

Analysis of Judgment in suit for perpetual injunction

Judgment Text-

(Disclaimer:-Text of Judgment is taken from website of Courts which is a public domain. Every effort is made to omit names of parties and Judge. The analysis of Judgment is for academic purpose to assist the law graduates and entry level Judges to learn the skill of writing Judgment. I analyse the Judgment on the basis of my experience but do not claim that my analysis is perfect. There may be another view different from my analysis.)

IN THE CIVIL COURT AT

SHORT CAUSE SUIT No.

... Plaintiffs

Versus

... Defendants

Ld. advocate for plaintiffs

Ld. advocate for defendant

**CORAM : HIS HONOUR
JUDGE**

DATE :

[J U D G M E N T]

. This is the suit for perpetual injunction restraining the defendants from disturbing plaintiffs' possession and enjoyment over Shop Nos.2 to 4, or dispossessing them from suit shop except by due process of the law.

2] Plaintiffs' case, in brief, is as under :-

Plaintiff No.1 and father of plaintiff No.2 along with their deceased uncle Mr. A. S. were carrying on a partnership business in the name and style of M/s..... . The terms of partnership were incorporated in the deed of partnership dated 2/3/1990. The original deed of partnership is in the custody of defendant No.1. The father of plaintiff No.2 was expired on 10/3/2011. The defendant No.1 is the widow of the deceased i.e. defendant No.1 is the aunt of plaintiff No.1. The defendant No.1 is the second wife of the deceased.

3] It is further contended that the said deceased during his lifetime was the tenant in respect of Shop Nos.2 to 4,. The partnership business was carried on from the said premises. It was agreed between the partners that the said premises would form part of the assets of the partnership and each of the partners would be entitled to a share, therein, in the proportion of their profit and loss of the partnership firm.

4] It is further contended that the owners of said premises were Charitable Trust. The tenants of the said property, including the deceased, have agreed to purchase the said property from the owners, subject to permission being granted by Charity Commissioner under Section 36 of The Bombay Public Trusts Act. The owners accepted the proposal of the tenants and Charity Commissioner by his order dated 00001996 granted permission for sale of the said property to the tenants.

5] It is further contended that the total consideration payable was Rs.4,00,000/-. The proportionate share payable for the said premises was Rs.1,75,000/-. A sum of Rs.1,25,000/- has been paid by the said firm as part consideration for purchase of said property. The above transaction was in consonance with the agreement between the partners that the said premises would be part of the assets of the said firm. In any event, plaintiffs have paid the consideration for purchase of the said premises. The said firm is

entitled to the ownership rights in respect of the said premises.

6] It is further contended that the said deceased expired on 20/2/1996. The said deceased left behind his last Will and testament dated 17/11/1993. The same was executed by the deceased at his native place. In terms of the last will three brothers are entitled to the said premises in equal share. The said will provides bequest to defendant No.1 being widow of the deceased. By virtue of the said last will, plaintiffs are entitled to the said premises besides entitled to the same by virtue of being partners of the said firm. The said Will has been acted upon by the parties and the bequest in favour of defendant No.1 has been duly honoured and implemented. Defendant No.1, thus, has accepted the said will and has taken benefit of bequest, therein, mentioned. Defendant No.1 is estopped from contending contrary to the said Will.

7] It is further contended that the said deceased and plaintiffs were carrying on business as joint family. The said business in partnership was, in fact, in existence even prior to the year 1990. However, the terms were recorded for the first time only under the said Deed of Partnership dated 2/3/1990. In partnership with the deceased the plaintiffs have been carrying on business from the said premises since last thirty years. In any event, it is a fact which cannot be disputed that the plaintiffs as partners of the said firm were carrying on business from the said premises since March, 1990 with explicit consent and permission of the deceased as is revealed from the said Will. Even after the demise of the deceased the business of the firm was continued by plaintiffs from the said premises. Even, as on date, plaintiffs continued to be in exclusive use, occupation, possession and enjoyment of the said premises. Clause No.XII of the Partnership Deed provides that share in partnership of a partner, who dies would cease from the date of demise. The said Clause also provides that in the event of death of a partner the firm would not stand dissolved. Plaintiffs, therefore, are entitled to carry on said partnership business even after the demise of the deceased. In fact, liabilities of the deceased are being met by plaintiff from the income of partnership. The liability is mainly in respect of present residential premises of defendant No.1.

