

## Shri Ramesh Chand Vs Suresh Chand and Another

**Court:** Delhi High Court

**Date of Decision:** April 9, 2012

**Acts Referred:** Civil Procedure Code, 1908 (CPC) â€” Order 2 Rule 2, 96

Contract Act, 1872 â€” Section 202

Evidence Act, 1872 â€” Section 68

Powers of Attorney Act, 1882 â€” Section 1A, 2

Succession Act, 1925 â€” Section 69, 70

Transfer of Property Act, 1882 â€” Section 53A, 54, 55

**Citation:** (2012) 188 DLT 538

**Hon'ble Judges:** Valmiki J Mehta, J

**Bench:** Single Bench

**Advocate:** Rajesh Aggarwal with Mr. Ravi Wadhvani, for the Appellant; R.L. Sharma, Advocate, for the Respondent

**Final Decision:** Dismissed

### Judgement

Valmiki J Mehta, J.

This Regular First Appeal was dismissed by a detailed judgment on 28.2.2011. A SLP was filed in the Supreme

Court against the judgment dated 28.2.2011 and the Supreme Court has remanded the matter back for a fresh decision by its order dated

31.10.2011. The order of the Supreme Court dated 31.10.2011 is based on the issue of the Supreme Court passing the judgment in the case of

Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana and Another, , and as per which judgment the Supreme Court overruled the Division

Bench judgment of this Court in the case of Asha M. Jain Vs. The Canara Bank and Others, Since the judgment of this Court dated 28.2.2011

had relied upon the Division Bench judgment in the case of Asha M. Jain (supra), and which judgment was over ruled the Supreme Court in the

case of Suraj Lamps & Industries Pvt. Ltd. (supra), the matter was therefore remanded back to this Court. Before I proceed to dispose of the

appeal, and which would turn substantially on the judgment in the case of Suraj Lamps & Industries Pvt. Ltd. (supra), it is necessary to reproduce

certain paras of this judgment of the Supreme Court, and which paras are paras 12, 13, 14 and 16, and which read as under:-

12. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of

Sections 54 and 55 of Transfer of Property Act and will not confer any title nor transfer any interest in an immovable property (except to the

limited right granted u/s 53A of Transfer of Property Act). According to Transfer of Property Act, an agreement of sale, whether with possession

or without possession, is not a conveyance. Section 54 of Transfer of Property Act enacts that sale of immoveable property can be made only by

a registered instrument and an agreement of sale does not create any interest or charge on its subject matter.

#### Scope of Power of Attorney

13. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is

creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be

binding on the grantor as if done by him (see Section 1A and Section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any

time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the

grantee. In State of Rajasthan and Others Vs. Basant Nahata, this Court held:

A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is

formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring

necessary authority upon another person. A deed of power of attorney is executed by the principal in favor of the agent. The agent derives a right

to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if

done by the donor. A power of attorney is, as is well known, a document of convenience.

Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers-of-Attorney Act is valid. A power of attorney,

we have noticed hereinbefore, is executed by the donor so as to enable the done to act on his behalf. Except in cases where power of attorney is

coupled with interest, it is revocable. The done in exercise of his power under such power of attorney only acts in place of the donor subject of

course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity.

Any act of infidelity or breach of trust is a matter between the donor and the donee.

An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on

behalf of the grantor.

#### Scope of Will

14. A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his

death. It is not a transfer inter vivos. The two essential characteristics of a will are that it is intended to come into effect only after the death of the

testator and is revocable at any time during the life time of the testator. It is said that so long as the testator is alive, a will is not worth the paper

on which it is written, as the testator can at any time revoke it. If the testator, who is not married, marries after making the will, by operation of law,

the will stands revoked. (see Sections 69 and 70 of Indian Succession Act, 1925). Registration of a will does not make it any more effective.

