Jai Rattan Bhalla & Anr. vs Puri Investments & Ors. on 23 December, 2011

Author: Manmohan Singh

Bench: Manmohan Singh

.* HIGH COURT OF DELHI : NEW DELHI

+ IA No.16165/2010, IA No.2159/2011, IA No.3346/2011 &
IA No.2824/2011 in CS (OS) No.2424/2010

% Judgment decided on : 23.12.2011

Jai Rattan Bhalla & Anr. .....Plaintiffs
Through: Mr. Abhinav Vasisht, Sr. Adv. with
Mr. Rajat Navet, Adv.

Versus

Puri Investments & Ors. .....Defendants
Through: Mr. P.V. Kapur, Sr. Adv. with
Mr. Jeevesh Nagrath, Ms. Anjali
Verma and Ms. Ikasha Bhalla, Advs.

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By this order I shall dispose of IA No.16165/2010 (O 39 R 1 & 2 CPC) filed by plaintiffs, IA No.2159/2011 (O 39 R 1 & 2 CPC) filed by plaintiffs, IA No.3346/2011 (O 12 R 6 CPC) filed by plaintiffs & IA No.2824/2011 (O 39 R 4 CPC) filed by filed by defendant Nos.1, 2, 5 and 6.

2. The brief factual matrix of the matter is that the plaintiffs have filed the suit for injunction, rendition of account, partition and declaration praying for the following reliefs:

> (a) Pass a decree of permanent prohibitory injunction in favour of the plaintiffs and against defendant Nos.2 to 6 restraining defendant Nos.2 to 6 from selling, transferring, alienating or creating any third party rights of their share in defendant No.1 and the suit property or parting with the possession of the suit property or any part thereof, in contravention of Clause 6 and 8 of the MOU dated 5.12.2005;
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> (b) Pass a decree directing defendant Nos.2 to 6 to render and draw up accounts of defendant No.1;

(c) Pass a decree directing partition of property bearing No.E/6-7, Saraswati Bhawan, Connaught Place, New Delhi 1100 01 by metes and bounds in terms of Memorandum of Understanding dated 5.12.2005 and to put the plaintiff No.2 (or the plaintiffs, as the case may be), in exclusive possession of the partitioned and demarcated share;

(d) Pass a decree of declaration in favour of plaintiff No.2 and against the defendants that plaintiff No.2 is the sole and exclusive owner of 13/60 per cent share in defendant No.1.

3. The plaintiff Nos. 1 and 2 claim themselves to be the co- owners of the property owned by the defendant No. 1 namely Puri Investments. The said property owned by the defendant No. 1 is situated at E/6-7, Saraswati Bhawan, Connaught Place, New Delhi - 110001. The plaintiffs state that the suit property which was earlier owned by partnership is now under the co-ownership (pursuant to the mutual agreement between the parties to treat the arrangement as co- ownership) in the name and style of Puri Investment (defendant No.1) of which the plaintiffs and defendant Nos.2 to 6 are co-owners and the same was purchased in the year 1968. The details of the co-owners and their respective shares is already mentioned in the plaint.

4. The plaintiffs then proceed to explain the formation of the defendant No. 1 and also provide the details of the respective shareholders in the defendant No. 1. It is stated in para 2 of the plaint that the Puri Investments/ Defendant No. 1 was formed and constituted in the nature of partnership vide partnership deed dated 5.3.1958 with the primary object of making investment in the properties and for conducting any other general business. It is stated that in the said partnership deed, the partners were and their respective profit sharing ratio/ shareholding therein were as under:

S. No.	Partners	Shares
4.	Sh. Jai Rattan Bhalla (Plaintiff No.1)	5/30
5.	Sh. Braham Prakash Puri	4/30
6.	Sh. Gian Prakash Puri (Defendant No.3)	3/30

5. It is mentioned in the plaint that subsequent to the setting up of the partnership firm, the firm acquired the property bearing No. E/6- 7, Connaught Place admeasuring 10844.96 Sq. Ft. or thereabouts under and by virtue of a perpetual lease dated 1.2.1968 and thereafter constructed a building thereupon comprising of 3 floors on Inner circle and 5 floors in the middle circle of the Connaught place admeasuring approximately 40000 Sq. Ft. of covered area. The said building complex is named as Saraswati Bhawan.

6. The plaintiffs state that the said partnership firm was subsequently dissolved and it was mutually agreed between the partners that the assets of the firm would vest in a co-ownership, with the partners becoming co-owners to the extent of their respective profit sharing ratio/ shareholding in the partnership. It is further mentioned in the plaint that subsequently on account of death of some of the original co- owners and in view of the fact that some co -owners wanted to make their legal heirs as joint co- owners, fresh co- ownership deeds/MOUs were executed from time to time. On 05.06.1989, 20.08.2005, 06.06.2005 and finally on 05.12.2005 by and between the co -owners and their legal heirs.

7. The plaintiffs mention in the plaint that the co-ownership deed dated 05.06.1989 was executed between the original co-owners and the legal heirs of Sh. Sohan Lal Bawa which were Mrs. V.K.S. Bawa, Mrs. Rashmi Kaura and Ms. Ushmi Sethi. Then, after the death of Sh. Braham Prakash Puri on 19.02.1993 his share was transferred to his wife Smt. Raksha Puri and after her death to her legal heirs. Thereafter, a co-ownership deed dated 28.05.2005 was executed on the death of Smt. V.K.S. Bawa when her interest was distributed amongst her legal heirs, Mrs Rashi Kaura and Mrs Ushmi Sethi and these changes were incorporated in the said deed dated 28.05.2005.

8. Thereafter, an MoU dated 06.06.2005 was entered into between the parties recording the collective and respective rights of the co-owners. Thereafter, Mr. Ved prakash Puri made Mrs. Mahima Puri, joint co-owner of his share and a resolution dated 03.11.2005 was passed by defendant No.1 accepting Mrs. Mahima Puri, as joint co- owner of Mr. Ved prakash Puri. Similarly, plaintiff No.1 transferred his entire shareholding in the said co-ownership in the name of plaintiff No.2, making him the absolute owner of 13/60 share in defendant No.1 and by his letter dated 08.04.2009, informed the defendant No.1 and erstwhile Managing co-owner of the same. However, defendant No.1 did not officially incorporate the said transfer in its records.

9. The plaintiffs submit that the changes in the co-ownership were incorporated in the fresh memorandum of understanding which was entered into between the co-owners on 05.12.2005. The said agreement or MOU recorded the profits to be divided as under:

S. No.	Partners	Shares
1.	Sh. Ved Prakash Puri/Ms. Mahima Puri (Defendant No.2)	19/60
2.	Sh. Jai Rattan Bhalla/Sh. Amit Bhalla (Plaintiffs)	13/60
3.	Sh. Gian Prakash Puri (Defendant No.3)	10/60
4.	Mrs. Neerja Kolhatkar (Defendant No.4)	6/60
5.	Mrs. Rashmi Kaura (Defendant No.5)	6/60
6.	Mrs. Ushmi Vasisht (Defendant No.6)	6/60

10. The plaint avers that the only source of income of the defendant No. 1 has been the rent received by it from letting out portions of the suit property owned by it. The property has been converted into the freehold one which is the subject matter of the suit and also the conveyance deed has been executed in favour of the defendant No.1.

It is stated that after the demise of Mr. V.P. Puri on February 2010, who was managing the affairs of the defendant No. 1, there has been mismanagement in the affairs of the defendant No. 1. It is also stated that the interests of the existing co-owners are not being safeguarded properly.

11. It is explained by the plaintiffs that the rear portion of the said building, Saraswati Bhawan i.e. 25000 sq. ft. is lying vacant since September, 2006 and no efforts are being made by the erstwhile Managing Co-owner to let out the premises which could fetch a rent of approx. Rs.75 lac per month. Similarly since October, 2009 3500 sq. ft. of the front portion of the said building has also been lying vacant. It is also stated that the reminders dated 12.11.2008, 6.3.2009, 6.10.2009 and 6.11.2009 were issued to the Managing co-owner to let out the premises and to that effect meeting was held on 2.1.2008 but not outcome came out. The plaintiffs themselves had also got offers from some concerns like ONGC at the rate of Rs. 300 per sq ft but the managing co-owner did not take any decision to do the needful.

12. It is also averred by the plaintiffs that the managing co- owner was also in the habit of the withholding the amounts due to the other co-owners for a considerable period which caused immense dissatisfaction amongst the co-owners including the plaintiffs.

The similar instances are also mentioned in the plaint about the non maintenance of proper accounts by the managing co-owner.

13. By relying all these events, it is the case of the plaintiffs that the co-ownership affairs are brought to a standstill and the same has not been able to be operated properly by the co-owners. It is also stated that by not letting out the portion lying vacant, the co-owners are depriving the other co-owners including the plaintiffs from their legitimate profits which ought to accrue to them from the said property. Thus, there shall be no useful purpose to continue to remain in the co- ownership. Consequently, the plaintiffs intend to safeguard their interest in the share of the property of the defendant No. 1 by seeking declaration and partition of the suit premises.