8] It is further contended that the plaintiffs are in settled possession of the suit premises. They are entitled to retain the possession and the plaintiffs' peaceful use, occupation, possession and enjoyment of the suit premises cannot be disturbed by anyone.

9] It is further contended that it appears that originally the tenancy of the suit premises stood in the name of the deceased i.e. husband of defendant No.1. Defendant No.1 is desirous of taking advantage by obtaining transfer of the ownership right in her name and thereafter dispose off the said premises.

10] It is further contended that on 2/12/1996 defendant No.1 had approached plaintiffs' with a view to get vacant possession of the said premises, as she intends to sell the said premises. Defendant also stated that she was taking necessary steps for transferring the said premises in her name. Plaintiffs refused to accept the request of defendant No.1 of vacating the said premises. Plaintiffs attempted to persuade defendant No.1 to understand their rights in the said premises and the fact that plaintiffs' were in settled possession of the said premises. However, defendant No.1 refused to even listen to plaintiffs and, instead threatened to dispossess plaintiffs forcibly from the suit premises. Plaintiffs were compelled to file Suit No.0000/1996 in this Court against defendant No.1. Vide order dated 0000/1996 plaintiffs' possession was duly protected. However, the said suit was dismissed for default. As well as the counterclaim of defendant No.1 came to be dismissed. Plaintiffs' application for restoration of the suit was also rejected.

11] It is further contended that plaintiffs continued to be in use and occupation of the

suit premises. Plaintiffs surprised to receive electricity bills in the names of defendant Nos.2 and 3. On enquiry and after application under Right to Information Act the plaintiffs have learnt that by a Registered Deed dated 1/7/2011 the defendant Nos.2 and 3 have purchased the suit premises from the defendant No.1.

12] It is further contended that on 24/4/2012, four persons, who were strangers to the plaintiffs, came to the suit premises and informed plaintiffs that they had necessary authorities from the defendants to obtain vacant possession of the suit premises from the plaintiffs. The said persons informed the plaintiffs that unless, the premises is vacated within three days, the plaintiffs would not only be dispossessed, but physical injury would also be caused to them. The plaintiffs being in settled possession of the suit premises, they cannot be forcibly dispossessed by anybody without following due process of law. Therefore, the plaintiffs are entitled for permanent injunction restraining the defendants from dispossessing or disturbing plaintiffs' peaceful use, occupation and enjoyment of the suit premises. So, prayed to decree the suit with costs.

13] Defendant Nos.1 and 2, though had appeared in this but, failed to file their Written Statement, therefore, the suit ordered to proceed without their Written Statement.

14] Defendant No.3 resisted this suit by filing Written Statement vide Exh.No.7. He denied all the adverse assertions made against him in the plaint and came with a case that the plaintiffs have filed false and fabricated suit and it is not maintainable. So, it is liable to be dismissed with compensatory costs.

15] It is further contended that plaintiffs had filed present suit to encroach upon the rights of defendants, more particularly, defendant Nos.2 and 3. Plaintiffs' intention to grab the suit premises by obtaining injunction order. So, the plaintiffs are not entitled for any reliefs.

16] Plaintiffs are misusing the process of law to obtain perpetual injunction. Present suit is nothing but clear cut misuse of legal process, so it is liable to be dismissed with compensatory costs.

17] It is further contended that the plaintiffs have suppressed material facts from this Court. Plaintiffs have filed suit in this Court earlier and enjoyed interim orders for more than ten years and on the same grounds plaintiffs have filed present suit against the defendants, so the suit is liable to be dismissed with heavy costs.

18] It is further contended that the suit is not maintainable in the eyes of law and the plaintiffs have filed Suit No.00000/1996 for perpetual injunction restraining the defendants from dispossessing the plaintiffs from possession and enjoyment of suit premises viz. Shop Nos. 2 and 3, save and except by due process of law.

19] It is further contended that the above suit is filed with similar reliefs on similar facts and similar cause of action pleaded in earlier Suit No.0000/1996. Suit No.0000/1996 came to be dismissed. Review Petition of the said suit came to be rejected. Present suit is not maintainable, as the same is against the principal of resjudicata and with multiplicity of the proceeding. So, the suit is liable to be dismissed.

