



C.M.S.A.(MD).No.32 of 2017

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 08.07.2024

DELIVERED ON: 12 .07.2024

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.S.A.(MD).No.32 of 2017

and

CMP(MD).No.9748 of 2017

Abdul Kadhar

...Appellant

Vs

1.Barakath Begum

2.P.K.Ibrahim

3.P.K.Yusuf

4.A.M.Sulthan

5.Kathija

6.Muhamath

....Respondents

Memo dated 19.01.2024 is recorded to the effect that issuance of notice to second respondent is dispensed with, as he was set exparte before the Court below, vide Court order dated 15.03.2024)



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PRAYER: The Civil Miscellaneous Second Appeal has been filed under Order 21 Rules 97 & 103 of Civil Procedure Code against the judgment and decree passed in C.M.A.No.8 of 2011 on the file of the Principal Sub Court, Tirunelveli dated 17.03.2017 reversing the fair and decreetal order passed in E.A.No.175 of 2009 in E.P.No.17 of 2009 in O.S.No.1233 of 1986 on the file of the Principal District Munsif Court, Tirunelveli.

For Appellant	:Mr.H.Arumugam
For R1	: Mr.R.Balakrishnan
R2	: Exparte
For R3	:Mr.M.P.Senthil
For R4 & R6	: No appearance

J U D G E M E N T

The instant second appeal has been filed by a third party to O.S.No.1233 of 1986 on the file of the Principal Subordinate Court, Tirunelveli.

(A) Factual background:

2. The first respondent herein as plaintiff had filed the above said suit for the relief of partition and separate possession of his ½ share in the ground floor of Door Nos.51 and 52 of the suit schedule properties. A preliminary decree came to be passed on 17.08.1992 and a final decree was



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passed on 02.08.2007. In the final decree proceedings, Shop No.51 was allotted to the share of the plaintiff.

3. Based upon the above said final decree, the decree holder had filed E.P.No.17 of 2009 for taking delivery of the property. While the said Execution Petition was pending, the present appellant had filed E.A.No. 175 of 2009 under Order 21 Rule 97 of C.P.C, raising objection to the delivery of the property on the ground that he is in possession of the Shop in Door No.51 from the year 1976 onwards, having taken the building on lease from the defendants 1 and 2 in the suit.

4. According to the appellant/tenant, his father has taken the lease from the year 1976 and after the death of his father, he is the tenant of the property in dispute from the year 1995 onwards. According to the tenant, he had been regularly paying rent to the first defendant without any default. He had further contended that he is regularly paying licence fee to the municipal corporation for the said shop and he is in settled possession. The tenant had further contended that the plaintiff/decree holder is not entitled to take actual delivery of the property under Order 21 Rule 35 of C.P.C, but he is entitled only for a constructive possession as contemplated under Order 21 Rule 36 of C.P.C. Based upon the said averments, the



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appellant herein had filed the said application.

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5.The decree holder had filed a counter contending that the appellant herein is not in a possession of the Door No.51 of the property and they have also disputed the appellant's father's possession from the year 1976 or the tenant's possession from the year 1995 onwards. According to the decree holder, the appellant was not running a footwear or fancy item business in Door No.51. The decree holder had further contended that the suit was instituted in the year 1986 and after institution of the suit, the parties to the suit are not entitled to encumber or alienate the said schedule properties and if any encumbrance is created it is subject to Section 52 of the Transfer of Property Act.

6.The tenant had examined himself as PW1 and opposite shop owner as PW2 and the brother of the third defendant as PW3 to establish his possession over the suit schedule properties prior to the filing of the suit. The tenant had filed Exhibits P1 to P6. On the side of the decree holder, the husband of the decree holder was examined as RW1.

7.The Executing Court after considering the various judgments filed on the side of the tenant, arrived at a finding that the appellant is in



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possession of the property as a tenant and therefore, the decree holder is entitled to take only symbolic delivery of the property and not the physical possession.

8.The decree holder had challenged this order in C.M.A.No.8 of 2011 before the Principal Subordinate Court, Tirunelveli. The Subordinate Judge had arrived at a finding that no documentary evidence has been let in on the side of the defendants to prove that the possession of the tenant is prior to the date of filing of the suit. The Appellate Court had further found that the tenant is not able to establish the date of the commencement of tenancy. The Appellate Court had further found that the tenant has been inducted into the property after filing of the suit and therefore, the said transaction is hit by Section 52 of the Transfer of Property Act. When Shop.No.51 is allotted to the share of the decree holder, the said shop has to be delivered in favour of the decree holder. The Appellate Court had set aside the order of the trial Court where it had held that the decree holder is entitled to only for a symbolic delivery. Challenging the said reversal order of the First Appellate Court, the instant second appeal has been filed by the tenant.



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9.The tenant had raised the following substantial questions of

law.

“(a).Whether the Lower Appellate Court is right in applying “Section 52” of Transfer of Property Act, 1882 for deciding the tenancy right in the suit for partition and particularly when the property was never in possession of plaintiff and the possession of the shop is admittedly with the appellant herein as tenant?