14. The plaintiffs also explained their cause by submitting that it has come to light that some of the co-owners were trying to sell their share in defendant No. 1 in violation of clause 6 of MOU dated 5.12.2005. The plaintiff No. 2 then wrote a letter dated 4.4.2009 and called upon defendant Nos. 2 to 6 and also the erstwhile managing co- owner, not to take any action in respect of the suit property without the prior consent of the plaintiff No. 2. Thereafter the letters were exchanged between the parties wherein several allegations were made and replied to by the defendants. On 20.10.2009, erstwhile managing co-owner wrote to the plaintiffs by replying the plaintiffs letter dated 6.10.2009 that no decision had been taken to lease out the suit property, it was also stated in the said letter that the other co-owners of defendant No. 1 were desirous of selling the suit property. In the reply to the said letter dated 20.10.2009, plaintiff No.2 sent a Notice dated 06.11.2009 wherein it was stated that the plaintiff No.2 was not interested in selling his share in the suit property and instead offered to buy the entire suit property for Rs.90 crores subject to other terms being negotiated and mutually agreed upon between the co-owners.

In the meantime, the plaintiffs continued to explain and convince the defendants and the earlier managing co-owner as to record the name of the plaintiff No. 2 as a co-owner and also insisted upon the letting out of the suit premises. Towards this end, the plaintiffs wrote to the defendants wherein the plaintiffs gave a proposal of the entity namely United Colors of Benetton wherein the plaintiffs proposed another tenant namely PUMA AG but as per the plaintiffs no heed was given by the defendants to the plaintiffs proposals of letting out the said premises nor the efforts were forthcoming from the defendants side.

15. Thereafter in February 2010, Mr. V.P. Puri passed away and the plaintiffs wrote a letter on 30.4.2010 to the defendant Nos. 2 to 6 calling upon them to elect new managing co-owner to ensure the smooth functioning of the defendant No. 1. The plaintiff No. 2 also reiterated his offer of Rs. 90 crores as a consideration to buy out the entire suit property and also enclosed the valuation report of ICICI Homes to this effect. However, the plaintiffs state that no response was received and also no managing co-owner was appointed.

16. The plaintiffs submit that considering the fact that the defendants were not responding to their communications last issued in April 2010 and also that the defendants were not appointing new managing co-owners, the plaintiffs became apprehensive of the fact that the defendants were intending to sell their shares in the suit property without informing them. The plaintiffs therefore carried out a public notice stating therein that in terms of the MOU, no co-owner was entitled to sell his/ her share in the suit property without the consent of all the co-owners and the same would be otherwise illegal.

17. Subsequent thereto, the plaintiffs submit that although the defendants informed that they were not contemplating to sell the suit premises but again the plaintiffs have learnt that the defendant No. 2 to 6 are negotiating with some third party for selling their share in the defendant No. 1 and consequently in the suit property in contravention and breach of the procedure laid down in the MOU.

18. All this has lead to the plaintiffs filing the suit in November, 2010 and seeking reliefs of injunction and partition and declaration. The present suit came up for hearing on 01.12.2010 along with IA No.16165/2010 (U/O 39 R 1 & 2 CPC) wherein the plaintiffs have also sought an ex-parte ad interim injunction. This court on 01.12.2010 passed the ex-parte ad interim order directing the parties to maintain status quo with respect to the title and possession of the suit property. The plaintiffs during the second week of February, 2011 filed another interim application under Order 39 Rule 1 and 2 CPC being IA No.2159/2011 seeking orders to restrain the defendants to operate bank account of defendant No.1 and to maintain status quo with regard to the affairs of defendant No.1. The said application was listed before court on 11.2.2011 and an ex-parte order was passed to the extent that let the defendants clear government dues alone and all other expenses be not incurred. Upon service, defendant Nos. 2, 5 and 6 issued a letter dated 01.12.2011 about receiving an offer from a prospective buyer to purchase the suit property together with its encumbrances and a meeting was convened on 5.2.2011, however, according to the plaintiffs, the defendant Nos.2, 5 and 6 passed a purported self-serving resolution that the property being a composite unit could not be partitioned and the same be sold to the prospective buyer Metatron Global Fund LLC subject to the

approval of the court.

19. Thereafter, on 21.2.2011, the defendant Nos.1, 2, 5 and 6 moved an application under Order 39 R 4 CPC being IA No.2824/2011 and also filed statement and prayed for vacation of ex-parte order dated 01.12.2010.

20. The defendants have raised the following grounds as a matter of defences and also in support of the application under order 39 rule 4 praying for vacation of the ex-parte order:

> a) The defendants submit that the plaintiffs have not presented the facts before this court correctly while securing the interim order.

It is stated that the plaintiffs are thus guilty of concealment of material facts from this court.

b) The defendants submit that the plaintiffs are asserting some non existent right under the agreement and also not performing the other terms of the agreement. It is submitted that the Clause 18 of the agreement provides for the resolution of the disputes between the co-owners in relation to the affairs of business as well as the profits and winding up of business etc which are to be dealt with as per the resolution mechanism contained in the said agreement itself wherein the decision of the majority of 2/3rd co- owners shall prevail. Thus, the plaintiffs cannot rely upon selected terms of the agreement to their advantage and ignore rest of them which are specifically agreed between the parties to resolve the disputes. Accordingly, the interim orders by this court are not warranted and the plaintiffs be directed to resolve the disputes in view of the mechanism provided under the agreement.

c) The defendants although admitted the factual matrix enunciated by the plaintiffs to the extent of the shares owned by the co- owners (however later during arguments defendants made the argument that the co-ownership vests in the firm and parties are merely association of persons), but varied on the following aspects in relation to MOU:

> It is submitted by the defendants the clauses relied upon by the plaintiffs are misplaced. It is stated that in order to avoid third party outsiders from becoming the shareholder in the profit and losses and the affairs of the business of the defendant No. 1, it was agreed in the clause 6 of the MOU that no co-owner shall be able to assign, transfer, licence, sell, mortgage or otherwise dispose of his/her share/interest etc. without the prior consent of all the co-
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> owners. The defendants submitted that the said covenant was entered into to avoid the third party to become the co-
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> owner of the property. However, it is submitted that the said restriction is intended to operate only to the extent of single co-owner intending to alienate his or her share but will not preclude the majority co-owners decision to sell out the property in firm or to wind up the business. The said condition is stipulated in the separate Clause 6

to Clause 8 cannot override the other stipulations i.e. Clause 16 and 18. The same are read as under :

"Clause 16 That all matters relating to the Co-ownership, its conduct and purposes other than those required to be done with the consent of all Co-owners shall be decided by a two thirds majority of Co-owners.

Clause 18 That any disputes or differences that may rise between the Co-owners of their representatives with regard to business or to the construction, interpretation and effect of this Memorandum of Understanding or any part thereof or respecting the accounts, profits or losses of the business conducted by the Co-Ownership, or the rights and liabilities of the Co-Owners under this Memorandum of Understanding, or the dissolution and winding up of the business or any other matter relating to Puri Investments shall be decided upon by the Co-Owners a two-third majority and such decisions shall be binding on all Co-Owners."

It is submitted that the defendants that Clause 18 have been incorporated in the agreement to avoid litigation and is aimed at resolution of disputed by the agreed mechanism. The plaintiffs are themselves party to the said MOU by agreeing to abide by the same. Now, the plaintiffs by filing the present suit on wrong premises are rather breaching the terms of the agreement which has been agreed between the parties. This court should not allow the same to happen by enforcing the condition or restriction which in fact does not exist in the agreement. Therefore, the said agreement should operate and must be followed in the letter and spirit.

The defendants state that the plaintiffs have their own motives and dishonest intentions to buy out the said suit property at the lesser value rather than to go at the fair value to the outsider. This can be seen from the fact that the plaintiffs themselves had been negotiating with the defendants prior to the filing of the suit. Plaintiffs have also been negotiating with the defendants after filing of the suit also. It is submitted that the value of the suit property was almost Rs.150 crores when the plaintiffs offered merely Rs.90 crores which is almost the half value. Thus, it is the plaintiffs who intend to gain from the said co- ownership and deprive the other co-owners from their profits by selling the property outside when the majority intends to do the same.

The suit property cannot be partitioned by way of metes and bounds.

The defendants need money as some of the defendants namely defendant No. 5 is old and widow and defendant No. 3 is under financial distress. Thus, the sale to third party is the mode whereby they can reap maximum profits as the plaintiffs intend to buy out the property at lesser value.

