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SA 745.15.odt

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 745 OF 2015

1. Rewannath s/o. Bhaskar Pilgar,
Age 48 years, Occ. Business
since deceased through LRs

1-A Ranjana Rewannath Pilgar,
Age 50 years, Occ. Household,

1-B Sachin Rewannath Pilgar,
Age 30 years, Occ. Service.

1-C Aditya Rewannath Pilgar,
Age 18 years, Occ. Education,
All R/o. Bachkar Wasti Galnimb
Tal. Shrirampur, Dist. Ahmednagar.
2. Ashok s/o. Babrao Bahule,
Age 46 years, Occ. Business,
3. Namdeo S/o. Gangaram Jate,
Age 50 years, Occ. Business,
All R/o. Gamnimb, Tq. Shrirampur,
Dist. Ahmednagar.

**.. APPELLANTS
(Orig. Defendants 3 to 5)**

VERSUS

1. Tarabai w/o. Raghunath Shinde,
Age 43 years, Occ. Household,
R/o. Galnimb, Tq. Shrirampur,
Dist. Ahmednagar.
2. The State of Maharashtra
through the Collector, Ahmednagar.
3. The Engineer,
Public Works Department
Shrirampur Sub-Division, Shrirampur,

Dist. Ahmednagar.

.. RESPONDENTS,
(Resp. No.1 Orig. plaintiffs
& Respondent Nos. 2 and 3
orig. Defendant Nos. 1 & 2 .

...

Mr. Rahul A. Tambe, Advocate for appellants,
Mr. R.R. Karpe, Advocate for respondent No.1
Mr. V.S. Badakh, AGP for respondent Nos. 2 and 3.

CORAM :S.G. CHAPALGAONKAR, J.

DATE : 16th APRIL, 2025.

JUDGMENT :-

1. The appellants/original defendant Nos. 3 to 5 impugn the judgment and decree dated 13.8.2015 passed by the District Judge, Shrirampur, in Regular Civil Appeal No. 5 of 2009 thereby upholding the judgment and decree dated 25.11.2008, passed by Civil Judge (J.D.), Shrirampur in RCS No. 237 of 2006.

2. Respondent No.1/original plaintiff instituted R.C.S. No. 237 of 2006 seeking relief of mandatory and perpetual injunction against defendants. It was her contention that she is owner of Gram Panchayat House No. 118, purchased under registered sale deed dated 17.4.1997 from the Panch Committee. It is abutting to Belapur-Kolar District Road No.34. Defendant Nos. 3 to 5 installed Tapris by side of public road in front of plaintiff's house un-authorizedly and defeated right of frontage of plaintiff. Defendant No.2 – PWD had issued notice to defendant Nos. 3 to 5 for removal of unauthorized Tapris, however, due to political reasons, they failed to take further action. Plaintiff explained that she had also filed RCS No. 85 of 1999, 88 of 1999 and 91 of 1999 before the

Civil Judge (Junior Division) Shrirampur against defendant Nos. 3 to 5 for removal of encroachment. However, since encroachment is on public road, her suits were dismissed. Plaintiff states that on 9.8.2006 plaintiff issued notice under Section 80 of CPC to defendant Nos. 1 and 2 and requested them to remove the encroachment. Defendant No.1 Collector, Ahmednagar also informed plaintiff that defendant No.2 will take appropriate steps, but no action is taken. Consequently, she filed present suit.

Defendants filed written statement and refuted the claim of plaintiff mainly on the ground that plaintiff's previous suits filed against defendant Nos. 3 to 5 have been dismissed on merit. As such, present suit is barred by principle of Res-judicata. Similarly, there would be bar of Order 2 Rule 2 of CPC.

The learned Appellate Court framed points for determination, recorded evidence of parties and after evaluation of material on record, decreed the suit directing defendant Nos. 1 and 2 to remove the encroachment made by defendants Nos.3 to 5 in RCA No. 5 of 2009, thereby dismissing the appeal vide judgment and order dated 13.8.2015. Hence, the second appeal.