(b)When the property is in possession of tenant/appellant whether the lower Appellate Court is right in not applying order-21 Rule 36 of CPC?

(c)When there is no proposition in law that relatives are to be treated as untruthful witnesses as per “Section 3” of Indian Evidence Act, 1872 and the tenancy was proved even before filing of suit through PW3 whether the Lower Appellate Court is right in not accepting the evidence simply because the witness is brother of parties to the suit without any reason of plead of partiality?

(B).Contentions of the learned counsels appearing on either side:

10.The learned counsel appearing for the appellant had contended that the plaintiff in the suit has purchased only an undivided $\frac{1}{2}$ share from the first defendant in respect of Shop Nos.51 and 52 in the



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ground floor of the building. During the trial, the plaintiff had contended that the Shop No.52 is in possession of the second defendant who is one of the co-owner. There was no pleadings that the present appellant is in possession of the said Door No.51 as a tenant. He had further contended that the tenant has examined himself as PW1. In his deposition, he had categorically deposed that his father in his possession of the property in dispute from the year 1976 onwards. After his father's death, he is in possession from the year 1995 onwards. He had further contended that the tenant had examined the owner of the opposite shop as PW2 who had also categorically deposed that the shop is in possession of the tenant's father from the year 1976 onwards.

11. The learned counsel had further pointed out that the First Appellate Court had erroneously construed that PW3 is the brother of the tenant and he is an interested witness. On the other hand, PW3 is the brother of the third defendant in the suit who is the co-owner of the property and not the brother of the tenant. Therefore, the First Appellate Court had erroneously disregarded the oral and documentary evidence let in on the side of the tenant and has arrived at a finding that the tenancy pending suit and therefore, he hit by the doctrine of lis pendens.



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12.The learned counsel for the appellant had relied upon two decisions reported in *AIR 1941 Calcutta 436 (Bhupati Banerjee Vs. Bon Behary Roy and another)* and *AIR 1946 OUDH 99 (Ram Narain and others Vs. Nawab Sajjad All Khan)* to contend that unless a right to immovable property is directly and specifically in question, the question of invoking Section 52 of the Transfer of Property Act would not arise. In the present case, the share of parties was not in dispute and therefore, the pendency of the partition suit cannot attract the provision of Section 52 of the Transfer of Property Act. The learned counsel for the appellant had further relied upon a judgement of the Hon'ble Supreme Court reported in *(2008) 15 SCC 705 (Rajesh Kumar Vs. State of Himachal Pradesh)* to impress upon the Court that merely because a witness is a relative of one of the parties, he cannot be treated as an untruthful witness. For discrediting the witness, reasons have to be assigned when a plea of partiality is raised to show that the witnesses had reason to shield the actual culprit and falsely implicate the accused. Therefore, according to the learned counsel for the appellant, the First Appellate Court had erroneously construed PW3 as his own brother and has discredited his deposition.



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13.The learned counsel for the appellant had further contended that as far as the partition suit is concerned, the doctrine of lis pendens cannot be invoked, in view of the fact that there is no right relating to immovable property is involved, only there is a re-adjustment of shares among the co-owners. Even assuming that the tenancy has been created during the pendency of the partition suit, that would not be a obstacle to consider the request of the tenant under Order 21 Rule 36 of C.P.C. He had relied upon Section 44 of the Transfer of Property Act to contend that a co-owner is entitled to alienate the undivided share of the property and therefore, such an alienation even during the pendency of the proceedings is protected and it cannot be affected under Section 52 of the Transfer of Property Act. Hence, he prayed for allowing the appeal.

14.Per contra, the learned counsel appearing for the decree holder had contended that Shop No.51 has been allotted to him in the final decree proceedings and it has reached finality. He had relied upon Section 52 of the Transfer of Property Act to contend that it relates to any suit and therefore, it does not exclude a partition suit from its purview. He had further contended that it not only makes the alienation subject to the result of the suit, but also a tenancy that is created during the pendency of the



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suit. He had further contended that none of the documents filed on the side of the tenant are prior to the filing of the suit. The oral evidence through PW1 to PW3 also did not support the case of the tenant that the tenancy had commenced prior to 1986. Therefore, he had prayed for confirming the order passed by the First Appellate Court.

15.I have considered the submissions made on either side and perused the material records.

(C). Commencement of Tenancy:

16.The tenant had filed Exhibits P1 to P6 to establish the fact that he is in possession of Shop No.1 from the 1976 onwards. All these records are only from the year 1995 onwards. There are no documents to establish that the petitioner's father is in possession of Door No.51 from the year 1976 onwards.

