

Mr. C. G. Gavnekar for Applicant.
Mr. Abhijeet A. Desai for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 27, 2017

Heard Mr. Gavnekar, learned Counsel for applicant and Mr. Desai, learned Counsel for respondent at length.

3. Respondent, hereinafter referred to as 'Madhukar', had instituted Regular Civil Suit No.250 of 2005 inter alia praying for cancellation of mutation entries made in respect of C.T.S.No.2860, 2861, 2862 and 2863; for declaration that entry made in favour of Shankar in respect of C.T.S. No.2859 is illegal; for partition and separate possession of plaintiff's 1/3rd share in C.T.S.No.2859.

4. Shankar instituted Regular Civil Suit No.224 of 2005 inter alia praying for - (i) cancellation of mutation entries in respect of C.T.S.No.2859, 2860, 2862 and 2863; (ii) for perpetual injunction restraining Madhukar and other brother Shivaji from causing obstruction to the plaintiff's possession over these properties; and (iii) for mesne profits.

5. Both the Suits were tried together. By judgment and decree dated 30.05.2007, the learned trial Judge declared that C.T.S.No.2859 is separate property of Shankar and issued injunction restraining Madhukar and Shivaji from causing obstruction to the peaceful possession of Shankar over that property. The learned trial Judge declared that Madhukar is owner of C.S.No.2860 to 2863. The learned trial Judge also set aside the mutation entries made in favour of Madhukar in respect of properties other than C.S.No.2859.

6. It seems that Madhukar and Shankar preferred appeals before the District Court and the same were dismissed. The orders passed by the Courts below were challenged by Shankar by instituting Second Appeals No.81 and 143 of 2009. It appears that Madhukar also instituted Second Appeal (St.) No.3294 of 2010 against the order passed by the Courts below. As far as the appeals preferred by Shankar are concerned, it seems on 05.04.2010, they were dismissed on the ground that no substantial questions of law arise for determination. As far as the appeal preferred by Madhukar is concerned, it appears that there was delay of one year and 321 days in filing the Second Appeal. This Court dismissed the Civil Application on the ground that no sufficient cause was made out and eventually Second Appeal also stood dismissed. In other words, the order passed by the trial Court was maintained in the Appeals preferred by Shankar and Madhukar.

7. The controversy in the present Petition arises from Regular Civil Suit No.350 of 2012 instituted by Madhukar against Shankar inter alia praying for declaration that Madhukar has easementary rights in 6 ft. wide east-west road passing through C.T.S. No.2860 to 2863 and 2859; for recovery of possession of 8 rooms on the western side in open space of plaintiff's C.T.S.No.2863 as also for damages together with interest @ 12% p.a.; for perpetual injunction restraining Shankar from creating any interest in the suit property as also prohibiting plaintiff from using 6 ft. wide road among other prayers.

8. During the pendency of this Suit, Shankar filed application at exhibit-30 under Sections 10 and 11 read with Order II, rule 2, and Order VII, Rule 11 of C.P.C. for dismissal of the plaint. By the impugned order, the learned trial Judge has rejected that application. It is against this order, Shankar has instituted the present C.R.A.

9. In support of this C.R.A., Mr. Gavnekar has taken me through the prayers made in the Suit instituted by Madhukar and Shankar as also to the fact that the decrees passed by the trial Court has attained finality. He has also invited my attention to paragraph 5 of R.C.S.No.250 of 2005 instituted by Madhukar against Shankar, other brother Shivaji and State Government. In paragraph 5 of R.C.S.No.250 of 2005, Madhukar contended that for approaching his property bearing C.T.S.No.2860 to 2863, 6 ft. east-west road passes through C.T.S.No.2859. However, plaintiff did not seek leave of the trial Court under Order II, Rule 2 of C.P.C. He further submitted that no relief was granted in the Suit instituted by Madhukar and therefore, the present Suit namely R.C.S. No.310 of 2012 is hit by Order II, Rule 2 and also Section 11 of C.P.C. He has taken me through the impugned order to contend that the learned trial Judge committed error in rejecting the application.

10. On the other hand, Mr. Desai supported the impugned order. He submitted that in order to attract provisions of Order II, Rule 2 of C.P.C., it must be shown that at the time of instituting Suit by Madhukar, cause of action had accrued to him and though cause of action accrued to Madhukar, he did not claim relief of easementary rights as also he did not seek leave under Order II, Rule 2 of C.P.C. In fact, the easementary right was not subject matter of the Suits instituted by Madhukar and Shankar. The cause of action accrued to Madhukar only after decisions of the Suits and as Shankar caused obstruction to its user of 6 ft. wide road. He has taken me through the averments made in R.C.S.No.310 of 2012 and in particular, paragraphs 4, 6 and 8. During the pendency of the litigation, Shankar was trying to put up fencing on C.T.S.No.2859, which would cause obstruction to the plaintiff's user of 6 ft. east-west road. In other words, he submitted that cause of action accrued to Madhukar only after Shankar tried to put up fencing on C.T.S.No.2859. He, therefore, submitted that as the right of easement was not subject matter of the earlier Suits as also no cause of action accrued to Madhukar claiming relief of easementary rights, the learned trial Judge was justified in rejecting the application.

11. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. I have also dealt with the prayers made in the Suits instituted by Madhukar and Shankar. The short question is whether the present Suit instituted by Madhukar is hit by Order II, Rule 2 and Section 11 of C.P.C. Order II, Rule 2 of C.P.C. reads thus,

“2. Suit to include the whole claim.- (1) Every suit shall include the whole of the claim which the plaintiff is entitled to made in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim.- Where a plaintiff omits 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.

(3) Omission to sue for one of several reliefs.- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.”

2. Perusal of Order II, Rule 2 shows that every Suit has to include the whole of the claim which the plaintiff is entitled to make **in respect of the cause of action**. Perusal of the plaint in the earlier Suit instituted by Madhukar shows that in paragraph 5, plaintiff merely asserted existence of road. However, at that time, prima facie, no cause of action accrued to him claiming easementary rights. Perusal of the present Suit and in particular paragraphs 4, 6 and 8 prima facie shows that the right to sue accrued to him as during the pendency of litigation between the parties, Shankar tried to erect fencing which caused obstruction to Madhukar's user of easementary right. The easementary right of Madhukar was not in issue in the earlier Suits. It also does not fall in any of the explanations (II) to (VIII) of Section 11 of C.P.C. In view thereof, I do not find that the learned trial Judge has committed any error in holding that Suit is not barred by Section 11 as also Order II, Rule 2 of C.P.C. Hence, no case is made out for invocation of powers under Section 115 of C.P.C. Application fails and the same is dismissed. It is needless to observe that the learned trial Judge will decide the Suit on the basis of evidence on record, in accordance with law and on its own merits, uninfluenced by the observations made herein. Order accordingly.

(R. G. KETKAR, J.)