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A.Nos.1929 & 1930 of 2023

in C.S.DR.No.35228 of 2023

<i>Reserved on</i>	<i>14.06.2023</i>
<i>Delivered on</i>	<i>26.06.2023</i>

K.KUMARESH BABU, J.

These applications have been filed seeking leave of this Court to institute a suit in respect of properties which are outside the jurisdiction of this Court and to institute a suit as against the first respondent who is residing outside the jurisdiction of the Court.

2.Heard Mr.P.Srinivas, learned Senior Counsel appearing for Ms.Mythili Srinivas, learned counsel for the applicant, Mr.T.K.Ramkumar, learned counsel appearing for M/s.Ram and Rajan Associates for the respondents 2, 3 & 4 and Mr.Prahalad K.Bhat, learned counsel appearing for the first respondent.



3.Mr.P.Srinivas, learned Senior Counsel appearing for the applicant would submit that the present suit had been filed seeking for partition of properties originally belonging to Hindu Undivided Family of the respondents. He would submit that the applicant is the daughter of the first respondent and that the applicant is under the exclusive care & custody of the mother. He would submit that the respondents 1 to 3 by a registered Deed of Partition had divided the joint family properties which had been acquired by them from their ancestors and certain properties were allotted to the first respondent. The mother of the applicant was married to the first respondent in the year 2012 and the applicant was born to them on 11.10.2015. Due to some difference between the first respondent and the mother of the applicant, they are living separately and the applicant was in the care & custody of the mother. While that being so, the respondents 1 to 3 have entered upon an unregistered Memorandum of Understanding purported to record alleged oral family arrangement dated 16.11.2021.



4. Under the said Memorandum, it was decided between themselves to revisit the registered Partition Deed which would presuppose that they had rescinded from the earlier Partition Deed. Since the applicant being a daughter of the first respondent and that by her birth, she had acquired right in the ancestors property and therefore, the present suit had been filed seeking for partition of the Suit Schedule Properties and for various other reliefs. It had become necessary to take the present application for grant of leave, as some of the properties are outside the jurisdiction of the Court and that the first respondent is also residing outside the jurisdiction of the Court. Hence, he would pray to this Court to grant the relief as prayed for in these applications.

5. Learned Senior Counsel would rely upon the provisions of Order 8 Rule 2 of the Original Side Rules, Order 32 Rule 1 of C.P.C. and Section 17 of C.P.C, to drive home his contentions, as regards to the jurisdiction as well as the entitlement of the applicant to institute the present suit.



6.Mr.Prahalad K.Bhat, learned counsel appearing on behalf of the first respondent would vehemently oppose the grant of leave by this Court. He would contend that the present suit of partition is a suit for land and that Clause 12 of the Letters Patent Act would not be made available to suit for land. Leave could only be granted in any suit other than a suit for land. He would rely upon a judgment of the Federal Court in *Moolji Jaitha's* case reported in *MANU/FE/0007/1950* wherein, the Federal Court had held that in a case of suit for land, the jurisdiction would be determined by the location of the land alone and not based on other factors.

7.He would submit that as regards to the suit for partition, the land situated outside the jurisdiction of the concerned Court could also be added in a jurisdiction of the Court where some of the properties are available by virtue of Section 17 C.P.C. But, however, he would submit that Section 121 of C.P.C. specifically excludes application of Section 17 to the High Courts. Therefore, he would submit that the provisions relied upon by the learned Senior Counsel could not be made



available to the present fact of the case. He would submit that it is not that the applicant is without remedy, he would suggest that the applicant could file the present suit before any other Court which has territorial jurisdiction and that the Court being not a High Court under Section 17 of C.P.C. entertain a suit even for properties not situated within its jurisdiction. There is no necessity to grant leave to institute the suit as the same is not maintainable before this Court. To drive home his contentions, he would further rely upon a judgment in the case of ***Adcon Electronics Pvt. Ltd. vs. Daulat and Another*** reported in ***2001 7 SCC 698*** and the case of ***Begum Sahiba Sultan vs. Nawab Mohd. Mansur Ali Khan and Others*** and therefore, he would pray this Court to reject the applications filed by the applicant.

8. In reply, learned Senior Counsel would rely upon two Division Bench judgments of this Court in the case of ***A. Giridhar & another vs. A. Suresh & others*** reported in ***1988 2 LW 308*** and in the case of ***S.A. Fasluddin & another vs. S.M.A. Siyauddin & 3 others*** reported in ***2011 SCC OnLine Mad 2073***.



9. Learned counsel appearing on behalf of the respondents 2 to 4 would submit that the suit for partition is a suit for land and therefore, he would submit that the application seeking grant of leave should not be entertained by this Court as major portions of the properties are outside the jurisdiction of this Court.

10. I have considered the submissions made by the respective counsel appearing for the respective parties and perused the materials available on record.