16. We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance.

Transactions of the nature of "GPA sales" or "SA/GPA/WILL transfers" do not convey title and do not amount to transfer, nor can they be

recognized or valid mode of transfer of immoveable property. The courts will not treat such transactions as completed or concluded transfers or as

conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to

the limited extent of Section 53A of the Transfer of Property Act. Such transactions cannot be relied upon or made the basis for mutations in

Municipal or Revenue Records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer

of leasehold property. A lease can be validly transferred only under a registered Assignment of Lease. It is time that an end is put to the pernicious

practice of SA/GPA/WILL transactions known as GPA sales.

(Emphasis added)

2. A reference to the aforesaid paras shows that unless there is a proper registered sale deed, title of an immovable property does not pass. The

Supreme Court has however reiterated that rights which are created pursuant to Section 53A of the Transfer of Property Act, 1882 dealing with

the doctrine of part performance (para 12), an irrevocable right of a person holding a power of attorney given for consideration coupled with

interest as per Section 202 of the Contract Act, 1872 (para 13) and devolution of interest pursuant to a Will (para 14). Therefore, no doubt, a

person strictly may not have complete ownership rights unless there is a duly registered sale deed, however, certain rights can exist in an

immovable property pursuant to the provisions of Section 53A of the Transfer of Property Act, 1882, Section 202 of the Contract Act, 1872.

There also takes place devolution of interest after the death of the testator in terms of a Will.

3. There is also one other aspect which needs to be clarified before proceeding ahead and which is whether a power of attorney given for

consideration would stand extinguished on the death of the executant of the power of attorney. The answer to this is contained in illustration given

to Section 202 of the Contract Act, 1872, and the said provision with its illustration reads as under:-

Section 202. Termination of agency, where agent has an interest in subject matter.- Where the agent has himself an interest in the property which

forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

#### Illustrations

(a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority,

nor can it be terminated by his insanity or death.

(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself

out of the price the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.

The object of giving validity to a power of attorney given for consideration even after death of the executants is to ensure that entitlement under

such power of attorney remains because the same is not a regular or a routine power of attorney but the same had elements of a commercial

transaction which cannot be allowed to be frustrated on account of death of the executant of the power of attorney.

4. In the aforesaid background, I would seek to reproduce the relevant paras of the judgment passed by me on 28.2.2011 to show that the said

reasons given in the judgment dated 28.2.2011 would still apply for disposal of the present appeal and which reasons have no co-relation to the

aspect of overruling the Division Bench judgment of Asha M. Jain (supra). The relevant paras of the judgment dated 28.2.2011 are as under:-

1. The challenge by means of this regular first appeal u/s 96 of the Code of Civil Procedure, 1908, is to the impugned judgment and decree dated

11.5.2000 whereby the suit of the respondent No. 1/plaintiff for possession and mesne profits with respect to the property No. 563, Ambedkar

Basti, near Balmiki Gate, Ghonda, Delhi-110053 was decreed.

2. The case of the respondent No. 1/plaintiff was that Sh. Kundan Lal, father of the parties, who owned the property, sold the property to him by

means of the documents being the agreement to sell, power of attorney, affidavit, receipt and Will on 16.5.1996. It was pleaded that the

appellant/defendant No. 1 was residing as a licensee in the suit property and which licence was terminated making the appellant/defendant No. 1

liable to hand over possession of the suit property. It was also pleaded that the appellant/defendant No. 1 had the possession of the original papers

of the property and which he had refused to part with and therefore a mandatory injunction was also sought for return of the documents.

3. The appellant/defendant No. 1 contested the suit by stating that the father Sh. Kundan Lal owned three properties namely the suit property,

another property being property no. 290 at the same Ambedkar Basti and third property being the property adjoining property no. 290. It was

stated that father during his life time partitioned the properties. The suit property fell to the share of the appellant/defendant No. 1. The partition

was stated to be in July, 1973. The appellant/defendant No. 1 also filed a counter-claim for cancellation of the documents executed in favour of the

respondent No. 1/plaintiff by the father on 16.5.1996.