20] It is further contended that upon death of the husband of defendant No.1, she as well as plaintiffs were his legal heirs. As per the Muslim Law a bequeath by way of Will in favour of one heir without consent of another heir is void. The suit is filed on the basis of cause of action which is void and, as such, the same deserved to be dismissed with costs.

21] It is further contended that the defendant Nos.2 and 3 have purchased the suit premises from defendant No.1 by executing Indenture of Conveyance dated 1/7/2011, which is duly registered before the Joint Sub-Registrar of Assurances, bearing No 000000/2011. The defendant No.1 along with one S.M. and G. T. had purchased the suit property from Charitable Trust with prior sanction of Charity Commissioner under Section 36 of The Bombay Public Trusts Act, 1950, which is duly registered under Serial No.000000 dated 000000 before the Joint Sub-Registrar of Assurances, after paying the consideration became owner of 35% premises which was duly conveyed by the said Deed of Conveyance dated 21/9/1998.

22] It is further contended that the plaintiffs are claiming their rights through the husband of defendant No.1 by virtue of alleged will and by virtue of being partner of husband of the defendant No.1. The suit property was jointly conveyed in the name of defendant No.1 individually and not being partner of any firm, of which, the plaintiffs claimed to be the partners. Unless, the said Deed of Conveyance conveying the property in favour of the defendant No.1 is set aside by following due process of law, plaintiffs have not claimed over the suit property at all. The plaintiffs are well aware about the conveyance of the suit property by virtue of the said Deed of Conveyance dated 21/9/1998 in the personal name of defendant No.1. However, they have chosen not to take any proceedings to have cancelled the same by following due process of law within prescribed period of limitation. Therefore, the said Deed of Conveyance dated 21/9/1998 is having binding effect and no relief can be claimed which is contrary, or inconsistent therewith. So, prayed to dismiss the suit with costs.

23] On the basis of rival pleadings my Learned Predecessor framed the issues vide Exh.No.8. I recast the issues on 24/3/2015 and I record my findings thereon with brief reasons as under :-

Sr. No.	<u>I S S U E S</u>	<u>F I N D I N G S</u>
1.	Do plaintiffs prove that they are in use, occupation and enjoyment of the suit premises i.e. Shop Nos.2 and 3 since March, 1990 ? No.
2.	Whether the suit is maintainable in the present form ? Yes.
3.	Do plaintiffs prove that defendant No.1 threatened to dispossess them forcibly from the suit premises ? No.
4.	Is plaintiffs entitled for the reliefs as sought for ? No.
5.	What order and decree ? As per the final order.

:: R E A S O N S ::

24] In support of the claim the plaintiffs have examined (P.W.1) vide Exh.No.10 and (P.W.2) vide Exh.No.17. Defendants Nos.1 and 2 neither contested this suit, nor stepped into the witness box. Defendant No.3 examined Mr K. Z. by way of two affidavits in lieu of examination-in-chief vide Exh.No.19 and 19/A. Plaintiffs have relied on documents vide Exh.Nos.12 to16. Defendant No.3 has relied on documents vide Exh.Nos.21 to 23.

25] Heard arguments advanced on behalf of both sides at length.

26] **AS TO ISSUE NO.2** :- Defendant No.3 has come with a case that the suit is not maintainable, more particularly, on the grounds that the plaintiffs had filed Suit No.00000/1996 against the defendants, which came to be dismissed. The defendant No.3 has tried to bring on record copy of plaint and Written Statement of Suit No.0000/1996 but has not produced their certified copies, as well copies of Issues framed and judgment of the said suit is produced on record. Though, D.W.3 has deposed that the said suit came to be dismissed for want of prosecution, more particularly, at the stage of filing of evidence by the plaintiffs, herein. But, the affidavit in lieu of examination-in-chief, itself, shows that the said suit came to be dismissed for want of prosecution. This, itself, is sufficient to show that the said suit was not finally heard and decided on merits. Unless, certified copies of plaint, issues, Written Statement and judgment are produced on record, it cannot be said that this suit is barred by the provisions of *Res judicata* under Section 11 of The Civil Procedure Code.

27] Section 11 of The Civil Procedure Code relates to *Res judicata*- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been sub-sequently raised, and has been heard and finally decided by such Court.