11. The main objection of the first respondent is based upon the contention that a suit for partition is a suit for land and when the suit for land is initiated before this Court, the property should vest within the jurisdiction of this Court. If otherwise the suit could not be initiated before this Court. Further Section 17 which enables the suit to be filed even in respect of a property situated outside the jurisdiction of the Court is not applicable to the High Court in view of Section 120 of C.P.C. Reliance of the Federal Court judgment reported in



MANU/FE/0007/1950 has been heavily made. The issue involved in the said case is as regards to a suit initiated for a declaration in respect of lands and for a mandatory injunction to direct execution of all such documents and deeds for transferring the lands in the name of the applicant and for recovery of sums wrongfully withdrawn by the respondents.

12.It is pertinent to note that three of the Judges of the five Judges Bench had held that the suit filed by the plaintiff was not a suit for land even though there was a specific prayer seeking for declaration that the properties belonged to the plaintiff company and also for execution of such documents and deeds for transferring the title of the lands. The relevant paragraphs in the aforesaid judgment are extracted hereunder:

“15.The view of a large majority of Judges thus appears to be that the expression 'suit for land' should not be narrowly confined and limited to suits for the recovery of possession of land or to obtain a declaration of title to land only. The wider meaning of the expression, so as to cover all suits



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relating to land, i.e., which has anything to do with land, does not appear to be accepted by anyone. That leaves the question wherein between the line of demarcation should be drawn. The Courts have differed in the matter of drawing this line under different circumstances, and the same Court has taken divergent views on the point. No judicial decision has attempted to give an exhaustive enumeration of the suits covered by the expression 'suit for land' and I do not propose to do so. It is sufficient to say that taking the suit as a whole, one has to consider whether it is for the, purpose of obtaining a direction for possession or a decision on title to land, or the object of the suit is something different but involves the consideration of the question of title to land indirectly.

...

25. That leaves the question whether the respondents' suit should fail because they had put prayer (a) in the plaint. The inclusion or absence of a prayer is not decisive of the true nature of the suit, nor is the order in which the prayers are arrayed in the plaint. The substance or object of the suit has to be gathered from the averments made in the plaint and on which the reliefs asked in the prayers are based. A plaintiff may ask for a relief which a Court of equity may not grant. But I do not see any justification to non suit the plaintiff because of such a prayer. That will be insisting on a form of pleading and not on the substance of the suit. In Penn v. Lord Baltimore,



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2 *White & Tndor's Eq. cas. 4th Ed. 923*, a claim for possession was made but the Court did not give that relief in its decree. But the Court did not dismiss the suit because such claim was made by the plaintiff in the writ. In my opinion, there fore, the respondents' prayer for a declaration of title to the land is no ground for holding that: the Original Side of the Bombay High Court is not competent to try the suit.

...

54. I may observe in this connection that the test of the decree in the suit "operating directly on the land" propounded in some of the decisions seems rather unsatisfactory. The words are of no precise connotation besides being not quite accurate as applied to decrees operating only inter partes. Strictly speaking, it is only judgments in rem adjudicating upon the status of a res that can be said to operate directly on the thing, and such judgments can be given only by Courts exercising special jurisdiction as in admiralty. The effect of such a judgment is that "the order of the Court operates directly upon the status of the property and transfers an absolute title to a purchaser;" the operation of other judgments, being in the nature of a command or prohibition, is only personal. (See Halsbury's Laws of England, Hailsham Edn., Vol. 1, para. 84). This principle is embodied in S. 41, Evidence Act, which refers, inter alia, to judgments in Probate etc., jurisdiction declaring "any person to be entitled to any specific thing not as



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against any specific person but absolutely" and provides for their relevancy and conclusiveness against all the world. For similar reasons, I would rather not use the expressions "actions in rem" and "actions in personam" or "local actions" and "transitory actions" in defining a suit for land, as some of the Judges in the decided cases, e.g., Mackay J., in Velliappa Chettiar v. Govinda Doss, MANU/TN/0077/1928 : 53 Mad. 809 : (A.I.R. 1929 Mad. 721 F.B.), and Bhagwati J., in the Court below, have done. As pointed out by Mr. Dicey (Conflict of Laws, 6th Edn., p. 205) the only strict action in rem now existing under the English law is the action which can properly be brought in the Admiralty Division of the High Court against a ship or other res such as cargo or freight; all other actions being only proceedings in personam. Nor is the old classification of actions into local and transitory of much practical importance now in England, local venues for trial of actions having been abolished except where otherwise provided by statute (O. 36, R. 1, R.S.C.), Surely, the meaning of the phrase "suit for land" in the Letters Patent should not be made to depend on what used to be regarded as actions in rem or local actions in England prior to the Judicature Acts. While all suits for land may be regarded as local actions, it will not be correct to say that all local actions according to the old English classification must be regarded as suits for land.