4. After the pleadings were complete, the trial court framed following issues.

1. Has the plaintiff any right, title or interest in the suit property?

2. Whether the defendant became the owner of the suit property by virtue of oral partition in the year 1973?OPD

3. Whether the defendant no.1 became the owner of the suit property on the basis of adverse possession also OPD

4. Whether the alleged documents i.e. agreement to sell, GPA, will are null and void in view of the para 5 of the preliminary objection in the W.S.?

OPD

5. Whether the suit is barred by O-2 Rule 2 CPC?OPD.

6. Whether the suit is not properly valued OPP

7. Whether the plaintiff is entitled to the relief claimed.

8. Whether the defendant no.1 is entitled to the relief of counter claim OPD

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6. The respondent No. 1/plaintiff appeared in the witness box and proved the documents dated 16.5.1996 being the agreement to sell

(Ex.PW1/2), General Power of Attorney (Ex.PW1/6), Affidavit (Ex.PW1/3), Receipt for Rs.1,40,000/- (Ex.PW1/4) and Will (Ex.PW1/5). The

respondent No. 1/plaintiff also got support of their stand from the depositions of the attesting witnesses to the documents namely Sh. Munir Ahmed

who was examined as PW-3 and Sh. Shri Ram was examined as PW-4. Brother of the parties Sh. Ram Swaroop, deposed in favour of the

respondent No. 1/plaintiff as PW-2.

7. In my opinion, the respondent No. 1/plaintiff has validly proved that the right in the suit property was transferred in his favour by means of the

documents dated 16.5.1996. The witnesses to these documents deposed in favour of the respondent No. 1/plaintiff and supported the execution

of the documents. Learned counsel for the appellant sought to argue that there were inconsistencies in the statement of the attesting witnesses

because Sh. Munir Ahmed (PW-3) stated that he did not know whether Sh. Kundan Lal used to put thumb impression or signatures and Sh. Shri

Ram (PW-4) talked of a sale deed whereas the documents in question do not show existence of a sale deed. Learned counsel for the appellant

also argued that the brother Ram Swaroop (PW-2) stated that the property bearing no.290 Ambedkar Basti was given in gift and not in sale and

thus there was contradiction in the statement of PW-2 because the suit property was not gifted but sold.

8. I do not find any substance whatsoever in the arguments of the learned counsel for the appellant. A civil case is decided on balance of

probabilities. In every case, there may appear inconsistencies in the depositions of witnesses however, the depositions have to be taken as a

whole. Minor inconsistencies which do not affect the main substance of the case, are to be taken in correct perspective along with the other

evidences, including documentary evidence which is led in the case. Assuming that a witness is not stating correctly in some places does not mean

that he is to be held lying generally and hence an unreliable witness. This is so because it has been repeatedly said by the Supreme Court that the

doctrine Falsus in Uno, Falsus in Omnibus does not apply in India. The inconsistencies which are pointed out by learned counsel for the appellant

do not in any manner, whittle down the effect of the documents dated 16.5.1996, and which established that, the respondent No. 1/plaintiff paid

consideration of Rs.1,40,000/- to his father for purchase of the property. In any case, it has come in the deposition of the other brother PW-2 that

the father offered the property for sale to all the brothers, and it was only the respondent No. 1/plaintiff who offered to purchase the property, and

thereafter purchased the property. The deposition of the brother Ram Swaroop (PW-2) is important because if the case of the appellant/defendant

No. 1 was correct that there was a partition in the year 1973 then, even Sh. Ram Swaroop would have got one of the properties, but Sh. Ram

Swaroop who was having good relations with the appellant/defendant No. 1, deposed that there was no partition in the year 1973. Another aspect

worth noting is that before the stand of the appellant/defendant No. 1 can be considered that there was a partition in the year 1973, it was

necessary to be shown that besides the suit property Sh. Kundan Lal also owned two other properties namely 290 Ambedkar Basti and also the

property adjoining of the 290 Ambedkar Basti. There is not a shred of evidence on record that Sh. Kundan Lal owned the two properties namely

290 Ambedkar Basti and the property adjoining 290 Ambedkar Basti and thus, this case of partition of the appellant/defendant No. 1 accordingly

falls to the ground. Also, if there was a partition, then, surely, the father also would have taken some share in the properties however, as per the

case of the appellant/defendant No. 1, the father did not choose to have even one out of three properties. This also is unbelievable assuming that

father owned two other properties besides the suit property, and which in any case he is never shown to have owned.

