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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA 597/2017, CM APPL.Nos.35091/2018, 43289/2019,
49952/2019

JAGDISH RAI

..... Appellant

Through : Mr.Rajesh Yadav, Ms.Chandrani
Prasad, Ms.Shikha Aggarwal,
Advocates.

versus

RAM KRISHAN & ORS

..... Respondents

Through : Mr.Deepak Dhingra, Advocate for
R3.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

ORDER

% **06.02.2020**

CM APPL.No. 37562/2019

This is an application moved by respondent no.3, wife of respondent no.2 to let out a part of residential property viz. plot no. B-2/23, Ashok Vihar Phase-II, New Delhi-52, admeasuring 1000 sq.yds. The space which she intends to let out opens towards the main road, the site plan of which is on record. The reason to let out is the financial constraints faced by respondent no.3.

However the learned counsel for the appellant says the said property is owned by appellant, the respondents no.1 and 2 jointly by way of a perpetual lease deed dated 11.12.1972 and is a *dwelling* house in residential area and per Section 44 of the Transfer of Property Act no outsider can be allowed to stay in the such dwelling

house. It is alleged the respondent no.3 intends to create a lease in favour of some third person and per Section 105 of the Transfer of Property Act creation of lease would then create an *interest, right* in the said property which per se is barred by the proviso of Section 44 of the Transfer of Property Act, which runs as under:

“44. xxxxx Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.”

The learned counsel for the appellant taken me to *Shaha Ratansi Khimji and Sons vs. Kumbhar Sons Hotel Private Limited and Others* (2014) 14 SCC 1 which notes:

“17. xxxxx A lease of immovable property is a transfer of right to enjoy such property in consideration of price paid as per Section 105 of the T.P. Act. By way of lease, a right and interest is created which stands transferred in favour of the lessee. xxxxx”

Hence it is argued the premises cannot be let out.

However the learned counsel for respondent no.3 says *admittedly* this portion was earlier being used for commercial purposes by the son of respondent no.3 and the subject property is in a mixed land use area as it is on a 30 feet wide road. The documents in this regard be submitted by the counsel for respondent no.3 within a week from today with an advance copy to the learned counsel for the appellant.

List on 26.02.2020.

YOGESH KHANNA, J.

FEBRUARY 06, 2020

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