The defendant No. 1 is an association of the person wherein the ownership vests in the composite whole in the form of firm as against the ownership in the individuals.

d) The defendants submit that the plaintiffs have been approached even after passing of the ex-parte order, but the plaintiffs have not attempted to resolve this impasse and rather insisted upon the

creating obstacles in the sale of the property to the third party. The event post passing of the exparte order shows that even the plaintiffs are not interested in getting his share of profits in the form of money but rather have their own motives to get the property.

e) It is submitted by the defendants that pursuant to the passing of interim orders by this court, the meeting of co-owners were called on 05.02.2011 in the presence of notary public and also two independent persons. The plaintiffs were also called but did not attend the meeting. It is stated that in the said meeting unanimous decision was taken and resolved that they would approach this court for passing of the orders to the effect of the sale of the suit property as the said property is incapable of being partitioned being a composite unit by metes and bound. It is also in the best interest of all the co-owners that the sale is ordered by the court. The defendants also filed the offer dated 01.02.2011 of Metatron Global Fund LLC who had confirmed its intention to purchase the suit property for a sale consideration of Rs.155 crores but it should be free from all encumbrances and vacant possession. In the letter dated 01.02.2011 issued by defendant Nos.2, 5 and 6 it had also been stated the said buyer was willing to purchase the suit property alongwith its encumbrances.

It is stated that it was also resolved that it is not interest of the co-owners to lease out the said property as the co-owners shall suffer losses. It is also resolved that the said property should not be partitioned and the co-owners shall suffer losses if the said property is partitioned. It is stated in the written statement that the said resolution between the defendants have been accepted by the defendant No. 2 himself and 3 and 4 by their attorneys.

f) It is submitted that the conduct of the plaintiffs is un-equitable as the plaintiffs being minority shareholders just want to impose their say upon the majority by enforcing the terms which never existed in the agreement. The said act or conduct of the plaintiffs are un-equitable considering that the defendants are majority shareholders intend to the deal with the property otherwise by selling the same to the third party to serve the larger interest of the other co-owners as against the limited private gains of the plaintiffs.

g) It is submitted that even under the Partition Act, the court can direct the sale of the suit property. The plaintiffs do not have absolute right to partition. This court should invoke clause 18 of the agreement and direct sale of the party.

21. In nutshell, I.A. No.2824/2011 (O39 R 4 CPC) was filed for vacation of interim order dated 01.12.2011 and 11.2.2011 on the following two grounds :

> (i) 2/3rd of the co-owners have resolved to sell the suit property and in terms of Clause 18 of the MOU the decision is binding on the other co-owners.
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> (ii) That the suit property cannot be partitioned by metes and bounds and the value of the partitioned shares would reduce.

22. The defendants have raised the aforementioned grounds in the application in order to seek vacation of the interim order passed on 01.12.2010 The plaintiffs have filed the replication and

rejoinder.

23. The matter came up for hearing when Mr. Abhinav Vasisht, learned Senior counsel appeared on behalf of the plaintiffs and Mr. P.V. Kapoor appeared on behalf of the defendants and have made their submissions at the bar.

24. The submissions advanced Mr. Vasisht, learned Senior counsel for the plaintiffs can be outlined to the following terms:

a) Firstly, learned Senior counsel submitted that the suit property is owned by the co-owners having their shares defined in the memorandum of understanding entered into between the parties on 5.12.2005. Therefore, the plaintiffs is well within rights to seek partition under the provisions of the partition Act. This court should thus follow the process of the partition of the suit property as envisaged under the partition Act.

b) Secondly learned Senior counsel submitted that there are clear admissions of the shares made by the defendant in their written statement. Thus, the shares of the plaintiffs as co-owners have never been disputed by the defendants. This court should then proceed to appoint the local commissioner in order to ascertain the modes of partition as to whether the suit property can be partitioned by way of metes and bounds.

c) Thirdly, Mr. Vasisht, learned Senior counsel has urged before the court that the reading of clause 6, 7 , 8, 16 and 18 would make it clear that there are matters wherein the consent of all the co-owners are required and there are matters wherein there are 2/3 rd majority is required. Thus, the alienation to third party requires the consent of all the co-owners which means that the defendants stand to the effect that they can sell the property outside being majority shareholders and therefore seeking vacation of the interim orders is totally incorrect as it is the matter which requires the consent of all the co-owners. Clause 6 is reproduced hereinafter:

d) The plaintiffs in their plaint have referred the Clauses 6, 7 and 8 of MOU dated 5.12.2005 for the purposes of the present case. The same are reproduced as under :

"Clause 6 That no Co-Owner shall be able to assign, transfer, license, sell mortgage or otherwise dispose of his/her share/interest in the asset(s) or profits of the firm, create a lien, charge or any encumbrance on his/her share/interest in the asset(s) or profit of the firm without the prior consent of all the other Co-Owners. Clause 7 That the Co-Owners shall have the right to transfer his/her shares to his/her legal heirs or successors during the Co-Owners lifetime without the prior consent of the other Co-Owners. Clause 8 That notwithstanding clause 6 above, any Co-Owner shall have the right to transfer his/her interest in Puri Investment on such terms as he considers fit to the Co-Owner(s) of his/her choice and upon such Co-Owner(s) expressing their unwillingness in writing to acquiring the transferring Co-Owners interest, to circulate

> the same to other Co-Owners to take over his/her interest in Puri Investment on such as he/she considers fit."

It is further argued that the mechanism to sell the property would be that the defendants can offer the same to the plaintiffs or seek the consent of the plaintiffs. The defendants have not done either of them. Accordingly, the defendants ground of seeking modification of vacation of the order passed by this court is totally in violation of the MOU entered on 5.12.2005 as the said sale if ever done by the defendants shall be in violation of the clear terms of the agreement.

Learned Senior counsel for the plaintiffs in order to support his argument has relied upon the following authorities laying down the principles relating to interpretation of statutes and contracts.

1. Gurdevdatta VKSSS Maryadit & Others versus State of Maharashtra, (2001) 4 SCC 534 wherein apex court observed as under:

> "26. Further we wish to clarify that it is a cardinal principle of interpretation of statute that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning, unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to suggest to the contrary. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the Courts are bound to give effect to that meaning, irrespective of the consequences. It is said that the words themselves best declare the intention of the law giver. The Courts have adhered to the principle that efforts should be made to give meaning to each and every word used by the legislature and it is not a sound principle of construction to brush aside words in a statute as being inapposite surpluses, if they can have a proper application in circumstances conceivable within the contemplation of the statute. Bearing in mind, the aforesaid principle of construction, if the expression "any new member society"

occurring in the proviso to sub-section (3) of Section 27 is construed, it conveys the only meaning that it refers to the societies to be formed hereafter and not of those societies which have already become member societies of the federal society. Therefore, the requirement of the completion of the period of three years from the date of its investing any part of its fund in the shares of such federal society would apply only to those societies which became member society of the federal society after 23.8.2000. In this view of the matter, the impugned judgment of the High Court does not suffer from any infirmity. Even if there remained any doubt in the matter of interpreting the proviso, the Ordinance that has been promulgated on 27.02.2001, called the Maharashtra Ordinance 10 of 2001, after the first proviso to sub-section (3), a second proviso had been inserted, which has removed any doubt or controversy inasmuch as it has been indicated therein that the first proviso will not apply to the member society which has invested any part of its fund in the share of the federal society before the commencement of the Maharashtra Cooperative Societies (Amendment) Act, 2000 dated 23.08.2000. The aforesaid Ordinance also has been given a retrospective effect, to be effective from

23.08.2000. The Ordinance having been held to be valid by us as stated above, the so-called prohibition contained in the first proviso to sub-section (3) of Section 27 will not apply to all those societies which have already become members of the federal society prior to 23.08.2000."

2. Bay Berry Apartments (P) Ltd & Anr. Vs Shobha, (2006) 13 SCC 737 wherein apex court observed as under:

> "34. When a document is not uncertain or does not contain an ambiguous expression it should be given its literal meaning. Only when the contents are not clear the question of taking recourse to the application of principles of construction of a document may have to be applied. It is also not a case where there exists any inconsistency between an earlier and later part of the document. What is necessary for a true, proper and effective construction of the will in question is to give effect to the intention of the propounder of the will. It will bear repetition to state that an embargo was put on his sons inheriting the property in absolute terms. Their title was to be limited. They could enjoy the property only during lifetime."

3. Kali Ram versus Ram Rattan, 1977 (13) DLT 250 wherein this court observed as under:

> "7. The courts below have referred to Section 7 of the Act which gives a definition of what is a partnership at will. It states :-
>
> "Where no provision is made by contract between the partners for the duration of their partners, or for the determination of their partnership, the partnership is "partnership at will"."

This Section shows that a partnership at will is a form of partnership in which the parties do not fix a duration of the partnership and do not make any provision as to how the partnership is to be dissolved. Therefore, if the partners do not make an arrangement as to how the partnership is to be dissolved the partnership ipso facto ceases to be a partnership at will. This is the argument that has impressed both courts below. They have looked at the terms of section 7, they have looked at the partnership deed and stated that as the parties have agreed as to how the firm should be dissolved, the partnership cannot be at will inspire of the statement to that effect contained in the partnership document. The question to be determined is whether this is correct. And secondly, even if this was so, whether the partnership was dissolved by the notice actually given in this case."

e) Learned senior counsel further argued that the plea of the defendants that clause 18 would be applicable as the co-owners have agreed to dissolve/liquidate the co-ownership is factually incorrect as the same is not coming out of the resolution dated 5.2.2011. There is no document on record to show that the defendants have ever decided to wind up or dissolve the said co- ownership. Therefore, it can be assumed that the defendants are actually intending to dissolve the co-ownership.