9. At this stage, I must bring a relevant fact on record that this case was argued in detail on 31.1.2011 whereafter it was fixed for today. There

was a possibility of compromise in the appellant/defendant No. 1 getting a share of the said property. It transpires that in fact the

appellant/defendant No. 1 has also sold 50% of this property, whereas at best if the property was to be partitioned today, the appellant would

have had only 1/4th share of the properties as there were three sons of late Sh. Kundan Lal and one daughter. The respondent No. 1 agreed that

the appellant/defendant No. 1 may keep receipt for sale consideration of 50% of the property, which in fact would be double of his share of 1/4th,

however, the counsel for the appellant, on instructions from the appellant, who is present in court refused the offer of the respondent No. 1/plaintiff.

10. This court is entitled to interfere with the findings and conclusions of the trial court only if the findings and conclusions of the trial court are illegal

and perverse. Merely because two views are possible, this court will not interfere with the impugned judgment and decree unless the same causes

grave injustice. I do not find illegality or perversity in the impugned judgment and decree which calls for interference by this court. The facts of the

case show that respondent No. 1/plaintiff was duly able to substantiate his case and get support from both attesting witnesses of the documents

besides also from the brother Ram Swaroop who had good relations with the appellant/defendant No. 1.

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5. To avoid unnecessary repetition, I am not again stating all the facts, issues, evidence and discussion as contained in the aforesaid paras and I

would seek to adopt the same for the purpose of disposal of this appeal as if the said paras are in fact part of this judgment.

The summarization is that the documents which were executed by the father Sh. Kundan Lal in favour of the respondent No. 1/plaintiff/son dated

16.5.1996 would not stricto sensu confer complete ownership rights, however, the said documents would create rights to the extent provided for

by Section 202 of Contract Act, 1872 and ownership on account of devolution in terms of the Will after the death of the testator in terms of

relevant provisions of Indian Succession Act, 1925. Of course, I hasten to add that so far as the facts of the present case are concerned, I am not

giving the benefit of the doctrine of part performance u/s 53A of the Transfer of Property Act, 1882 to the respondent No. 1/plaintiff inasmuch as

learned counsel for the appellant is correct in arguing that the benefit of the said doctrine cannot be given as the physical possession of the property

was not transferred to the respondent No. 1/plaintiff by the father Sh. Kundan Lal under the agreement to sell dated 16.5.1996.

6. Accordingly, even if we do not give the benefit of Section 53A of the Transfer of Property Act, 1882 to the respondent No. 1/plaintiff, the

respondent No. 1/plaintiff however would be entitled to benefit of Section 202 of the Contract Act, 1872 and the fact that ownership had

devolved upon him in terms of the Will executed by the father in his favour on 16.5.1996. The argument urged on behalf of the appellant by his

counsel that power of attorney, Ex.PW1/6 ceased to operate after the death of the father is an argument without any substance in view of the

provision of Section 202 of the Contract Act, 1872 alongwith its illustration (which I have reproduced above) and which shows that power of

attorney given for consideration operates even after the death of the executant.

7. Great stress was laid on behalf of the appellant to the fact that the respondent No. 1/plaintiff had failed to prove the Will, Ex.PW1/5 in

accordance with law inasmuch as no attesting witnesses were examined. Reliance is placed on behalf of the appellant on the judgment of the

Supreme Court in the case of Kashibai & Anr. Vs. Parwatibai & Ors. 1995 4 AD S.C. (C) 41 to argue that the Will has to be proved in terms of

the provisions of Indian Succession Act, 1925 and Section 68 of the Evidence Act, 1872 by calling of the attesting witnesses and if the same is not

done merely because there is an exhibit mark given to the Will, the same cannot be said to be proved.

