

APPLICATION NO.5015 OF 2008
IN C.S.NO.19 OF 2008

PUSHPA SATHYANARAYANA, J.

The application is filed by the applicant / first defendant under Order VII Rule 11 of the Code of Civil Procedure for rejection of the plaint in the above suit.

2. The suit is filed by the sole plaintiff against the defendants for declaration that the plaintiff is the sole and absolute owner of the land of an extent of 2,482 sq.ft., in R.S.No.665/1, Block No.16, Fort - Tondiarpet Taluk and for permanent injunction restraining the defendants from interfering with the plaintiff's peaceful possession and enjoyment of the suit property.

3. The above application is taken out by the first defendant contending that the suit as filed is vexatious.

4. The plaintiff had earlier filed C.S.No.715 of 1985 on the file of this Court which was subsequently transferred to the City Civil

Court and numbered as O.S.No.3276 of 1996 claiming damages and for permanent injunction restraining the defendants from interfering with the possession and enjoyment of the plaint schedule property. It is stated that the plaint schedule property in the said suit is also situated in R.S.No.665/1, Block No.16, Fort - Tondiarpet Taluk, which is the suit property in the present suit. The said suit was dismissed on 07.11.2003 and was allowed to become final, as no appeal was preferred against that.

5. It is pointed out by the applicant / first defendant that one of the issues in the suit was that whether the plaintiff is entitled to the suit property. The finding in the said judgment was that there was no evidence to show that the narrow stretch of land was in possession and enjoyment of the plaintiff at any time. Evidence on hand did not disclosed any encroachment made by the defendant therein into the land of the plaintiff and the disputed area appears to be a poramboke land, for which the plaintiff had not produced any evidence to prove his possession or enjoyment. On the said finding, the suit was dismissed.

6. It is contended by the learned counsel for the applicant that as already the dispute with respect to the same property between the same parties was decided, the present suit is barred by *res judicata*.

7. Resisting the said application, the plaintiff had filed his counter stating that the earlier suit is only for damages and for injunction and the same was dismissed only due to technical reasons and that would not bar the present suit, which is filed for declaration of title. It is contended that the provisions of Order VII Rule 11 of the Code of Civil Procedure are not attracted, as the suit would not fall in any of the clauses mentioned in Order VII Rule 11 and prayed for dismissal of the application.

8. It is a trite position of law that the Court while considering an application under Order VII Rule 11 has to look into only the plaint averments and cannot traverse beyond the pleadings.

9. In paragraph no.9 of the plaint, the plaintiff has specifically mentioned about the earlier suit filed before this Court and

was transferred to the City Civil Court, which later came to be dismissed. In para 11, it is specifically admitted by the plaintiff that there was no appeal preferred against the said judgment as he was not advised to do so and there was a talk of settlement going on.

10. Therefore, from the above facts, it is clear that the present suit as filed, admittedly is a second one for the same relief. The earlier suit though was filed for damages and injunction, it should have included the prayer for declaration of title also, which relief was available on the cause of action.

11. It is useful to extract para 16 of the plaint in the present suit, which deals with the cause of action, which also mentions about the dismissal of the suit.

“16. The plaintiff states that the cause of action for this suit arose at Madras within the jurisdiction of this Hon'ble Court where the Schedule-A and B property is situated and where both the plaintiff and the Defendants

carry on their respective businesses, from the year 1982-83 onwards when the Defendants have been trespassing on the Plaintiff's Schedule-B property, on 07.11.2003 when the suit filed by the plaintiff in O.S.No.3271 of 1996 was dismissed, on various dates thereafter when negotiations for a peaceful settlement took place between the Plaintiff and the Defendants, on September 2007 when the talks finally failed, on 27.09.2007 when the Board of the Plaintiff resolved to file the suit, and thereafter.”

12. Order II Rule 2 of the Code of Civil Procedure lays down the rules as to the frame of suit. Order II Rule 2 specifically bars the second suit where a plaintiff omitted to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished on a same cause of action. For a bar under Order II Rule 2, a second suit should have been laid on the same cause of action as that of the first suit. The cause of action for the purpose of this rule means all the essential facts that constitute the rights and its infringement. The correct test in a case falling under Order II Rule 2 is whether the claim in the new suit is, in fact, founded

upon a cause of action, distinct from that of which was the foundation of the former suit.

13. A plain reading of the plaint, in para 8, states that the defendants trespassed into the plaintiff's property and when they were objected by the plaintiff, it was not heeded to, which resulted in the earlier suit. Even in the present suit, the cause of action stated to be from 1982-1983, when the defendants have been trespassing on the plaintiff's "B" schedule property and on 07.11.2003, when the earlier suit was dismissed.

14. The expression cause of action means the cause of action for which, the suit was brought. In order that the cause of action in two suits could be the same, it was necessary that the facts which entitled the plaintiff to the right claimed must not only be the same, but also that infringement of his rights at the hands of the defendants must have arisen in substance out of the same transaction. The resulting test would be whether the subsequent suit was founded on a cause of action distinct from that which was the foundation of the former suit.

15. The present application is filed under Order VII Rule 11 (d) of the Code of Civil Procedure. Where it appears from the statement in the plaint, that the suit is barred by any law an application for rejection of the plaint can be filed. If the allegations made in the plaint, even if given the face value and taken to be correct, if it appears to be barred by any law, the plain can be rejected.

16. From the reading of the plaint, it is also evident that the disturbance from the defendants was from 1982-1983 and the suit filed earlier in 1985, was dismissed. Even in the present suit, the same cause of action is pleaded that the defendants from 1982-1983 onwards have been trespassing on the plaintiff's "B" schedule property. When the cause of action is same, the relief of declaration of title and the consequential injunction was available, even on the date of filing of the first suit. Having omitted to include the relief of declaration, in the earlier suit, the present suit is barred by order II Rule 2. When the suit is barred by Order II Rule 2, the plaint cannot be entertained and the same has to be rejected.

17. Accordingly, the plaint in C.S.No.19 of 2008 is rejected and the present application is allowed. No costs.

06 / 10 / 2016

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