Further, it is argued by Mr. Vasisht, learned Senior counsel that even the defendants resolution do not actually constitute 2/3rd Majority as the defendant No. 2 is not the sole owner of 19/60 share as is being contended by her and defendants share if added together do not constitute 2/3rd majority.

f) Learned Senior counsel for the plaintiffs submitted that the submission of the defendants that the suit property is not partitionable is totally untenable or ill-conceived in as much as the suit property being more than 40000 sq ft built up area on a freehold plot can be easily be partitioned by metes and bounds. Even otherwise, without adopting the measures prescribed under law by way of appointment of local commissioner and clear ascertainment thereto, it cannot be said that the suit property cannot be partitioned.

Mr. Vasisht further submitted that the defendants plea that the smaller shares in fraction will diminish the valuation is also a matter of ascertainment and it can be said to be on mere saying of the defendants unless there is a proper ascertainment by the court through the legal channels.

g) Mr. Vasisht, learned senior counsel also disputes the aspect of the offer of some Metatron Global Fund LLC, there is no legal and valid offer for purchase of the suit property as the offer provides the vacant peaceful possession whereas admittedly, there are sitting tenants occupying 7500 sq ft of the suit property. Thus, in no probability the offer made by the Metatron Global Fund LLC can culminate into the sale of the suit property.

By making the above submissions, Mr. Vasisht concluded that in the present case, the court may conveniently order of preliminary decree of partition after ascertaining the possibility of the partitioning the same by adopting the mechanism prescribed under the law.

25. Per contra, Mr. P.V. Kapur, learned Senior counsel, appearing on behalf of the defendants has made his submissions which can be crystallized in the following manner:

> a) Mr. Kapur, learned Senior counsel firstly submitted that the plaintiffs in the present suit is seeking the partition of the share in the property which is governed by Memorandum of Understanding and thus the plaintiffs are clearly flouting the terms of the memorandum of undertaking by resorting the partition under the Partition Act.

This has been explained by Mr. Kapoor on reading the terms of the agreement clause 6, 8 and 18 wherein it has been explained by Mr. Kapoor that the clause 6 relates to the embargo wherein one co-owner cannot transfer the rights to third party without the consent of all the co-owners. Unlike clause 6, clause 8 provides that the co-owner can transfer his or her share to the other respective co-owner. Clause 18 however is departure from these clauses which does not relates to rights of the single co- owner and it gives the majority of 2/3rd co-owners a right to decide over the rights and liabilities of the co-owners and also any dispute relating to profit or loss or relating to dissolution or winding of the business.

In the present case, the rest of the co-owners except the plaintiffs intend to wind up their business by selling the suit property as they are under financial distress and also no useful purpose shall be served by running the said co-ownership. Accordingly, as per Mr. Kapur, the said power of winding up of the business and selling the property flows from clause 18 of the agreement which has been entered between the parties including the plaintiffs.

Now, once the defendants which are majority co-owners are attempting to find a profitable buyer in exercise of their powers, the plaintiffs could not have any objection. The plaintiffs by resorting to the mode of partition is rather breaching the clear terms of clause 18 and thus guilty of violation of the terms of the agreement.

In order to support his contention, Mr. Kapoor also relies upon some letters which have exchanged between co-owners and also the resolution dated 5.2.2011 to the effect of the decisions of the defendants to sell out the suit property.

In view of the same, as per Mr. Kapur, the present suit is not maintainable in view of the MOU and its terms and condition and the defendants acts cannot be faulted with.

b) Secondly Mr. Kapoor, learned senior counsel submitted that by entering into MOU, the plaintiffs have waived its right to seek partition by entering into such agreement with open eyes.

In order to support his contention, Mr. Kapoor relies upon the judgment passed in Lachoo Mal vs. Radhey Shyam, (1971) 1 SCC 619 wherein the court said that the statutory rights can be waived by contracting otherwise if the same are not against public policy. It is submitted that the agreements which are contracted to limit the benefit which ought to have accrued to the party may not be said to be against the public policy and only those contracts which are aimed at achieving unlawful object by seeking to agree to do something which is prohibited can be said to be ones against the public policy.

c) Thirdly, Mr. Kapur, learned senior counsel argued that the plaintiffs have their own oblique motives to buy out the suit property at the lesser value rather than to benefit the other co- owners by selling the said property outside. The plaintiffs in this way are seeking to invoke the right which never exists in MOU and therefore the suit property cannot be partitioned.

d) Fourthly, Mr. Kapur submitted that the said suit property being a composite unit and the co-owners are large in number, the same cannot be partitioned by the method of the metes and bounds. It is also argued that the suit property if sold as a one unit shall fetch much higher value than the one which sold in fractions and ultimately that will be a loss proposition for all the co-owners. It is submitted by Mr. Kapur that even otherwise, the court can order direct sale in the partition suit if it is realized that the partitioning by metes and bounds shall not be beneficial for the co-owners. Accordingly, this court should order the sale of the property instead than exercising the option of partitioning through metes and bounds.

Mr. Kapur relied upon the following authorities proposition wise:

a) R. Ramamurthy Iyer vs. Raja v. Rajeshwara Rao, 1972 (2) SCC 721 to rely upon the proposition that the partition is not absolute conclusive right. The court can refuse partition if it appears inconvenient or unreasonable having regard to inter alia number of shareholders.

b) Ashanullah versus Kali Kinkur Kur, (ILR 10 Cal 674), to support the proposition that the court can refuse to grant partition where partition would lead to reduction in the intrinsic value of the property.

c) Abdullah Haji versus Kunhamina, AIR 1961 Kerala 674 to say that if the property cannot be partitioned to give every co-owner a share, partition ought not to be granted and sale should be resorted to.

e) Fifthly, Mr. Kapur submitted that the memorandum of understanding entered into the parties will operate as the family settlement whereby the parties by way of an agreement have settled their rights and agreed to amongst themselves to be governed by the rights flowing from the agreements. Thus, the agreed mechanism for resolution of dispute would be the one provided by the MOU and the plaintiffs cannot therefore seek partition of the suit property by breaching the said agreed dispute resolution mechanism wherein the majority decision would be binding upon the minority co-owners.

f) Sixthly, Mr. Kapur submitted that even if the said submissions are not found to be meritorious, still the co- ownership vests in Defendant No. 1 and not in the individual persons and the parties to the suit are merely association of the persons. The consequence of this would be that the individual persons/ parties to the suit cannot claim themselves to be the owner and it is only the defendant No. 1 wherein the ownership vests and thus cannot seek partition.

26. In order to support his argument on the association of persons, Mr. Kapur relied upon the judgment passed by the apex court in Ramanlal Bhailal Patel vs. State of Gujarat, AIR 2008 SC 1246 wherein the apex court observed as under:

> "14. The extent of land that could be held by the appellants depends upon the interpretation of the word „person in section 6(1) of the Ceiling Act which provides that "no person shall be entitled to hold land in excess of the ceiling area". If the ten co-owners are considered as an „association of persons or „body of individuals and consequently as a „person , then the ten co-owners together as a person, will be entitled to only one unit of land which is the ceiling area per person. But if „association of persons or body of individuals is not a „person , or if a co-ownership is not an association of person/body of individuals, then each co-owners or the family of each co-owner, as the case may be will be a separate „person having regard to the definition of person in section 2(21) of Ceiling Act, in which event, each family will be entitled to hold one unit of land."

27. Mr. Kapur drawing the aid from the aforementioned observations of the Supreme Court has argued that the present case also relates to the similar situation wherein the parties are merely association of persons and the ownership actually vests in the firm. This has been further sought to be strengthened by Mr. Kapur on facts by placing reliance upon the following facts:

a) The conveyance deed of the property is in the name of "Puri Investments".

b) The conveyance deed is not signed by all the co-owners in the name of either of them but is in the name of Puri Investments.

c) None of the co-owners can sign any individual document transferring any right in the property.

d) Property tax is paid by Puri Investments

e) Rent was received in the name of Puri Investments.

f) TDS was issued in the name of Defendant No. 1 by using Pan of V.P. Puri

h) In co-ownership there is no concept of liquidation and winding up

i) Plaintiff himself in the memo of parties refers to the co-

ownership or association of persons and use the term interchangeably.

28. All the aforementioned facts also find mention in the list of reliance and written synopsis handed over by the defendants at the later date. Mr. Kapur thus argued that from the above narrated facts, it is clear that the ownership actually vests in the defendant No.1 and not in the individuals and the parties are merely association of the persons and cannot claim to be owners in their own right and consequently cannot claim the partition of the suit premises.

29. By making aforementioned submissions, Mr. Kapur submitted that the interim order passed on 1.12.2010 must be vacated by the court as the suit property in view of his submissions cannot be partitioned. The defendants may be allowed to sell the property to the third party so that it can fetch a better price than what has been offered by the plaintiffs to serve their own interest.