17.The tenant has examined himself as PW1. During his cross examination, he has categorically admitted that he is not in possession of any document to establish that either himself or his father was in possession of the suit schedule properties as a tenant prior to 1986. PW2 is the owner of a Shop which is located opposite to the Shop in dispute. He had simply stated that he is doing business in the opposite side property for



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the past 20 years without specifying the date or month of commencement of tenancy. PW2 has deposed in September 2010. Even assuming that his deposition is true, the tenancy of the petitioner would date back only to 1990 and not prior to 1986. PW3 is the adjacent shop owner and on the date of his deposition, he is not a tenant in the said shop. During his cross examination, he has categorically admitted that he is not aware of the fact from which year he had commenced his business in the disputed property. Therefore, it is clear that neither the documentary evidence nor the oral evidence let in on the side of the tenant is sufficient to prove that that tenancy had commenced prior to the filing of the partition suit.

18.As rightly pointed out by the First Appellate Court, the records relating to the tenancy of the appellant are only from the year 1995 and not prior to the suit.

(D). Applicability of doctrine of lis pendens to partition suit:

19.Section 52 of the Transfer of Property Act is extracted as follows:

“52. Transfer of property pending suit relating thereto.—

During the pendency in any Court having authority within the limits of India excluding the State of Jammu and



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Kashmir or established beyond such limits by the Central Government of any suit or proceedings which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.”

20.A careful perusal of the above said section will clearly indicate that it is applicable to any suit or proceedings in which any right to immovable property is directly and specifically in question. Therefore, the applicability of this doctrine cannot be in dispute with regard to the suit for partition. In the present suit, the defendants 1 to 3 who are the co-owners have contested the suit for partition and thereafter, a preliminary decree has been passed. Therefore, the contention of the learned counsel



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appearing for the appellant that the right to immovable property was not in question in the suit for partition is not factually correct.

21.The Hon'ble Supreme Court in a judgment reported in **(2010) 14 SCC 370 (T.G.Ashok Kumar Vs. Govindammal and another)** in paragraph No.15 has held as follows:

“15.If the property transferred pendente lite, is allotted in entirety to some other party or parties or if the transferor is held to have no right or title in that property, the transferee will not have any title to the property. Where a co-owner alienates a property or a portion of a property representing to be the absolute owner, equities can no doubt be adjusted while making the division during the final decree proceedings, if feasible and practical (that is without causing loss or hardship or inconvenience to other parties) by allotting the property or portion of the property transferred pendente lite, to the share of the transferor, so that the bona fide transferee's right and title are saved fully or partially.”

22.In view of the provisions of Section 52 extracted supra and the judgment of the Hon'ble Supreme Court, there cannot be any doubt that the doctrine of lis pendens is applicable to the partition suits also.



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(E) Tenancy created during the pendency of the suit:

23.The learned counsel for the appellant had contended that there is no alienation or encumbrance of the property during the pendency of the proceedings. The tenancy has been created prior to the filing of the suit. Even assuming that the tenancy is created during the pendency of the suit, the same cannot be construed to be affected by the doctrine of lis pendens in view of the fact that the creation of the tenancy cannot be considered to be a transfer of property or encumbrance created over the property.

24.Section 105 of Transfer of Property Act, 1882 defines lease as transferor of the right to enjoy property. Lease is also a transfer of a right in the property. Section 52 of the Transfer of Property Act, 1882 not only prohibits transfer of property, but also dealing with the property in any manner. Therefore, by no stretch of imagination, it can be contended that the lease created during the pendency of the suit would be outside the scope of Section 52 of the Transfer of Property Act, 1882.



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25.The Hon'ble Supreme Court in a judgement reported in **(2003) 1 SCC 722 (Venkatrao Anantdeo Joshi and others Vs. Malatibai and others)** in paragraph No.8 has held as follows:

“8.....Presuming that pending the suit for partition, even if batai patra is executed, it would not confer any rights on Baburao as it is hit by principles of lis pendens. In any case, as the preliminary decree becomes final, it was not open for Baburao to raise such contention at the time of passing of final decree for partition.”

26.'Batai patra' referred to in the judgment of the Hon'ble Supreme Court is nothing, but a tenancy agreement created during the pendency of a partition suit. In such circumstances, this Court is not inclined to accept the said contention of the appellant that the creation of tenancy during the pendency of the partition suit would not be hit by Section 52 of the Transfer of Property Act.

27.When the documents filed on the side of the tenant and the deposition of the tenant itself is not believable, the discrediting of deposition of PW3 by the trial Court may not have any relevance for deciding the case. In the upshot, it is clear that the tenancy having been



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created during the pendency of the partition suit, that too after passing of the preliminary decree, would not confer any right upon the tenant to call upon the decree holder to take only symbolic possession under Order 21 Rule 36 of I.P.C and not a physical possession under Order 21 Rule 35 of I.P.C.

28.In view of the above said deliberations, all the substantial questions of law are answered as against the appellant. This Civil Miscellaneous Second Appeal stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

12.07.2024

Index : Yes/No
Internet : Yes/No
NCC : Yes/No



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To

- 1.The Principal Subordinate Judge,
Tirunelveli
- 2.the Principal District Munsif,
Tirunelveli.
- 3.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR, J

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Pre-delivery judgement made in
C.M.S.A.(MD).No.32 of 2017
and
CMP(MD).No.9748 of 2017

12.07.2024