3. Mr. R.A. Tambe, learned advocate for appellants would submit that plaintiff had instituted previous suits against defendant Nos. 3 to 5 for similar relief in respect of same subject matter. Those suits came to be dismissed on merit. The decrees attained finality. Therefore, present suit filed with cosmetic changes like introduction of defendant Nos. 1 and 2 would be barred by principle of res-judicata. Similarly, bar under Order 2 Rule 2 of CPC would operate, however, these aspects are not given consideration by both courts. He would further submit that even otherwise, present suit is barred by limitation. Plaintiff was aware

about the encroachment of defendants even prior to purchase of house and admitted so, during the course of evidence. Therefore, suit instituted in the year 2006 is hopelessly barred by limitation. According to Mr. Tambe, all the aforesaid legal aspects constitute substantial questions of law qua parties and appeal needs to be admitted. In support of his contentions, he relies upon the judgment of the Supreme Court of India in the case of *Virgo Industries (Engineering) Private Limited vs. Venturetech Solutions Pvt. Ltd. reported in (2013) 1 SCC 625*.

4. Per contra, Mr. Karpe, learned advocate for respondent No.1 submits that both the suits are based on independent cause of action. In previous suits, plaintiff contended that defendants have encroached upon portion of property owned by her, however, during trial of that suit it was crystallized that encroachment of defendants was on public property. Eventually, plaintiff's claim for removal of encroachment was rejected. Present suit is filed based on subsequent cause of action, when defendant Nos. 1 and 2 i.e. statutory authorities failed to discharge their statutory function of removal of encroachment although they were noticed for same by plaintiff. In this background, neither bar under Section 11 nor under Order 2 Rule 2 of CPC would attract. According to him, in present suit, plaintiff has sought relief of mandatory injunction against public authorities. Cause of action for such claim arose when finding was recorded in previous suits that defendants have raised construction on public road. In that view of the matter, he submits that no substantial question of law arises for consideration in present appeal and same is liable to be dismissed.

5. Mr. Tambe, learned advocate for appellant took this Court through the judgment and orders delivered in previous suits instituted by

plaintiff against defendant Nos. 3 to 5. Perusal of the pleading in those suits show that plaintiff purchased house property under registered sale deed dated 17.4.1997 in the month of December, 1998. At relevant time, PWD had issued notices to the defendant Nos. 3 to 5 for removal of encroachment of their Tapris. At this juncture, they attempted to shift their Tapris over land belonging to plaintiff and to certain extent, they succeeded in their attempt. Therefore, plaintiff instituted suits for perpetual and mandatory injunction. In those suits, an issue was framed, whether plaintiff proves that defendant has committed encroachment upon open space of suit house, as specified in plaint. The trial court held that construction of Tapris/shops of defendants are in existence since before purchase of suit house by plaintiff and it is on part of public road; eventually suit was dismissed.

6. Perusal of pleadings in present suit would show that plaintiff has specifically asserted that after dismissal of previous suits, defendant Nos. 1 and 2, due to political pressure failed to take steps for removal of encroachment. On or about 19.8.2006, defendant Nos. 3 to 5, unauthorizedly caused excavation of channel and closed down access of plaintiff to the road. In the result, there was accumulation of water which endangered construction of plaintiff's house. Plaintiff is unable to meaningfully use the house property. Plaintiff, therefore, issued notice dated 9.10.2006 under Section 80 of CPC, requesting them to remove the encroachment of defendant Nos. 3 to 5 within a period of two months, however, they failed to take further action. Hence, plaintiff filed suit.