30. In rejoinder, Mr. Vasisht learned Senior counsel strongly refuted the contentions of the defendants on the aspect of association of person. It is argued that the defendants are completely wrong contending that no ownership vests in the parties. This has been explained by relying upon the following factual situation:

a) The issue regarding TDS certificates as already raised by the plaintiffs in their letter to defendants that the rent should be received directly by the co-owners and TDS should be paid by them. The said issue has been addressed in the plaintiffs

letter dated 25.8.2009 and notice dated 6.10.2009 to the defendants.

b) The reading of MOU itself makes it clear that the intention of the parties to act as co-owners and not as Association of Persons.

This has been supported by the fact that if, Puri Investment would have been association of persons, then it would have been taxed separately.

c) The Balance sheet of the defendant No. 1 records a note wherein it is mentioned that Puri Investment is a group of co-owners having definite and ascertained share in the property known as Saraswati Bhavan. The said note in the balance sheet further makes it clear that the intention of the parties was to treat themselves as co-owners and not as of Association of persons.

d) It is also mentioned that in MOU that since no business was carried out by the said firm, it was mutually agreed by the parties that the assets of the said firm shall vest amongst the parties as co-owners which again makes it clear that the parties have themselves agreed to act as co-owners and not as the firm.

e) Clause 1 of the MOU records and clarifies that the parties to the above memorandum of the understanding hereby become and treated as co-owners.

31. It is thus argued by Mr. Vasisht that the aforementioned factual situation speaks for itself that the co-ownership vests in the individuals and not in the firm. Therefore, every co-owner is an individual right holder having ownership on every part of the property till the time it is partitioned and thereby entitling him for the right to seek partition.

The defendants in order controvert the submissions of the plaintiffs have further filed rebuttal submissions disputing all the points above.

32. I have gone through the plaint, written statement, replication and documents filed by the parties. I have also given careful consideration to the oral submissions advanced at the bar and written submissions given by the parties and shall now deal with them in seriatim.

33. The parties have made number of submissions as indicated above. However, the first point in my view which falls for consideration is what is the status of the parties in the suit and what is the status of the defendant No. 1 in the suit. Whether the defendant No. 1 is a partnership or association of persons or co-ownership or whether the parties other than defendant no. 1 can be said to be co-owners. The answer to this question will enable this court to proceed further in the matter depending upon the status of the parties by adopting the right recourse permissible under the law. This will also enable the court to understand whether the suit property can be partitioned or not.

34. Before initiating the discussion on the aspect of the status of the parties in the suit, it is worth noting few facts in the case as a matter of backdrop to this discussion.

a) It is averred in the plaint and also in the written statement that the defendant No. 1 originally started as a partnership firm and no dispute to the said averment has been made.

b) It is also stated that the said firm was dissolved subsequently and it was mutually agreed amongst the partners to hold the suit property as co-owners.

35. The parties nowhere place on record as to when the said firm was dissolved. The parties also do not file the documents and nor place any such deed of dissolution on record to show as to when such dissolution had occurred and when such arrangement was agreed by the parties to be carried on as that of the co-owners and whether the parties at the time of dissolution were transferred such shares in the properties by entering into such transfer deeds so as to become co-owners in their own right. This is due to the reason that during the subsistence of the partnership, the said partners in the defendant No. 1 were only share holders in the profits and losses of firm and the property actually belonged to the firm. All these unanswered questions necessitated this discussion.

36. Firstly, it becomes necessary to discuss in law as to what is nature of the partnership property and what happens when the firm is dissolved.

The Indian Partnership Act, 1932 provides for a mechanism for dealing in property which has been the subject matter of partnership firm upon dissolution of the firm. In this context, the relevant section of the Partnership Act relating to the same is reproduced herein after:-

> "Section 46 :
>
> 46. Right of partners to have business wound up after dissolution. On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights."

37. From the bare reading of the above section 46, it becomes clear that the assets /properties belonging to the partnership vests in the firm as the section uses the expression "property of the firm" and not in the individuals and upon dissolution after settling the debts of the firm, the sum realized out of the assets of the firm is divided amongst the partners to the extent of their profit sharing ratio as a surplus. This also shows that the partner s interest in the estate or property of the firm is confined to the realization of the sum arising of the sale of the property and not to treat himself as co-owner.

38. In this context, the observations of Supreme Court in the case of Commissioner of Income Tax, Madhya Pradesh Vs. Dewas Cine Corporation; AIR 1968 SC 676 are worth noting wherein the court observed thus:

> "Under the Partnership Act, 1932, property which is brought into the partnership by the partners when it is formed or which may be acquired in the course of the business

becomes the property of the partnership and a partner is, subject to any special agreement between the partners, entitled upon dissolution to a share in the money representing the value of the property. When the two partners brought in the theatres of their respective ownership into the partnership, the theatres must be deemed to have become the property of the partnership. Under s. 46 of the Partnership Act, 1932, on the dissolution of-the firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights. Section 48 of the Partnership Act provides for the mode of settlement of accounts between the partners. It prescribes the sequence in which the various outgoing are to be applied and. the residue remaining is to be divided between the partners. The distribution of surplus is for the purpose of adjustment of the rights of the partners in the assets of the partnership; it does not amount to transfer of assets.

On dissolution of the partnership, each theatre must be deemed to be returned to the original owner, in satisfaction partially or wholly of his claim to a share in the residue of the assets after discharging the debts and other obligations. But thereby the theaters were not in law sold by the partnership to the individual partners in consideration of their respective share in the residue."(Emphasis Supplied)

39. Few things immediately become clear from the reading of aforesaid observation of the apex court which are:

a) That once the property being in ownership of the partners is brought into the partnership, it becomes the property of the firm.

b) Every partner s interest in the partnership firm upon dissolution is confined to the sharing the money representing the value of the property in the profit sharing ratio. This is subject to special agreement wherein the partners may agree that instead of the money, some asset shall be allotted as a matter of adjustment or any other agreement.

c) Upon dissolution, the said property is returned to the owner as a matter of adjustment of his claim either in the form of money or property. But the said property cannot be said to be sold in law to the partner in consideration of his share.

40. In Dewas (supra), it was also argued before the Supreme Court that the partners can agree anything by way of special agreement as the mode prescribed in the dissolution is subject to special agreement and thus the property allocated to the partner can be subject to the arrangement between the partners wherein they can agree that the said allocation can be deemed to be in law the sale. This contention was raised by the revenue department which has been negated by the court in the following manner:

> "The Solicitor-General appearing for the Revenue submitted that each partner is entitled to have the assets of the partnership sold for discharging the debts and obligations of the partnership, and for the. purpose of dividing the residue among the partners if property is allotted to the partners in satisfaction of their claims, the transaction must be deemed in law to take the form of a notional sale of the property to the partner in consideration of the money value of his share. Counsel relied upon the statement of the law in Lindley on Partnership, 12th Edn., at p. 568:
>
> ".....in the absence of a special agreement to the contrary, the right of each partner on a dissolution is to have the partnership property converted into money by a sale, even although a sale may not be necessary for the payment of debts.", and also upon the decision of this Court in Addanki Narayanappa and another v. Bhaskara Krishnappa and others (1).
>
> "A partner may, it is true, in an action for dissolution insist that the assets of the partnership be realised by sale of its assets, but where in satisfaction of the claim of the partner to his share in the value of the residue determined on the footing of an actual or notional sale property is allotted, the property so allotted to him cannot be deemed in law to be sold to him."

41. Thus, the Supreme court has answered the said question as well that even if the partners agree otherwise to take the property instead of the monetary value of sale of the property in adjustment of the share of the partner, the said transaction shall not be deemed in law to be sale.

42. The same view has been affirmed by the Supreme Court in C.I.T., U.P Vs. Bankey Lal Vaidya (Dead) By L.R.S; 1971 AIR 2270, wherein Supreme Court observed as under:

> "In the case in hand there is no sale and payment of price, but payment of the value of share under an arrangement for dissolution of the partnership and distribution the assets. The rights of the parties were adjusted by handing over to one of the partners the entire assets and to the other partner the money value of his share. Such a transaction is not in our judgment a sale, exchange or transfer of assets of the firm. In Commissioner of Income-tax, Madhya Pradesh, Nagpur & Bhandara v. Dewas Cine Corporation in dealing with the meaning of the expressions "Sale" and "sold" as used in s. (10) (2) (vii) of the Income-tax Act, 1922, this Court observed that the expression "sale" in its ordinary meaning is a transfer of property for a price, and adjustment of the rights of the partners in a dissolved firm by allotment of its assets is not a transfer for a price. In that case the assets were distributed among the partners and it was contended that the assets must in law be deemed to be sold by the partners to the individual partners in consideration of their respective shares, and the difference between the written-down value and the price realised should be included in the total income of the partnership under the second proviso to s. 10(2) (vii). This Court observed that a partner may, it is true, in an action for dissolution insist that the assets of the partnership be realised by sale of its assets, but property allotted to a

> family in satisfaction of his claim to his share, cannot be deemed in law to be sold to him."

