out that even if the family is divided in status in the sense that they were holding the property as tenants in common but undivided qua the property that is the property had not been divided by metes and bounds it would be within the provisions of Section 44 of the Act."

5.8 In para 25 of Dorab Cawasji (supra) alienation of the portion of the property by one member of the family to the other who was living with them was not construed as a partition, it was observed, "In the absence of a document evidencing partition of the suit house by metes and bounds and on documentary evidence showing that the property is held by the appellant and his brother in equal undivided shares, we are of the view that the plaintiff-appellant has shown a prima-facie case as a dwelling house belonged to an undivided family consisting of himself and his brother."

5.9 Dorab (supra) was heavily relied upon in Mahipatsinh (supra) which was relied upon by learned counsel Mr.K.V.Shelat. This Court in para 13 referred to the said binding precedent thus;

"13. Analysing and dissecting Section 44 of Para-2 of the T. P. Act only for interpretation to know and ascertain the essential ingredients of Para-2 of Section 44.

This Court may at this stage simply refer to the binding precedent of the Apex Court where the Apex Court in the case of Dorab Cawasji Warden v. Coomi Sorab Warden (supra) found:

(i) In order to attract Second Para of Section 44, the subject-matter of the transfer has to be a dwelling-house belonging to an undivided family.

(ii) The transfer impugned is a share in the same dwelling-house to a person who is not a member of the family.

(iii) In order to satisfy the aforesaid ingredients, the existence of the right and its

infringement, the plaintiff will have to show a probable case that the suit property is a dwelling-house and it belonged to an undivided family.

(iv) On the other hand having regard to the restriction on the rights of a transferee for joint possession and the dominant purpose of the Second Para of Section 44 of the Act, there is danger of an injury or violation of the corresponding rights of other members of the family and an irreparable harm to the plaintiff and the Court's interference is necessary to protect the interest of the plaintiff."

5.10 In Mahipatsinh (supra) the property was exclusively owned by the testator who bequeathed limited rights therein to some of the legatee and absolute rights to other legatees. Based upon the said facts, the contention was raised that the property did not belong to the undivided family. Rejecting the contention, it was held in para 20 thus:-

"20. The Apex Court has in no uncertain terms found that in the facts of the case before it the factual position was that the property was still an undivided family dwelling-house, possession and enjoyment whereof are confined to the members of the family. The stranger transferees being debarred by law from exercising right of joint possession which is one of the main incidences of co-ownership of the property should be kept out. It is also observed by the Court that in the absence of any partition by metes and bounds qua the property, it shall have to be deemed to have been an undivided family property."

6. Mr.Kheskani, the learned counsel representing the transferee has heavily relied upon U.R. Virupakshaiah v. Sarvamma and Ors.; [AIR 2009 SC 1481]. The learned counsel particularly invited attention of this Court to the following observations contained in para 11 and 16 of the decision.

"11. It is well settled that the presumption in regard to existence of undivided family gets weaker and weaker from descendant to descendant and such weak presumption can be rebutted by adduction of slight evidence of separate possession of the property in which even the burden would shift to the plaintiff to prove that the family was a undivided family. ...

...

...

16. The premise on which, therefore, the High Court reversed the judgment of the courts below was non-existent.

Mr. Chandrasekhar may be right in his submission that the presumption with regard to the existence of undivided family gets weaker and weaker from descendant to descendant. It has been so held by this Court in Bhagwan Dayal (since deceased) and thereafter his heirs and legal representatives Bansgopal Dubey & Anr. V. Mst. Reoti Devi (deceased) and after her death, Mst. Dayavati, her daughter [AIR 1962 SC 287] in the following terms :

"16. The general principle is that every Hindu family is presumed to be joint unless the contrary is proved; but this presumption can be rebutted by direct evidence or by course of conduct. It is also settled that there is no presumption that when one member separates from others that the latter remain united; whether the latter remain united or not must be decided on the facts of each case. To these it may be added that in the case of old transactions when no contemporaneous documents are maintained and when most of the active participants in the transactions have passed away, though the burden still remains on the person who asserts that there was a partition, it is permissible to fill up gaps more readily by reasonable inferences than in a case where the evidence is not obliterated by passage of time."

[See also *Bhagwati Prasad v. Shri Chandramaul* [(1966) 2 SCR 286].

But it is evident that no such contention was raised. No substantial question of law in this behalf was framed."