In my opinion, the judgment of the Supreme Court in the case of Kashibai & Anr. (supra), and various other judgments which deal with the issue

of requirement of a Will having to be proved by summoning of an attesting witness, are judgments given in those cases where there are inter se

disputes between the legal heirs of a deceased testator and the validity of the Will is questioned in those circumstances. Observations in the said

judgments cannot have application to the facts of those cases where the disputes with regard to Will are not classical disputes between the legal

heirs of the deceased testator and the Will is an instrument which really furthered an intent to transfer the rights in an immovable property by the

testator to the beneficiary. I may note that in the present case, there is absolutely no cross examination at all on behalf of the appellant when the

registered Will was proved and exhibited in the statement of the respondent No. 1/plaintiff as PW-1. Once there is no cross-examination, in the



cases such as the present, which are different than the classical disputes inter se the legal heirs of a deceased testator, I would feel that the Will

should be held to be a proved document inasmuch as the object of the Will in cases such as the present was really to transfer rights in an

immovable property after the death of the testator. Further, I may note that the observations with respect to Will having to be very strictly proved

by calling the attesting witness are in probate cases where the judgment is a judgment in rem whereas in the present case the judgment on the basis

of ownership rights devolving upon the respondent No. 1/plaintiff under a Will not be a judgment in rem but only a judgment inter se the parties.

Also another aspect to be borne in mind is that besides the two sons of the deceased Sh. Kundan Lal, who were the plaintiff and defendant No. 1

in the suit, the other legal heirs of the deceased Sh. Kundan Lal were very much in knowledge of the present litigation but they never chose to add

themselves as parties. Whereas the other son i.e. the brother of the parties to the present suit, Sh. Ram Swaroop deposed in favour of respondent

No. 1/plaintiff as PW-2, the only daughter of the deceased Sh. Kundan Lal namely Smt. Krishna deposed in favour of the appellant/defendant No.

1 as DW-2. Therefore, all the interested parties, who would claim any benefit in the suit property, were aware of the subject litigation.

8. Another argument very strenuously put forth on behalf of the appellant was that the documents dated 16.5.1996 executed by the father in favour

of the respondent No. 1/plaintiff were forged and fabricated documents created after the death of the father who died in the year 1997. In my

opinion, this argument is totally without any merit for the reason that the documents being the agreement to sell, general power of attorney, receipt,

etc. dated 16.5.1996 includes a registered document being the Will which was registered with the sub-Registrar on the date of its execution i.e.

16.5.1996. Therefore, this argument that the documents were fabricated after the death of Sh. Kundan Lal in 1997, is therefore rejected.

9. Learned counsel for the appellant finally laid great stress on paras 18 and 19 of the judgment of the Supreme Court in the case of Suraj Lamps

& Industries Pvt. Ltd. (supra) and which read as under:-

18. We have merely drawn attention to and reiterated the well-settled legal position that SA/GPA/WILL transactions are not ""transfers"" or ""sales

and that such transactions cannot be treated as completed transfers or conveyances. They can continue to be treated as existing agreement of sale.

Nothing prevents affected parties from getting registered Deeds of Conveyance to complete their title. The said ""SA/GPA/WILL transactions"" may

also be used to obtain specific performance or to defend possession u/s 53A of TP Act. If they are entered before this day, they may be relied

upon to apply for regularization of allotments/leases by Development Authorities. We make it clear that if the documents relating to

SA/GPA/WILL transactions"" has been accepted acted upon by DDA or other developmental authorities or by the Municipal or revenue

authorities to effect mutation, they need not be disturbed, merely on account of this decision.