(Emphasis Supplied)

43. The proposition of law which emerges from the above discussion that the property allotted to a partner upon dissolution of firm cannot be deemed under the law a transfer or a sale of the same merely upon dissolution unless there is a specific instrument which can be shown to effect the said transfer has been done besides the dissolution deed.

44. Now, the question which arises for consideration is as to whether the partners of the firm upon dissolution can claim themselves to be the co-owners of a property of the partnership firm or Is interest of partners in the firm is co-extensive with that of the co-owner and whether the partner can regard themselves as co-owners merely upon dissolution either by way of agreeing to divide the said property or agree to claim themselves as co- owners.

45. The question whether the interest of the partner can be equated with that of the co-owner stands answered by the Full Bench Of the Gujarat High Court in the case of Vrajlal Makandas Valiya vs L.D. Joshi, Collector, (1971) 12 GLR 586 wherein Hon ble P.N. Bhagwati CJ (as his lordship then was) speaking for the full bench departing from the view of the Mysore High Court observed thus:

> "It is true that the Mysore High Court has taken a different view in Venkatachalapathi v. State (supra) but with the greatest respect to the learned Judges who decided that case, we find ourselves unable to accept that view. It appears from the judgment in that case that no argument was advanced before the learned Judges based on the distinctive character of the interest of a partner in a partnership.
>
> The interest of a partner in the partnership assets was treated as if it were an interest of a co-owner in property. The learned Judges held that if the result intended to be achieved by the execution of the instrument in question was extinguishment of the rights and interest of the first party in certain special parties of the dissolved firm and corresponding augmentation of the rights and interest of the second party, in consideration a certain sum of money paid to the first party there was no reason why the transaction should not be regarded as a sale of the undivided interest of the first party to the second party. This reasoning with the greatest respect overlooks the true nature of the interest of a partner in a partnership and fails to take into account what really happens when a partner retires from a partnership and takes away either in cash or in property his share in the partnership. We cannot accept this decision as laying down the correct law and in any event in view of the decision of the Supreme Court in the case of Commissioner of Income-tax v. Dewas Cine Corporation (supra), it must be regarded as devoid of authority."

(emphasis Supplied)

46. From the bare reading of the aforesaid observation, it becomes further clear that treating the dissolution document as a conveyance deed or a document of transfer means treating the interest of the partners and co-owners co-extensive which actually is not and would also be going against the dictum of Dewas(Supra). Thus, the proposition discussed above that the merely upon dissolution, the property allotted to the partner cannot be treated as transfer further gets extended which is that until the document effecting such transfer is executed, the said dissolution cannot be regarded as deed of transfer. Therefore, the partners cannot become co-owner upon allotment of the property in the event of dissolution of the firm.

47. The residual part of the proposition framed above still remains to be considered which is that what is the consequence of the partners agreeing upon dissolution to divide the said partnership property amongst themselves and whether the said agreement would confer the right in the partners as co-owners. This question is again answered by the another Full Bench decision of the Gujarat High Court in the case of The Chief Controlling Revenue Authority Vs. Chaturbhuj And Anr, AIR 1977 GJ 1 wherein the Full Bench of the court after analyzing the dictum of Dewas (Supra) and analyzing the differences between the co-ownership and partnership and also above quoted dictum of its own full bench in Vello Industries(Supra) observed as under:

> "In our opinion, what the legal position which ultimately emerges from Naravanappa v. Bhaskara Krishnappa (supra), Dewas Cine Corporation (supra). Commissioner of Income-tax v. Bankey Lal Vaidya, (AIR 1971 SC 2270) (supra) and Velo Industries (supra) is that whatever a partner gets either in the shape of money or in the shape of an immovable property which prior to the dissolution was a property of the partnership firm, is his share in the surplus of the assets of the firm which remained after the liabilities and other outgoings of the firm are provided for. There is no concept of co-ownership amongst partners during the subsistence of the partnership. The partnership properties are not held by the partners as co-owners. The property belongs to the firm and it merely vests in all the partners because the firm has no legal entity. But such vesting does not mean that all the partners are the co-owners of the Property. The distinction between co-ownership and partnership pointed out by the Supreme Court in Champaram Cane Concern v. State of Bihar, (AIR 1963 SC 1737) (supra) must be borne in mind in this connection. Moreover, what happens at the time of dissolution is merely handing over to each partner his share in the surplus of the partnership assets after all the liabilities and outgoings are provided for and if any particular property which prior to the dissolution was part of the partnership is allotted to the partner it is merely by way of adjustment of his share in the assets of the partnership.
>
> As the Supreme Court pointed out in Dewas Cine Corporation's case (supra) the distribution of surplus is for the purpose of adjustment of the shares of the partners in the assets and it is in the course of such adjustment that one or other property - may be moveable, may be immovable - comes in the allotment to a particular partner. The concept of partition or the concept of co-owners of the property dividing or agreeing to divide such property in severalty can never apply to what happens when a

firm is dissolved and one property or another is allotted to a partner." (Emphasis Supplied)

48. From the reading of the aforesaid observation, it becomes abundantly clear that upon dissolution of the partnership, the mutual agreement between the partners to treat themselves as a co-owners is inconsequential in law in as much as the same may not confer any title in the said immovable property which otherwise does not exist in the law. Therefore, the agreement to divide such property in severalty and treatment of the partners amongst themselves as co-owners without respective conveyance deeds in favour of the partners does not confer them the titles as co-owners.

49. Even if one sees the situation as it was existing uptil case of Dewas (Supra) and apply the principles set out therein which are that upon dissolution, the allotment of the property to the partner cannot be regarded as sale or transfer. Then, afortiori, it follows the conveyance deed is essential in addition to dissolution and act of dissolution cannot coincide with the conveyance which is the dictum of Vraj(supra). Lastly, once it is realized that the conveyance deed is separately required in order to confer such title upon the partner or person, Then, any covenant entered between the erstwhile partners to treat themselves as co-owners without the actual conveyance deeds is inconsequential in law as no right of that nature exists under the law as agreed by the parties which has been the exposition of the law in Chaturbhuj(Supra).

50. Applying the said principles of law to the present case in hand, if one sees the status of the defendant No. 1 firm as it existed earlier when it started was of partnership firm, it is stated by the parties that the said firm was dissolved. Firstly, it is not informed by placing the documents on record as to when such firm was dissolved. Even assuming if the said fact would have been informed by placing deed of the dissolution on record, still the said factum of dissolution will not make the partners as co-owners of the properties on their ipse dixit or as per their own agreement unless the mechanism discussed above follows which provides of deed of transfer or transfer document in favour of each of the parties or persons which will vest the said rights in individuals and not in firm.

51. But in fact, neither the dissolution deed is placed on record nor the conveyance deed has been placed on record to show the perfect title of the parties as co-owners and the parties are just silent about the factum of dissolution except to the extent of saying that the said firm was in fact dissolved and it was agreed between them that they will treat themselves as co-owners and proceed to run the same firm again. Going by the word of the parties, if the status of the parties as co- owners is attained on the basis of their mutual agreement in the form of MOU consequent upon dissolution of the partnership, then for the purposes of the prima facie view to be taken in order to decide injunction application, it seems extremely doubtful as to how the partners in the defendant No. 1 firm attain the status of the co-owners by agreeing to divide the said shares in the absence of the conveyance or transfer deeds vesting such rights in view of the exposition of law laid down in Dewas (supra), Vraj(supra) and Chatturbhuj(supra).

52. Accordingly, it can also be safely said for the prima facie purposes that the defendant No. 1 firm which initially started its genesis as a partnership firm, the partners therein cannot agree to regard themselves as co-owners and cannot agree to divide the said property in severalty with each other.

Their status uptil the date of MOUs is no different from that of the partners only as there is no vesting of rights in the co-owners.

53. Now the status of the parties can be looked at from another perspective too which is that the status can be seen from the events which has happened after the dissolution of the said partnership. If the memorandum of understandings as agreed by the parties are looked into, the presumption still goes in favour of the partnership besides the fact the parties could not have acquired the titles as co-owners without entering into the conveyance deeds.

54. This can be seen again by realizing the difference between the partnership and co-ownership. The reference is invited to often quoted excerpt from Lindley on Partnership ((Twelfth Edition Mae 57) who analyzes the said difference very minutely. The Learned Author observes as under:-

> "main differences between co-ownership and co-partnership have been compared. One of the principal differences is that co-
>
> ownership is not necessarily the result of agreement, whereas partnership is ... ... The second difference is that co- ownership does not necessarily involve community of profit or of loss, but partnership does ... ... The third difference is that one co-owner can without the consent of the other, transfer his interest etc. to a stranger, A Partner cannot do this ... ... In a partnership each partner acts for all. In a co-ownership one co-owner is not as such the agent, real or implied, of the other."

55. The said excerpt has been approved by the Supreme Court in the case of Champaran Cane Concern vs. State Of Bihar And Anr. 1963 AIR 1737 followed by several courts from time to time.