In the present suit, the affidavit, itself, shows that Suit No. 00000 was not heard and finally decided and it was dismissed for want of prosecution, therefore, this suit cannot be said to be barred by the provisions of Section 11 of The Civil Procedure Code. As the defendant No.3 has not produced certified copy of judgment to show that the parties were litigating under same title regarding the same subject-matter and the said suit is heard and finally decided. Therefore, the contentions raised on behalf of the defendant No.3 regarding non- maintainability of the present suit are not at all acceptable. As such, I hold that the suit is maintainable. So, I record my finding to Issue No.2 in the affirmative.

28] **AS TO ISSUE NOS.1, 3 AND 4** :- Plaintiffs have come with a case that the plaintiff No.1 and the father of plaintiff No.2 along with their deceased uncle-Mr. A.S. carried on business in partnership in the name and style as M/s..... The defendant No.1 is the widow of Mr. A.S., one of the partner of their firm. Defendant No.1 is the second wife of the deceased Mr. A.S. The suit premises were purchased out of the funds of the firm. The tenants of the said property, including the deceased, have agreed to purchase it from the then owners, subject to permission being granted by Charity Commissioner under Section 36 of The Bombay Public Trusts Act. The then owners of the said premises were Charitable Trust.

29] Version of (P.W.1) shows that Mr. A.S. expired at x on 00000 leaving behind his last Will and testament dated 17/11/1993, which was executed by the deceased at his native place. So also the version of this witness show that the plaintiffs were in use, occupation and possession of the suit premises. They were surprised to receive electricity bill of the suit premises in the name of defendant Nos.2 and 3. Upon enquiry and after making application under The Right to Information Act, the plaintiffs learnt that vide Registered Deed dated 1/7/2011 the defendant Nos.2 and 3 have purchased the suit premises from the defendant No.1. Though, the defendant Nos.2 and 3 claimed to be owners of the property, but the defendant No.3 has acted contrary to the will of her deceased husband and also the suit premises being asset of the firm, the use, occupation and possession cannot be disturbed including transferring electricity bill of the suit premises.

30] Version of (P.W.1) also shows that four persons from the defendants came to obtain vacant possession of the suit premises and also they threatened to dispossess the plaintiffs, otherwise, they would cause physical injury to the plaintiffs. P.W.1 has admitted in the cross-examination that he does not remember whether he produced on record to show that the firm is owner of shop premises. He has not produced agreement regarding purchase of shop premises, nor he had knowledge about it. His admissions show that he does not remember whether he has produced on record agreement regarding purchase of shop premises.

31] Plaintiffs have produced on record extract of register of firm vide Exh.No.12. Name of firm appears to be M/s....., names of partners Mr.A.S., J.S. and S.S.. But, there is no description of the property owned by the said firm.

Certificates of Registration of partnership are at Exh.Nos.13 and 14, but they are not sufficient to show that the suit property is owned by the original partnership firm of the plaintiffs.

Copy of judgment of the Court of Civil Judge Junior Division, is at Exh.No.16 of O.S. No.0000/1998. The said suit was filed by S. and Z. against A. w/o. Mr.A.S. and six others, which appears to be decreed on 000000 and, that too ex parte. The operative part of the said order shows that whatever proprietary rights were enjoyed by the testator A. S. in respect of the movable and immovable property described in the Will at the time of his death, the same rights shall be enjoyed by the plaintiffs and second defendants after his death with the condition that they shall continue to pay the maintenance as described in the Will to the first defendant. Copy of the will is produced on record but it is photocopy and not certified copy, therefore, it is not admissible in the evidence. On the contrary, defendant No.3 came with a case that defendant No.1 became owner of the suit premises by virtue of Indenture of Sale dated 21/9/1998 which was executed pursuant to sanction granted by Charity Commissioner under Section 36 of The Bombay Public Trusts Act, 1950. The plaintiffs have produced copy of the said order dated 000000. It is a common document admitted by the respective parties.

