



Order below Exh. 15 in R.C.S.No. 63/2020

This is an application made by the defendants under Order 7 Rule 11 (a) and (b) of the Code of Civil Procedure for rejection of plaint. It is contended that the suit is instituted for relief of declaration, mandatory and perpetual injunction. However, it is clearly seen that no cause of action arose for the suit. The plaintiff has not pleaded about situation or location of C.S.No. 354 and 352 owned by the defendants. The plaintiff also not filed any prima facie documentary evidence on record to show the alleged encroachment. The plaintiff has allotted share in C.S.No.355 situated at northern side of C.S.No. 353 and constructed a house therein. In remaining area, defendant No. 1 has erected toilet at western side prior to ten years and using certain area for washing clothes and utensils.

02. The property C.S.No. 352 owned by defendant No.2 is situated at eastern side of plaintiff's property. The plaintiff himself constructed common wall between C.S.No. 354 and 353. Likewise, common wall is existence between C.S.No. 352 and 353. Also, C.S.No. 353 and road in that lane is open and common to all. However, the plaintiff has made false contentions in the plaint. From pleadings in para No.5 of the plaint, cause of action does not appear to have been arose for institution of suit. Moreover, in para

14(B) of the plaint, the plaintiff has made prayer of vacant possession but the relief claimed is not valued in view of Section 6 (v) of the Maharashtra Court Fees Act and he has not supplied requisite stamp papers. The plaintiff has filed application for appointment of court commissioner only to collect the evidence. Thus, from the said application also, the plaint is barred by provisions under Order 7 Rule 11(a) and (b) of the Code. If the plaint is rejected no loss would be caused to the plaintiff. On the other hand, the defendants would put to irreparable loss if the suit is proceeded further. Ultimately, the defendants prayed for rejection of plaint on the aforesaid grounds.

03. The plaintiff has filed his say at Exh.19 and averred that C.S.No.355 is road. Therefore, neither the plaintiff nor the defendants can make encroachment and erect any construction over it. The defendants admitting that they have made construction over road in C.S.No.355. However, the said act of construction and closing the way on their behalf is recent. On 20.07.2020, the defendants by putting stones, bricks over road and encroaching certain area erected toilet. In such circumstances, entire encroachment in C.S.No.355 need to be removed. Therefore, measurement of C.S.No.353 and 354 belonging to the plaintiff and defendants and C.S.No.355 of road, is necessary to be carried out. From the said measurement, aspects like area of construction, area of encroachment and how the fact of road is changed would come on record. As such, without determination of encroachment, dispute between the parties will not be resolved.

Thus, the plaintiff has cause of action to institute the present suit. Finally the plaintiff prayed for rejection of application with costs.

04. Heard both sides. The defendants sought rejection of plaint firstly on the ground provided under Order 7 Rule 11(a) of the Code which provides that the plaint shall be rejected where it does not disclose a cause of action. In this regard they placed reliance on judgment in K.Akbar Ali vs. K.Umar Khan & Ors. LL 2021 SC 114 wherein, the Hon'ble Supreme Court held that "*It is patently clear from a meaningful reading of the plaint in its entirety that the plaintiff has no cause of action against the first defendant being the owner of the suit proeprty, the power of attorney being patently invalid. The inter-se dispute between the heirs of the deceased-Defenant No.1 will not confer any right on the petitioner as his claim is based upon a pre-emption agreement executed by a power of attorney, which does not authorize the attorney to deal with the property of the said defendant*".

05. Considering aforesaid ratio and facts of present suit, on perusal of present plaint, it appears that the plaintiff in paragraphs No.5 and 7 of the plaint specifically mentioned that the defendants made two feet encroachment at western side in C.S.No 353 owned by plaintiff. Likewise, on 20.07.2020, the defendants made obstacle by putting bricks and iron angles over the way in C.S.No. 353. Thus, from aforesaid pleadings in the plaint, cause of action appears to have been arose to the plaintiff for institution of present suit. For the said reason, he constrained to approach the Court by way of present suit for getting relief.

Therefore, ratio in the judgment of **K.Akbar Ali (supra)** on which the defendants placed their reliance, is not applicable to the case in hand being based on different facts and circumstances.

06. The another contention of the defendants that in para 14(B) of the plaint, the plaintiff has made prayer of vacant possession but the relief claimed is not valued in view of Section 6 (v) of the Maharashtra Court Fees Act and he has not supplied requisite stamp papers. Hence, as relief claimed is undervalued, the plaint shall be rejected under Order 7 Rule 11(b) of the Code. In this context, on perusal of relief clause in the plaint, the plaintiff has sought relief of vacant possession after removal of encroachment made over C.S.No.355 and 353. Simultaneously, the plaintiff has filed application for appointment of court commissioner. The said application is yet to be decided on merits. Therefore, at this juncture aspect of encroachment cannot be determined and the plaintiff cannot be asked to deposit necessary court fees on valuation of encroached portion to be recovered by him. It is for the plaintiff to prove his case by adducing cogent evidence. If he fails to prove his case, ultimate result of the suit would bind him. Therefore, at this juncture, it is not proper to jump on conclusion that the plaintiff had no cause of action to institute the present suit or the claim is undervalued. Rather, from pleading of the plaintiffs, no reason is found to reject the plaint on any of the ground as alleged by the defendants.

07. Cumulative effect of above discussion is that present application is devoid of merit. Hence, following order :

ORDER

1. The application is rejected.
2. No order as to costs.

Kale-Kheriwade.
Date : 15/03/2021.

(V. V. Khulape)
Civil judge Junior Division,
Kale-Kheriwade.