56. If the aforesaid differences between the partnership and co- ownership as elucidated above and applied by Supreme Court in Champaran (supra) as a matter of tests for determining the status of the entities are applied to the present case, the conclusion is inescapable which is that the parties till date as per the current arrangement are operating as a partnership. This can be seen by looking the MOU and its clauses as under:

> i) Clause 7 of Memorandum of understanding contains the clause that one co-owner can transfer the share to another co-owner without the consent of any co-owners but cannot transfer the same to the third party without the consent of all the other co-owners. This can happen even in partnership where one partner can transfer his or her share/ profit sharing ratio by retiring himself from the partnership to another partner or inter se, but cannot transfer his share to the third party without the consent of other partners and the same can be a ground for dissolution also.

This shows again the color of partnership rather than co-ownership. Reliance is again placed upon the excerpt of Lindley which states that the co-owner is a person who can transfer the share absolutely to the third party, however, the partner cannot, is one of the fundamental differences

between the partners and co- owners, which differentiate a partner from that of co- owner. This is due to the reason that the co-owner is the owner of the property in his own right and can at his will transfer or alienate his share to stranger unlike partner who is not the owner in his own right. Therefore, even if the parties to the MOU call themselves to be the co- owners but by virtue of their covenant/ understanding have imposed fetters upon themselves on the basis of restrictions on the transfer of their shares to the strangers which again take the parties back to the nature of partnership as against the ascertained rights of the co- owners. Thus, it cannot be said that they are perfectly operating themselves as co-owners rather they are still operating as that of partnership under the guise of co- owners. It is only the nomenclature which the parties have adopted as co-owners and actually they are the partners wherein the rights to transfer the properties are fettered covenant requiring the consent of all other co-owners.

ii) Similarly, the basic difference between partnership and co-

ownership as elucidated by Lindley is that partnership is necessarily contractual but co-owner is not. Here again, there is complete departure by the parties wherein the parties have entered into the MOU calling themselves as co-owners but imposing the fetters like partnership in the said covenant, making the arrangement purely contractual in nature. Therefore, again the said so-called co-owners shall be subject to the arrangements between them in the MOU will not act as independent co-owners entitling them to seek partition amongst themselves.

57. Moreover, the contents of MOU provides for the profit sharing ratio or proportion in clause 4, capital of the co-owners in clause 5, continuation of co-ownership even in the event of death of any of the co-owners in clause 9, appointment of the managing, maintenance of the accounts by the co-ownership, acquisition of the property by the co-ownership in its own name, dissolving and winding up of the firm. All these ingredients in the agreement shows that the intention of the parties was to run or continue the partnership or the entity Puri Investment as a partnership.

58. The incidents like capital and or profit sharing ratio normally are present is partnership, continuation of the firm even in the case of the death of the partner is one of the covenant which the partners usually enter in order to continue the partnership and avoid dissolution in the event of the death of the partner. The dissolution or the winding occurs of a partnership firm and not of the co-ownership. Similarly, it is the partnership which can acquire the property and not the co-ownership.

59. Even if one replaces the word partnership instead of co- ownership in MOU attempts to read the same in that manner, it can be seen that all the covenants entered into by the co-owners become the ones of partnership. But this cannot happen as there is difference between co-ownership and partnership.

60. The above discussion makes it clear that the parties has and had the intention of running Puri Investment like a partnership concern and not to act as the independent co-owners by entering into such covenants. This is in addition to the factor that the parties including the plaintiffs and defendants could not have acquired such rights at the first place as co-owners in law upon

dissolution of the partnership.

61. It is trite law that the intention of the parties are to be seen by reading the whole instrument in its entirety and the title of the instrument or the nomenclature or terms adopted in the instruments do not necessarily define the relationship or are decisive of the nature of the relationship between the parties. The parties may enter into the lease agreement calling themselves as licencees. Similarly, the parties may call themselves as co-owner while they are actually operating as a partners. (Kindly see judgment passed in Mrs. M. N. Clubwala & Anr. Vs Fida Hussain Saheb, 1964 SCR (6) 642 wherein the apex court observed that Whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the decisive consideration is the intention of the parties, which has to be ascertained on a consideration of all the relevant provisions in the agreement. In the absence, however, of a formal document the intention of the parties must be inferred from the circumstances and conduct of the parties.).

62. It is well settled that the party cannot be allowed to take the advantage of the part of the agreement or covenant therein and avoid the rest of the same which is operating to its detriment.(kindly see the judgment of Supreme Court in relation to election C. Beepathumma & Ors. Vs. V.S. Kadambolithaya & Ors., 1964 (5) SCR 836, wherein the apex Court relied on Maitland as saying: "That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it."; (Maitlands Lectures on Equity, Lecture 18). The apex Court also took note of the principle stated in White Tudor's Leading Case in Equity volume 18th edition at p.444 - wherein it is stated, Election is the obligation imposed upon a party by Courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both... That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument."

63. In the case of New Bihar Biri Leaves Co. And Others v. State Of Bihar And Others Nathalal Doshi And Others Vs. State Of Bihar And Others, (1981) 1 SCC 537, the apex Court observed that it is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim, qui approbat non reprobat (one who approbates cannot reprobate), applies in our laws too.)

64. From the above, it is clear that even if the situation as it exists today from the clauses of MOU if analyzed on the principles differentiate partnership from that of co-ownership which has been approved by the Courts from time to time. It is clear that the clauses which have been agreed by the parties calling themselves as co-owners are in the nature of partnership/ quasi-partnership and it cannot be said that the parties are perfectly operating themselves as co-owners or co- shareholders as their rights to consider the property or to enjoy the property are fettered by the covenant in the form of MOU and it is purely contractual affair.

The above stated conclusion as to the status of the defendant No. 1 is in the nature of partnership also finds support from the submissions advanced by the parties on facts. This can be explained as under:

> a) The Parties are attempting to dispute between themselves as to whether co-ownership vests in individual or in the firm.

Immense labour has been done by both the parties to differentiate them by explaining to the Court the concept of association of persons with that of co-ownership and there is dispute between the parties as to whether the co-ownership vests in the firm or in individual partners. This has happened due to the peculiar nature of arrangement or MOU which has been entered into by the parties giving legal shape wherein it started as a matter of partnership but thereafter the parties have mutually agreed to call themselves as co-owners and thereafter mutually agreed to impose fetters upon their rights and that led to the question as to whether the property rights vest in the firm or in the respective individuals. Further, when the parties themselves are disputing as to where the co- ownership vests, either in the individuals or in the firm in order to protect their rights, it shows that they are unclear about their rights and further it also shows that they are not operating themselves perfectly as co-owners as co-ownership vests in individuals and not in the firm and once this argument is taken that the co-ownership vests in the firm axiomatically the presumption tilts towards partnership.

b) It is very easy to understand if one looks at the same from the standpoint where the partnership ended as discussed above in Dewas (supra) that the partnership property vests in the firm and upon dissolution it cannot be said that the partner who has been allocated the property is a co-owners. Therefore, it cannot vest in the individual and the attempts made by the parties to distinguish the concept of co-ownership in the individuals and co-ownership in the firm is due to the reason that parties are themselves not clear about their rights and unsure which of the of the stand would be correct.

c) The plaintiffs in their letter admittedly referred Mr. V.P. Puri as Managing Partner to which the defendants responded that it is co-ownership and called upon the plaintiffs counsel to correct its record. Thereafter, the plaintiffs filed a suit wherein the defendant No. 1 is arrayed as Co-ownership and or unregistered association of persons. When the defendants sought to explain during the course of argument about the distinction between the association of person and co- ownership and sought to urge before the court that the co- ownership vests in the firm and not in individual, the same very plaintiffs have taken aback whereby the plaintiffs filed additional submissions contending that the mere fact it is arrayed in array of parties as unregistered association of person does not make it association of person when more than several places, it is shown as co-ownership.

d) Likewise, the defendants although initially not argued the issue relating to the association of person but virtually realizing that the said concept of co-ownership may invite partition argued about on the aspect of the association of persons but are unable to justify the stands in the covenants wherein they have referred themselves as co-owners of ascertained rights. Further even if defendants take the stand that the co-ownership vests in the firm and actually the parties are merely

association of persons, then again implicitly the defendants are conceding the partnership as association of persons shall be confined to the profit sharing ratio and the property right shall vest in the firm and again the said argument brings back the defendant No.1 within the realm of partnership. Therefore, the argument of the defendants that the co-ownership vests with the firm and the counter- argument that it vests in individuals itself makes it evident that the parties are unclear about their rights and the party which is stating that it vests in the firm actually leading to the inference that there is a kind of partnership between the parties. This dispute on facts by the parties further amplifies the conclusions set out above that the firm is in the nature of partnership wherein the property prima facie vests in the firm and this is more clear when the property is actually registered in the name of firm on records and not in the name of individual persons.

e) Secondly, both the parties have although stated that the firm was dissolved and it was mutually agreed that the parties will act as co-owners. However, the parties have not shown any instrument of transfer by which the said co-ownership is transferred and shall vest in the individuals as indicated above that upon dissolution of partnership, it cannot be said to be ipse dixit of partners themselves that there shall be the co- ownership. There has to be some instrument of transfer whereby the said persons can be said to be vested with the shares and can be categorized as co-owners. There is no instrument upon dissolution of firm which has been shown or placed on record to claim such co-ownership and rather the MOUs which have been entered into at the later date are clear departure from the said concept of co-ownership and tilt the arrangement towards partnership. In the absence of such document/ instrument of transfer, again the conclusion qua partnership finds support in the facts and circumstances

65. The above contradictions and anomalies done by the parties are pointed out in order to show and highlight the change in the stand taken by the parties during the course of the time in order ascertain the true status of the defendant No. 1 and the parties. It is inconceivable that an entity started as a partnership during course of the time have become co-ownership and ultimately sought to be declared as association of persons by the parties to the proceedings. This also shows that there is a serious dispute as to the status of the defendant No. 1 and the parties, which puts the title of the parties under cloud. Accordingly, it is to be discovered in trial when the parties are able to show with the cogent proof of documents what exactly is the true status of the defendant No.1 and whether it can be partition or not. However, in view of the conclusions arrived above, the defendant No. 1 prima facie appears to be operating as a partnership firm and accordingly the inference qua co-ownership is difficult to draw. Resultantly, the suit property prima facie belongs to the partnership or the firm which is defendant No. 1 and cannot be partitioned at the preliminary stage due to the serious nature of dispute as title as to whether the parties are co- owners or partners to be tried between the parties.