7. As is evident from the quoted observations, the case was being addressed in the context of joint Hindu family and Hindu coparcenary as understood under the Hindu law. Such a concept cannot be imported to the case arising under section 44 of the T.P. Act.

8. Mr.Khemkani also relied upon following observations in *Harinder Pal Singh Chawla v. Nirmal Daniere and Ors.* [1993 III AD Delhi 145], para 21 of which reads as under:

"(21) In the *Dorab Cawasji Warden* (Supra), the Supreme Court observed that "some notion of co-passer property of a Hindu joint family which cannot be quite accurate in considering Section 44; but what is relevant for the purpose of these proceedings was where the dwelling house belonged to an undivided family. Even if the family is divided in status in the sense that they were holding the property in common but undivided qua property i.e. the property had not been divided by metes and bounds it would be within the provisions of Section 44 of the Act. In the absence of a document evidencing partition of the suit house by metes and bounds and on the documentary evidence showing that the property was held by the appellant and his membership in equal undivided shares, it could be said by the plaintiff and appellant has shown a prima- facie case that the dwelling house belonged to an undivided family consisting of himself and his mother. Prima- facie, therefore, a transfer by the vendee would come within the mischief of the Section 44." It follows from this that where there is partition of the family dwelling house, the family cannot be said to be undivided family with respect to that house and, therefore, the provisions of Section 4 of The Partition Act and Section 44 of the Transfer of Property Act are not attracted. *Bharat Singh* (Supra) decided by the Madhya Pradesh High Court takes the same view i.e. the expression 'undivided family' house in Section 4 of the Partition Act means a family not divided qua the dwelling house. It is further observed that the essence of the matter is that the house itself should be undivided among the members of

the family who are its owners. The emphasis being on the undivided character of the house. The expression means a family, members of which have not effected a partition of dwelling house belonging to it. Where the members of a family are in joint occupation of a dwelling house and there has been no partition by metes and bounds between the family members, the family would be an undivided family with respect to such house within the meaning of Section 4 of the Partition Act. The other two judgments cited on behalf of the defendants are on the same lines and need no further mention."

9. Learned counsel also invites the attention of this Court to para 23 of the said decision which reads as under:

"(23) Land is common. House is built in a manner that it is one bungalow. The ground floor foundation and walls support the first floor and likewise the First floor supports the second floor. Thus from the construction point of view the building may be one unit. But the bequests in favor of defendant No. I of the ground floor confers exclusive and independent right on the legatee. Similarly, the upper portion goes exclusively and independently to the other legatee. The nature of construction of the building as one unit and the land underneath remaining undivided, cannot lead to the conclusion that it is an undivided family dwelling house. If this is accepted for purpose of attracting Section 4 of the Partition Act, there will be hardly any case where this provision will not apply. What is to be seen is that the house never became an undivided family house. From day one, it was a divided house. Therefore, these things cannot confer the status of a family dwelling house on the property. So far as the land is concerned, the Will does not speak anything about it. Whatever may become interpretation of the Will in this behalf is yet to be seen."

10. It can thus be seen that unlike the present case, the property in Harinder Pal (supra) was not proved to be dwelling house belonging to undivided family. The facts therefore cannot be applied to the case herein. Reverting to the facts of the case; it cannot be disputed that no witness with first hand personal knowledge as to the disputed facts was examined. Therefore their testimonies would not be useful for resolution of the controversy. What remains to be seen is the admissions in the pleadings and the documents as also the statements in the documents reflecting the conduct of the parties. As can be noticed from the detailed discussion in para 3 (supra) Mirchumal Harpaldas Bhatia and Bodomal Bhatia and their successors claimed the dwelling house in question in common by joint ownership ever since April, 1955 and such assertions of jointness were emphasized in Exh.60 in 1962 and again in Exh.105 by Mirchumal and Devikrishan while conveying some portion of the property to Harpaldas albeit without a registered sale deed somewhere in 1977. The learned counsel Mr.Shelat has invited the attention of this Court to the admissions by the transferor in the written statement that Harpaldas Bhatia and Bodomal Bhatia has raised the construction of a house for their families. There are however specific averments by the objectors in plaint para 4 as to the nature of property