19. We make it clear that our observations are not intended to in any way affect the validity of sale agreements and powers of attorney executed in

genuine transactions. For example, a person may give a power of attorney to his spouse, son, daughter, brother, sister, or a relative to manage his

affairs or to execute a deed of conveyance. A person may enter into a development agreement with a land developer or builder for developing the

land either by forming plots or by constructing apartment buildings and in that behalf execute an agreement of sale and grant a Power of Attorney

empowering the developer to execute agreements of sale or conveyances in regard to individual plots of land or undivided shares in the land

relating to apartments in favour of prospective purchasers. In several States, the execution of such development agreements and powers of

attorney are already regulated by law and subjected to specific stamp duty. Our observations regarding ""SA/GPA/WILL transactions"" are not

intended to apply to such bona fide/genuine transactions.

These paragraphs were relied upon in support of the proposition that by these paras the Supreme Court in fact explained its earlier observations

made in paras 12, 13, 14 and 16 of its judgment and that the Supreme Court did not intend to give any rights in immovable property. In other

words, the argument was that in spite of paras 12 to 16 of the judgment in the case of Suraj Lamps & Industries Pvt. Ltd. (supra) the documents

being an agreement to sell u/s 53A or a power of attorney coupled with interest or a Will cannot create rights in an immovable property. In my

opinion, this argument urged on behalf of the appellant really does not convey any meaning to me inasmuch as the argument, if accepted, would

mean that I am ignoring the binding observation/ratio of the Supreme Court given in paras 12 to 16 of the judgment in the case of Suraj Lamps &

Industries Pvt. Ltd. (supra).

10. Finally, I would like to take on record the fact that learned counsel for the respondent No. 1 has reiterated the stand of the respondent No.

1/plaintiff contained in para 9 of the judgment dated 28.2.2011 that the respondent No. 2 who seems to have acted bonafidely should not be

unnecessarily prejudiced by the litigation in the family and to the extent of 50% rights created in favour of respondent No. 2 in the suit property the

same are preserved and such rights in favour of respondent No. 2 will remain and the respondent No. 1/plaintiff is only claiming possession of the

balance portion of the suit property from the appellant/defendant No. 1. Also, I may for the sake of completeness state that the arguments which

were raised on behalf of the appellant in this Court were only with respect to issue Nos. 1, 2 and 4 which were framed by the trial Court and no

other issue was pressed or urged before this Court.

11. In view of the aforesaid facts and the validity of the documents, being the power of attorney and the Will dated 16.5.1996, the respondent No.

1/plaintiff would though not be the classical owner of the suit property as would an owner be under a duly registered sale deed, but surely he

would have better rights/entitlement of possession of the suit property than the appellant/defendant No. 1. In fact, I would go to the extent saying

that by virtue of para 14 of the judgment of the Supreme Court in the case of Suraj Lamps & Industries Pvt. Ltd. (supra) taken with the fact that

Sh. Kundan Lal has already died, the respondent No. 1/plaintiff becomes an owner of the property by virtue of the registered Will dated

16.5.1996. A right to possession of an immovable property arises not only from a complete ownership right in the property but having a better title

or a better entitlement/right to the possession of the property than qua the person who is in actual physical possession thereof. The facts of the

present case show that the respondent No. 1/plaintiff has undoubtedly better entitlement/title/rights in the suit property so as to claim possession

from the appellant/defendant No. 1/brother. I have already held above that the appellant/defendant No. 1 miserably failed to prove that there was

any partition as alleged of the year 1973 whereby the suit property allegedly fell to the share of the appellant/defendant No. 1. In fact, the second

reason for holding the appellant to be unsuccessful in establishing his plea of partition is that the appellant failed to lead any evidence as to the other

two properties being the property No. 290, Ambedkar Basti, Delhi and the second property being the property adjoining the property No. 290,

Ambedkar Basti, Delhi as having belonged to the father Sh. Kundan Lal. In view of the above, I do not find any merit in the appeal, which is

accordingly dismissed subject to the observations made above that the respondent No. 1/plaintiff will only be entitled to possession of 50% of the

suit property which is in possession of the appellant/defendant No. 1, and the rights of respondent No. 2 would remain secure with respect to the

50% share of the suit property which was purchased by the respondent No. 2/defendant No. 2 from the appellant/defendant No. 1. Parties are left

to bear their own costs. Trial Court record be sent back.