It can be argued that the parties have not disputed the co- ownership but only disputed the nature of vesting. The said submission is totally without merit as the parties by contending and differentiating the vesting of co-ownership in the individual with that of the firm are disputing the status of the defendant No. 1 directly. It is to discern the true nature of the status of the parties, the discussion became relevant in the present case.

66. Further, the prima facie view of mine that the defendant No. 1 operates as partnership also takes away the suit property within the concept of partition as the remedy of the unsatisfied partners lie not in partition but in dissolution which shall be subject to the covenants entered into between the parties in the MOU.

Interpretation of Clause 6 of MOU The plaintiffs case from the beginning has been that the defendants are attempting to sell the property in violation of the clause 6 of the terms of the MOU. Firstly, the clause 6 talks about the right of single co-owner and seeks to impose the fetters upon the said right to transfer his or her share outside in the asset or profits of the firm. The reading of the clause makes it clear that it is the share of the co-owner in the assets or profit of the firm and not his share in the property. Further, the said right of a co-owner is restricted qua transfer by way of selling etc without the consent of all the co-owners.

However, the said restricted right of co-owner cannot be said to restrict the unfettered right of the majority of 2/3rd in relation to deciding about the rights and liabilities of the co-owners or the dissolution and winding up of the business as per clause 18. The defendants have shown some communication between defendants between July, 2008 to November, 2010 wherein they decided to wind up the business by selling the property. The said restricted right of a co- owner cannot operate as an embargo to that of the right of the majority under clause 18 of the MOU. The defendants in the written statement have stated that they are looking for the buyer of the property wherein one entity namely Metatron Global Fund LLC is intending to buy the property at the rate of Rs. 155 crores. The defendants have also stated that they are in need of money and are agreeable to the give plaintiffs their share in the profits. All this reveals that the defendants are intending to sell the business of defendant No.1 which is right vests in the majority and the same cannot be fettered by operation of clause 6 of the agreement.

67. It is further noteworthy that the plaintiffs on the one hand contend that the said attempt by the defendants to sell the property is violative of clause 6 of the agreement. However, the plaintiffs themselves do not abide by the agreed mechanism under clause 18 wherein any decision relating to rights or liabilities of the co-owner as well as the winding up or dissolution of the firm vest in the majority. Thus, the plaintiffs cannot accuse the defendants when they are intending to wind up the business by selling the property in view of majority decision as violating memorandum of understanding by filing the suit for partition. The plaintiffs stand of seeking partition under the partition Act itself is coming out the agreement wherein the dissolution rights vest in the majority decision.

68. It is well settled that a party cannot be allowed to take the advantage of the part of the agreement or covenant therein and avoid the rest of the same which is operating to its detriment.(kindly see judgment) Applying the said principle to the fact of the case, it cannot be said by the plaintiffs for the purposes of seeking partition that the defendants are violating the terms of MOU in clause 6 and the court should adopt the modes of partition. If the reliance is placed by the plaintiffs on MOU of clause 6, then the court should adopt the mechanism as agreed between the parties in MOU which means that the right to dissolve the firm vests in the majority as per clause 18 of the agreement and will rather not insist upon the partition in the case like the present wherein the rights of the parties

flow from contractual arrangement which is agrees to the contrary. This is another factor which enables this court to believe that the suit property cannot be partitioned at the preliminary stage as the rights are governed by contract in the nature of MOU wherein dissolution of firm is possible by majority decision.

Further in view of my finding that the status of the defendant No. 1 is prima facie is in the nature of the partnership and the same is governed by the covenant, it is also not proper to treat the partition suit as that of the dissolution and proceed to decide the rights of the parties. The MOU is interpreted to extent necessary as the submissions are advanced by the parties by placing reliance of the same. Once, it is found out that MOU itself leads to the inference of partnership, the discussion on the embargo of the rights of the partners under MOU in the partition suit is otherwise irrelevant.

69. Let me now deal with the submission of the rival parties made at the bar :

> a) Firstly, it is the contention of the plaintiffs that the shares of the plaintiffs and the defendants are allocated in the agreement and there is no dispute as to the shares of the co-owners and therefore, partition is warranted. The said submission of the plaintiff s senior counsel Mr. Vasisht is rejected in as much as the defendants dispute the said share by contending the co-

ownership vest in the firm and the parties are association of the persons. Although my findings are the firm prima facie appears to be of character of partnership. All this reveals that the shares of the co-owners are not ascertained or defined and rather there is dispute qua the status of the parties as co-owners. Thus, the said submission of the plaintiffs is devoid of any merit.

b) Secondly, as regards the interpretation of clause 6 and others, I have already indicated that the operation of clause 6 imposes of the rights of the co-owner and of co-owners and even if the plain rule as discussed by Mr. Vasisht applied, the said reading makes it plain that the right to transfer is fettered when it comes to a co- owner but the right to dissolution of majority is unfettered under clause 18. Further, the part reliance upon the MOU cannot be allowed. If the MOU is accepted, then property all the more becomes not partitionable

c) As regards the submissions on partitions made by the plaintiffs, the same do not warrant discussion in view of my prima facie findings that the suit property is the one belonging to partnership and thus the recourse to partition is not proper.

d) The submissions about the buyer being not proper or incapability of delivering the possession by the defendants also do not aid the case of the plaintiffs as the same will not change my findings qua the status of the suit property and the defendant No. 1 as partnership.

e) Further discussion qua the co-ownership and association of person also becomes unnecessary as I have in depth analyzed the issue above and have come to the prima facie finding the incidents of co-ownership in the parties are missing and the argument of association of persons adopted by the defendants wherein it is sought to be contended that the ownership or co- ownership vests in the

firm rather brings back the defendant No. 1 closer towards partnership and supports the conclusions qua partnership.

No further submission remains unanswered.

70. It is now for me to discuss the principles governing the grant of interim injunction which have succinctly put forward in the case of Dalpat kumar Vs. Prahlad Singh, (1992) 1 SCC 719 which are :

a) Prima facie case

b) Irreparable loss

c) Balance of convenience

71. The plaintiffs have failed to make out a prima facie case for the grant of injunction or partition as in the partition suit, it is found that the prima facie nature and status of the property is that the same is a partnership property vest in the firm and not in the individuals and the rights of the parties flow from contract which is MOU. Thus, there is no prima facie case made out by the plaintiffs for continuation of the said interim order passed on 01.12.2010 in case wherein the plaintiffs seeks partition when prima facie the property is in capable of being partitioned being partnership asset or firm s asset. The balance of convenience is in favour of the defendants as the plaintiffs would be less inconvenienced if the interim order passed on is vacated in as much as the plaintiffs would in any way get their share in the profits of the firm consequent upon the dissolution or winding up by the defendants selling the said property at the higher rates and the defendants are already ready and willing to give said share of profit as per the agreement to the plaintiffs. It is however plaintiffs who is insistent for the partition when the co-ownership rights are prima facie not been established. The irreparable loss will ensue to the defendants if the order dated 01.12.2010 is continued as the defendants will not unnecessarily be restricted to sell out the property when MOU provides for the winding or dissolution of the business by the majority decision and more so when the property is not partitionable in view of it being a partnership asset.

72. Accordingly I.A. No.2824/2011 (O 39 R 4 CPC) is allowed and interim order granted on 01.12.2010 and 11.2.2011 are consequently vacated. I.A. No.3346/2011 (O 12 Rule 6 CPC) is also dismissed as there no admissions in view of my findings and there are rather dispute on the title and nature of ownership by the parties. Consequently both the applications being I.A. No.16165/2010 (O 39 R 1 & 2 CPC) and IA No.2159/2011 (O 39 R 1 & 2 CPC) are dismissed.

73. No costs.

MANMOHAN SINGH, J.

DECEMBER 23, 2011