Document produced on record dated Exh.No.23 is certified copy of Indenture. On going through the same, it reveals that A. M., N. M. and M. M., being the Trustees of Charitable Trust had agreed to sale the suit property to Mr S.M., G. T. and w/o. A. S, described in the Schedule annexed with Exh.No.23. The land revenue under LTA/000 by the Collector together with messuages and structure standing thereon situated at _____admeasuring 175 Square yards equivalent to 146.32 Square Metres or thereabouts and bearing C.S. No. 00000 of F Division and bounded on the North by property bearing C.S. No.0000 of F Division, on the South by property bearing C.S. No.00000, on the East by Street and on the West by Road. This is a registered document. Not only this but, said Indenture of Conveyance was executed on the basis of sanction accorded by the Learned Joint Charity Commissioner. Vide order dated 00/0/1996 passed under Section 36(1) (a) of The Bombay Public Trusts Act, 1950 the Learned Joint Charity Commissioner accorded sanction for sale of the immovable property of the above Trust viz. house property bearing No.00000 admeasuring 175 Sq. yards, situated at _____in favour of tenants i.e. Mr S. M., Mr A.S. and G. T., for amount of Rs. 4,00,000/-. The Learned Joint Charity Commissioner had granted permission to the said Trust to sale suit property. The document is produced on record on behalf of defendant No.3 supporting with the order passed by the Learned Joint Charity Commissioner, therefore, it has got presumptive value.

32] On the contrary, though the plaintiffs have come with a case that the suit

property is of partnership firm. But, as I have already held that no document is produced on behalf of plaintiffs to show that the suit property belongs to partnership firm. Certification of Registration and Certification of Registration with Sales Tax (Exh.Nos. 13 and 14) are not sufficient to show that the suit property is owned by the original partnership firm of plaintiffs. There is no reference of suit property in the certificates of registration of partnership. The plaintiffs have not proved the registration.

33] Mr (P.W.1) is not able to tell whether he had challenged the order passed by the Learned Joint Charity Commissioner by way of appeal. So also he was not able to tell whether he had produced record regarding payment of money to Charity Commissioner regarding purchase. Not only this but he has further admitted that he does not remember whether he has produced on record any document to show that the shop premises is owned by the firm. So also he admits that he has not produced agreement regarding purchase of shop premises, nor he has knowledge about it. Affidavit of P.W.1 is without any documentary proof.

34] Plaintiffs have also examined Mr (P.W.2), who deposed that he tendered in the evidence copy of Partnership Deed, its original is in the custody of defendant No.1, being widow of deceased Mr. A.S.. But, as I have already mentioned that plaintiffs have not taken any efforts to obtain original partnership deed. Merely saying that the said firm was duly registered with Sales Tax Department, Maharashtra, it does not mean that the said property belongs to the said firm. Though, P.W.2 has testified that they had prepared fresh partnership deed in the year 2011, but he admits that fresh partnership deed is not produced on record. There is no document executed for purchase of property from the original owner and the same could not be executed, because his grandfather had expired, but Rs.1,25,000/- was disbursed from the account of firm and was given to Charitable Trust. He admits that no amount was directly paid to the Trust. Rent receipts and electricity bills produced on record on behalf of plaintiffs, are not sufficient to prove title of plaintiffs on the suit property.

35] Mr (D.W.1) deposed that he along with defendant No.2 have purchased Shop Nos.2 and 3, situated at _____ by executing Indenture of Conveyance dated 1/7/2011 from defendant No.1, which has been duly stamped and registered at Serial No.000000/2011 before Sub-Registrar,. By virtue of Indenture of Sale dated 21/9/1988 executed pursuant to sanction granted by Charity Commissioner under Section 36 of The Bombay Public Trusts Act, 1950 to sell suit premises to defendant No.1 by order dated 23/1/1996. So also his version reveals that plaintiffs have not challenged the order of Charity Commissioner by filing Writ Petition. On the basis of Indenture of Conveyance (Exh.No.23) names of defendant Nos.2 and 3 have been brought on record of rights as owner of suit premises by the revenue authorities. His version further reveals that plaintiffs had filed Short Cause Suit No.0000/1996 for the same reliefs, which came to be dismissed for want of prosecution at the stage of filing of evidence. On the death of Mr. A.S. plaintiffs have continued same business in Trust for and on behalf of defendant No.1 without having any rights and without being settled and/or legal possession of same. Plaintiffs are not in settled and/or legal possession of the suit premises but are merely physically present over there illegally on behalf of defendant No.1. They are illegal occupants of the said premises.