7. If the cause of action as pleaded in previous suits and present suit are compared, it is altogether different. In previous suits,

plaintiff asserted encroachment by defendant Nos. 3 to 5 on her own property and sought removal, however, in present suit, plaintiff is seeking mandatory injunction against defendant Nos. 1 and 2, who are statutory authorities, to remove encroachment on public road, which is creating obstacle in use of frontage of her house property. Although the subject matter of both the suits is one and the same, the nature of relief and cause of action is incomparable. The bar under Order 2 Rule 2 of CPC applies only when the cause of action and parties involved on both the suits are same and relief claimed in specific suit could have been claimed in previous suit itself, but had been omitted. Only then, would subsequent suit be barred under Rule 2 of Order 2. For that purpose, the courts are required to examine pleading in both the suits and identify cause of action. Only when the cause of action on which two suits are based appears to be same and parties were also same, the subsequent suit can be treated as barred under Rule 2 of Order 2.

8. The Supreme Court of India, in the matter of Coffee Board vs. Ramesh Exports reported in (2014) 6 Scc 424, observed in para. 12, thus :-

“The Courts in order to determine whether a suit is barred by Order 2 Rule 2 must examine the cause of action pleaded by the plaintiff in his plaints filed in the relevant suits (See: [S. Nazeer Ahmed v. State Bank of Mysore & Ors.](#)). Considering the technicality of the plea of Order 2 Rule 2, both the plaints must be read as a whole to identify the cause of action, which is necessary to establish a claim or necessary for the plaintiff to prove if traversed. Therefore, after identifying the cause of action if it is found that the cause of action pleaded in both the suits is identical and the relief claimed in the subsequent suit could have been pleaded in the earlier suit, then the subsequent suit is barred by Order 2 Rule 2.”

9. Considering aforesaid analogy and comparative analysis of the pleadings in both suits, it is difficult to hold that bar under Order 2 Rule 2 would apply. Pertinently, there is no specific defence in written

statement as regards to the bar under Order 2 Rule 2 of CPC. Under such circumstances, contention of appellant that suit is barred by Order 2 Rule 2 cannot be accepted.

10. Although Mr. Tambe relies upon the judgment in case of *Virgo Industries Ltd. (supra)*, he may not get any assistance, since similarity of cause of action and similarity of parties to the dispute, is the test for application of Order 2 Rule 2 of CPC. In present case, evidently, nature of relief claimed and cause of action in both the suits is totally different. In present suit, plaintiff sought decree of mandatory injunction against public authorities for removal of encroachment. In earlier suit, they were not parties and even the basis of claim of plaintiff, was altogether different.

11. The next contention raised on behalf of appellant is that, suit is barred by principle of res-judicata. However, as discussed above, the issues involved in present suit are totally different than those which were agitated in earlier proceeding. In present case, main relief is sought against public authorities, who were not parties in previous suit. In earlier suits, finding is recorded that plaintiff failed to prove encroachment by defendant Nos. 3 to 5 on her property. In present suit, plaintiff is coming with admission or rather she is relying upon finding recorded in previous suit, to contend that defendant Nos. 3 to 5 have encroached upon public property, however, such encroachment is creating nuisance to her. Therefore, sought relief against public authorities to remove such encroachment. In this background, the bar contemplated under Section 11 of CPC would not attract.

12. Mr. Tambe endeavours to contend that suit is barred by

limitation. He tries to impress upon the court that plaintiff had knowledge about such encroachment even since before purchase of property. Therefore, she could have raised claim within 3 years of getting such knowledge or atleast within 3 years from the date of purchasing property. Apparently, plaintiff has come with the case that defendants' encroachment on public property is confirmed after dismissal of suit. Thereafter, she persuaded public authorities for removal of encroachment and lastly gave notice under Section 80 of CPC. In this background, bar of limitation cannot be attracted. Learned District has elaborately dealt with aforesaid aspect in para. 13 of its judgment.

13. Appellate court rightly observed that plaintiff cannot be said to have a right to sue against defendant Nos. 1 and 2 unless notice under Section 80 of CPC is served. In present case such notice was served upon them on 9.10.2006 and suit was instituted on 22.12.2006. Therefore, the suit is held to be within limitation.

14. No fault can be found in the approach of the courts below. No substantial question of law arises for consideration in this appeal. Hence, second appeal stands dismissed. Pending civil application stands disposed of.

[S.G. CHAPALGAONKAR, J]

grt/-