55.Mr. Setalvad referred to some of the provisions of the Civil Procedure



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Code of 1859 as supporting the view for which he contended, namely, that a suit for land means a suit relating to land. A comparison of the language of S. 6 of that Code with that used in cl. 19, Letters Patent originally issued in 1862 shows, no doubt, that Cl. 12 was modelled on S. 5 and that it was intended that the original jurisdiction of the High Court should be exercised subject to the same limitations as the jurisdiction of civil Courts under the Civil Procedure Code of 1859. Section 33 of that Code provided that "if the claim relate to land or other immovable property" and it appeared to the Court that such land or other property was not situate within the Court's jurisdiction, the Court shall return the plaint to the plaintiff in order to its being presented in the proper Court. It was said that this section should be read with S. 5, which made provision as to where a "suit for land" had to be instituted, as the two provisions were complementary, and, so read, they showed that the legislature intended that ft suit for land should be understood in the sense of a suit relating to land. It seems to me that this inference does not necessarily follow. While "suits for land" mentioned in the principal provision which dealt with jurisdiction' of Courts, could well be referred to in the subsidiary provision as "suits relating to land," it is not legitimate, in my opinion, to conclude that the legislature considered that any suit relating to land was a suit for land. On the other hand, there are other provisions in the Code of 1859 such as Ss. 190, 199, 223 and 524, to which our attention was drawn which lend



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support to the contention that a suit for land means only a suit for recovery of the land. Thus, the approach based on the consideration that cl. 12 is modeled on S. 5 of the Code of 1859 does not lead to any clear or definite conclusion as to the interpretation of that clause, and we are brought back to the same question : what is a suit for land ?”

13.From a reading of the entire judgment, the majority of judges in Federal Court reported in **MANU/FE/0007/1950** have come to the conclusion that the suit in its entirety has to be considered before taking a decision as to the claim whether the suit is for a suit for land or not. Further, they had also considered that apart from Clause 12, this Court could also consider the relief on the basis of equitable relief that is available under Clause 19.

14.In this context, it is pertinent to analyze the two Division Bench judgments of this Court wherein, the Division Bench of this Court followed well settled principles in Vol 97 LW 485. The Division Bench of this Court had observed as follows:



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“It thus appears to us that while there can be no controversy that as regards suits for land or immovable property where the whole of land or immovable property is situated within the ordinary original jurisdiction of the High Court, the High Court can take cognizance of such suits, it is also well established that even though a part of the land or immovable property is situated within such limits and part outside the limits, if leave has been first obtained, a suit for such land or immovable property can be entertained by the High Court in its ordinary original civil jurisdiction. The construction placed before the Division Bench of this Court in the Bank of Madurai's case³, is clearly in consonance with the construction placed on Clause 12 of the Letters Patent in the decisions of the two other Chartered High Courts, which have been followed now for more than fifty years. We respectfully agree with the view taken in the Bank of Madurai's case³. It does not therefore appear to us necessary that the scope of Cl. 12 of the Letters Patent needs to be reconsidered afresh. We are inclined to observe that if the decision in the Bank of Madurai's case³, had been placed before the learned Judge, probably the occasion for making a reference to the Division Bench would not have arisen. Having regard to the scope of Cl. 12 as construed by the Division Bench in Bank of Madurai Ltd. v. Balaramdas and Bros³, the plaintiffs are clearly entitled to leave to file the present suit. We may also make it clear that the plaintiffs are also entitled to leave notwithstanding the fact that some of the defendants reside outside the



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jurisdiction of this Court as the suit expressly falls within the first part of Cl. 12 as analysed by the Division Bench. Accordingly, this petition for leave is allowed.”

15. Further, a Division Bench of this Court in a judgment reported in 2011 SCC OnLine Mad 2073 had held that the suit for partition of a property outside the jurisdiction of the Court could be tried before this Court, if any other property subject matter of the suit is available within the jurisdiction of this Court.

16. It is seen that the Federal Court had dealt with the issue which did not relate to the partition. But, however, the majority of the Judges in the Federal Court had held the suit therein was not a suit for land. Further two Division Benches of this Court has held that a suit for partition even though a suit for land could be instituted invoking Clause 12 of Letters of Administration, which is binding upon me. In a suit for partition, the plaintiff seeks for a declaration of his share in the property. Only when the plaintiff has right in the share of a property, he would be



granted a relief of partition, this right accrues to the plaintiff on his birth and it is deemed by the provisions of law that a sharer of the property (a person entitled to share in the property) is also deemed to have constructive possession of a property. In such a view of the matter, I do not find any conviction in the arguments made by the learned counsel for the respondents.

17. In view of the aforesaid reasonings & findings, I am of the view that the applicant is entitled to leave to sue not only the properties situated outside the jurisdiction of the Court but also as against the first respondent who is residing outside the jurisdiction of the Court.

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