36] Mr (D.W.1) is cross-examined by ld. advocate for plaintiffs at length. But, there is nothing in the cross-examination to discard his version, on the contrary, his testimony is supported by Indenture of Conveyance (Exh.No.23). It is tried to submit on behalf of plaintiffs that D.W.1 has not filed suit for possession of suit property, but merely on this count, the suit cannot be decreed. Oral evidence adduced on behalf of defendants is corroborated by documentary evidence. There is no reason to discard evidence produced on record on behalf of defendants. There is nothing on record to show that defendants had

threatened to dispossess plaintiffs from the suit premises.

37] Plaintiffs have sought perpetual injunction restraining defendants from dispossessing/disturbing plaintiffs' possession over Shop Nos.2 to 4, , except by due process of law. Mr (P.W.1) has testified that on 24/4/2012 four unidentified persons had been to suit premises and informed plaintiffs that they had necessary authority from defendants to obtain vacant possession of suit premises. But, there are no specifications who are going to obtain possession of suit premises from plaintiffs. On the contrary, evidence produced on behalf of defendants, itself, is sufficient to prove the title, as well as their possession over the suit property. When, the defendants have got title, plaintiffs have no rights, title or interest in the suit property. When, the possession is sought on the basis of title deeds, it cannot be said to be illegal dispossession of plaintiffs.

38] Ld. advocate for defendant No.3 has vehemently argued that no interim relief can be granted against defendants and placed reliance in the case of **A. B. Hassan and others v. Sundari (AIR 2002 MADRAS 342)**, in which, the Hon'ble Madras High Court was pleased to observe that,

"An injunction to restrain An ACT will be refused where it is not reasonably clear that it would cause injury. The Court should not ACT upon Vague Apprehensions. The Court will not grant injunction where it Appears that Any injunction, which MAY be granted would inflict FAR more injury on the defendant than Any ADVANTAGE which the plaintiff would derive from it. In A Suit for injunction it is the burden duty of the plaintiff to prove the interference caused by the defendant which is MANDATORY requirement."

39] As, I have held that evidence produced on behalf of defendants is sufficient to prove title, as well as possession over the suit property. Plaintiffs have no any right, title or interest in the suit property and they are not entitled for any reliefs.

40] In the light of above discussion and in taking into consideration the ratio laid down by the Hon'ble Madras High Court, I am of the view that the suit is liable to be dismissed. So, I record my findings to Issue Nos.1, 3 and 4 in the negative. Resultantly, I pass the following order :-

ORDER

- 1] The suit is dismissed.
- 2] No order as to costs.

Date :

**Judge,
Civil Court,**

Analysis-

- The suit is for simpliciter injunction to protect possession of her 3 shops in F area. It is the case of plaintiff that the plaintiff no.1 father of plaintiff no 2 and Mr. A.S., who were closely related, were partners of M/s..... Deed of partnership was registered in 1990 however the partners were carrying business in the suit shops from more than 3 decades. The suit shops were owned by a charitable trust and Mr. A.S. was mentioned a tenant of suit shops. The firm decided to purchase suit shops from the trust and permission was sought from charity commissioner, obviously by Mr. A.S. On grant of permission in the year 1996, consideration of Rs. 4,00,000/- was paid. Amount of Rs 1,25,000/- was paid from the account of the firm and 1,75,000/- paid proportionately by partners. It was agreed by the partner of firm that ownership rights of suit shop will be of the firm.
- Mr. A.S. died in the year 1996. Before his death he has executed will deed. Defendant no. 1 is widow of Mr. A.S. It is mentioned in Will that suit premises belong to him and his two brothers. The will was honored by plaintiff and defendant no. 1. The firm carries business in the said shop.
- Defendant no. 1 taking advantage of tenancy in the name of Mr. A.S. sold the suit premises to defendant nos. 2 and 3 in the year 2012. Defendant nos. 2 and 3 tried to take forcible possession of suit premises. The plaintiffs preferred to institute suit for simpliciter injunction on the basis of their possession. Only defendant no. 3 contested the suit. Various technical issues such as issue of *res judicata*, non-joinder of necessary parties were raised by defendant party. The defendant no. 3 further contended that he and defendant no. 2 purchased the suit premises from defendant no. 1 vide indenture of conveyance dated 1st July 2011 after ascertaining that husband of defendant no. 1 purchased the suit property from the trust.
- Primary issue in the suit is whether plaintiffs are in possession of suit premises. The second issue is whether there is possibility of their dispossession from suit premises without following due process of law. It is pertinent to mention here that defendant no. 3 nowhere mentioned that he was in possession of suit premise though he claimed that he became owner of suit premise along with defendant no. 2 by virtue of sale deed of year, 2011. However, in the suit for simpliciter injunction ownership of defendant without possession have little importance. Then there are two issues of maintainability of suit one is *res judicata*, and other of non-joinder of necessary parties. In spite of pleadings (para 19 of the judgement) issues on maintainability do not appear to have been framed, though while giving reasons there is discussion about impediment of *res judicata*.
- Let's first consider issue of *res judicata*. The plaintiffs have pleaded that they have filed previous suit in Small Causes Court for protection to their possession against defendant no 1. As per them interim protection was granted but the suit was then dismissed in default. Ld. Judge tried to ascertain these facts by mentioning that parties have not produced copies of pleadings, issues and order in previous suit. The question arises whether the court while dealing question of *res judicata* answered it in negative for default of production of evidence by the parties? If it is so then the finding is contrary to law, because the mandate under section 11 of CPC is against the court and therefore when such issue is raised the court has to ascertain whether the issue before the court has earlier been decided or not before resorting to answer the issue. Secondly, in case of continuing cause of action every act of obstruction giving rise to cause of action to seek injunction is fresh cause of action. In such situation whether the bar of *res judicata* can create impediment to the suit on the basis of act of obstruction subsequent to cause of action in previous suit is also a debatable question. As the previous suit dismissed in default and issues therein are not finally and completely decided the bar of *res judicata* is not attracted. Previous suit was filed in small