and its' purpose and the nature of use. It is clearly stated that the plot in question was purchased for the purpose of construction of a dwelling house for the family and upon construction, the members of the family came to reside there. The written statement-cum-reply to the notice of motion came to be filed by the transferee at Exh.22. While dealing with the averments made in para 4 of the plaint, the relationship between the objectionists as brothers was admitted. The decision by the two brothers to raise the construction in joint ownership in Tilaknagar society was also admitted. It was inter-alia disputed however that the house was sought to be constructed for residence of the family. The said statement is qualified by a true version according to the transferee. The true version according to the transferee is that since the plot was purchased jointly in two different names, it was not owned by the undivided family and that the fact that it was purchased in the name of Mirchumal being the elder brother is also not true according to the transferee and that the construction on the said plot was from the undivided family funds is also not true according to the transferee. However, the factum of residence of the family of Bodomal, Mirchumal and Mohanlal in the property was not disputed.

11. In para 8 of the written statement, it is clearly stated that the fact that the house was constructed for the undivided family for the residence of Harpaldas and Bodomal is not disputed. Pertinently, the written statement is jointly signed by the transferor and transferee; as indicated above, transferor is one of the family members of the objectors and thus fact admitted by him in the written statement as above stated are borne from his first hand knowledge. There is no reason to dispute such facts. It is thus clear from the admissions and the evidence above referred and the pleadings that the share conveyed by the transferor to the transferee was the one in the dwelling house which belonged to the undivided family and the transferee not being the member of the family is disabled by restrictions under second para of section 44 from entering into the possession and enjoying the share sold to him, with other co-owners.

12. In view of the legal position qua Section 44 as above, the demarcation of the common dwelling house of an undivided family for convenient separate living or even the assertions as to their exclusive possession and ownership of specified portions of such house or their conduct approving the possession, ownership and enjoyment of such property or their inter-se concession favouring the encumbrance on the undivided share in such property for making it convenient for other member to obtain loan would not amount to partition by metes and bounds, more particularly, when assertions of jointness qua the disputed portion of the property are found in the documents above referred.

13. In above view of the matter, this Court is unable to agree with the findings rendered by the Court below to the contrary. It appears that the Court below was unnecessarily swayed away by the concept of the joint Hindu family which is not germane to the section 44 of the T. P. Act, more particularly, second para thereof. It is required to be reiterated that separate usages or separate facilities like

electrical connection etc. or separate passages for enjoyment of the immovable property by co-owners or their conduct to permit the other co-owner to individually and exclusively use or create encumbrances on undivided but specific share would not constitute partition by metes and bounds and such usages etc. as indicated in Dorab (supra) would be irrelevant for the purpose of section 44 of the Act.

14. In the result, both the appeals preferred by the objectors are required to be allowed to an extent indicated in this judgment.

15. In the Civil Suit by transferee, injunction as to his being the owner of the dispute share by virtue of the sale deed in question was sought. To that extent, the judgment and decree is not challenged. Even otherwise, the right of a co-owner to sell his share of the property irrespective of it being a dwelling house belonging to the undivided family is not hit by section 44 and transfer is permissible under the relevant provisions of the T. P. Act and the Contract Act. Therefore, to the said extent, the impugned judgment and decree in Civil Suit No.2728 of 1995 is required to be upheld. Accordingly, the First Appeal arising out of the said suit being First Appeal No.2830 of 2010 is allowed with the confirmation of the judgment and decree to the above extent.

16. In the result, the common judgment and decree passed in Civil Suits No.2728 of 1995 and 2922 of 1995 rendered by the City Civil Court, Ahmedabad, by order dated 20.08.2010 are quashed and set aside except to an extent indicated in para 15. First Appeal No.2831 of 2010 is allowed and Civil Suit No.2922 of 1995 is decreed. The decree be drawn accordingly. The decree in First Appeal No.2830 of 2010 shall also be drawn subject to the terms indicated in para 15 above.

17. Considering the fact that litigation was initiated in 1995 which has already consumed by now about a quarter of a century, it would be in the interest of justice if the Trial Court takes up the suit for partition, if filed by the transferee as may be advised to him, as expeditiously as possible and will make an endeavor to conclude the hearing within

12 months of the institution of the suit provided the same is filed within two months from today.

18. In view of the decision in these two First Appeals, Special Civil Application No.8984 of 2013 would not survive and the same is also disposed of. Civil Application (for stay) filed in First Appeal No.2831 of 2010 is also disposed of.