causes court, a court of limited jurisdiction to deal with disputes of landlord and tenant and therefore uniqueness of jurisdiction of courts deciding previous suit and present suit is lacking. In this material was available to determine the issue of res-judicata on merits.

- The second affirmation regarding tenability of suit is non-joinder of necessary parties particularly all the beneficiaries of the Will. The plaintiffs are seeking protection to their possession on the basis of long standing possession. The facts regarding Will deed are being pleaded to show the legality of their possession. So, the suit is not to ascertain rights under Will deed therefore non-joinder of all the beneficiaries in the Will deed does not affect maintainability of suit.
- Regarding the possession of suit premises, as I stated earlier, the defendant no 3 nowhere mentioned in his pleadings that he is in possession of suit premises and the court while deciding the suit was well aware of this fact as he mentioned in para no. 35 as under

“on the death of Mr. A. S. plaintiffs have continued same business in Trust for and on behalf of defendant No. 1 without having any rights and without being settled and/or legal possession of same. Plaintiffs are not in settled and/or legal possession of the suit premises but are merely physically present over there illegally on behalf of defendant no. 1. They are illegal occupants of the said premises.”

The court thus has given finding of fact that the plaintiffs are in possession of suit shops but the court refers them as illegal occupants. The court also mentions that they are occupying suit shops as trustees of defendant no. 1. The partnership deed is produced before the judge and the plaintiffs have brought on record that, as per terms of the deed, on the death of partner his rights under partnership seized. So, defendant no. 1 after death of her husband has no concern with the partnership firm. So, the finding of holding possession as trustee is contrary to the proved facts. Admittedly the business is in existence since 1990. The plaintiffs are partners of the firm. Predecessor of seller of the property acknowledged in Will deed the right of plaintiff over suit property. In this background terming the plaintiffs as illegal occupants is not a sound conclusion.

- Dismissal of previous suit of plaintiffs, plaintiff's inaction against order of Charity Commissioner is mentioned as some of the grounds to refuse protection to the plaintiffs. As I mentioned earlier the suit is for simpliciter injunction on the basis of long-standing possession. Admittedly plaintiffs are in possession and running partnership business in shop since 1990 i.e. 22 years before filing the suit. Defendant no. 2 and 3 purchased the suit premises from defendant no. 1 who is not in possession of suit premises either without taking search of facts or with knowledge of plaintiff's possession and design to evict the plaintiffs forcibly after getting the title deed. In this situation it was necessary to do equity and protect the possession of plaintiff till they are dispossessed by following due process of law by defendant no 2 and 3 on the strength of document of title of the suit shops which as per them is valid title deed.
