

Order below Exh. 24

This is an application filed by defendant under Order VII Rule 11 of the Civil Procedure Code 1908, through which he is seeking dismissal of the suit under clause 'd' and 'e' of the said provision.

2. It is averred that plaintiff was filed similar suit vide R.C.S No. 21/2010 against the same party and on the same cause of the action which was dismissed for want of prosecution. Therefore for the same cause of action against the same party plaintiff could not file fresh suit since, it is hit by Res Judicata under provision of section 11 of the C.P.C.

3. It is further averred according to the recital of the plaint, shows that the cause of action arose in respect of suit property in the year 1990, therefore, plaintiff has failed to file this suit within the statutory period laid down under the provision of Limitation Act. Hence suit is time barred and needs to be quashed.

4. It is further averred plaintiff is filed present suit for possession and perpetual injunction. Therefore it is bounded duty of the plaintiff to mention proper boundaries of the suit property in the manner laid down under the provision of Order 7 Rule 3 of the C.P.C. Defendant further claimed that plaintiff did not file additional copies of the plaint, further suit is subjected to non joinder of necessary parties which leads to quashed the proceeding.

5. In the other hand plaintiff has filed say and admitted that in the

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year 2010 suit was filed by plaintiff vide R.C.S no. 21/2010 which was dismissed on the ground for want of prosecution since both the parties were remain absent from the proceeding. He further assailed that, the present suit could not barred under the provision of Res Judicata. As to embraces the provision under section 11 of C.P.C. it is necessary the suit has to be adjudicated on merit by deciding each issue framed under it. It is further assailed the suit has been filed within the limitation and it would be feasible to decide the issue of limitation at the conclusion of the trial. The other objection taken by the defendant are frivolous and does not sustained since suit has been filed and number after due verification by concerned clerk of the court.

6. After considering the rival contention of both the parties, the following points arise for determination. I have recorded findings and reasons thereon, which are as under :-

	<u>Points</u>	
1.	Whether suit is barred by Res Judicata ?	Negative.
2.	Whether suit has been filed within the limitation ?	It is a mix question of law and fact hence need be decide at the conclusion of trial.
3.	What order ?	As per final order.

-:- R E A S O N S -:-

7. As to point no. 1 and 2

Point no. 1 and 2 are interconnected with each other, hence I have discussed both of them together.

8. Read the application and say, heard both advocate at length. The suit has been filed for possession and perpetual injunction. At the threshold it is necessary to state the case of the plaintiff. The plaintiff came with the case that suit property i.e. old substratum ad-measuring 24 x 28 feet situated in Sr. 2 Hiss No. 46 is joint family property of plaintiff. It is averred 50 years ago the forefather of plaintiff viz Alshya Randhya Patil had given suit property to forefather of defendant for residence purpose on the commitment that they will handover the same after securing their own house at village Vasheni.

9. It is further averred in the year 1990 forefather of the defendant had returned the suit property since they had construction their own house at Vasheni. Thereafter in 2009 in the absence of knowledge of plaintiff defendant was illegally started raising house construction and brought construction material over the suit property. Plaintiff was immediately came into action and was filed suit vide R.C.S No. 21/2010. During the pendency of the said suit parties were agreed to measured the boundaries of Sr.2 Hiss 46 and Sr.2 Hiss 45 by TILR and agreed until the measurement report come defendant would not construct the house over the suit property. Thereafter both the parties did not attend substantive hearings of the suit hence suit got dismissed for want of prosecution.

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10. It is further case of plaintiff that on 29/09/2019 defendant has again started cleaning on the suit property by cutting down drumstick tree owned by plaintiff. Plaintiff was tried to persuaded them but they did not pay heed, hence plaintiff went to the Chirner Police station as to lodge complaint but Police refuses to take cognizance since matter is in civil nature.

11. It is argued by the defendant that the suit hit by section 11 of the C.P.C. since the similar suit was dismissed between the same parties and same caused of action in the year 2010. It is imperative to state that section 11 of the C.P.C. specifically envisaged when suit is heard and finally decided on the issues and between the same parties. The subsequent suit would be barred to determined for the same issues against same parties. In the present case admittedly suit was dismissed for want of prosecution, but it was no decided by the court on merit, therefor terminology of section 11 of C.P.C would not be attracted to the case in hand. Order 9 rule 4 C.P.C also envisages that parties are entitle to file fresh suit without restoring the same but subject to limitation.

12. Defendant further came with the case that suit is barred by limitation. According to him plaint itself speaks that the caused of action arose in the year 1990, therefore limitation of the suit will be start from 1990. On perusal of the plaint para no.5 specifically brought to notice that cause of action arose on 29.09.2019 by alleging that, defendant illegally entered to suit property and has stared cleaning it by cutting down drumstick tree of the plaintiff. Therefore according to the plaint it

appeared suit has been filed on different footing, hence at this juncture it would be too early to decide that the suit is barred by limitation since the question of limitation is mix question of law and fact.

13. Defendant further claim that plaintiff has fails to comply with requisite compliance under order VII Rule 3 of C.P.C. on perusal of the plaint plaintiff has categorically depicted boundaries of the suit property according to the provision. Hence I have not find any substance therein. Joinder of the necessary parties will be the issue of the suit and hence there is need to decide at this juncture

14. After thoroughly discussion I am in the humble view that the present application is devoid of merit, therefore my finding as to the issue no 1. negative and for issue no.2 will be the issue of suit .

16. As to issue no.3 I have passed following order.

ORDER

- (1) Application hereby rejected.
- (2) Cost on caused.

Uran,
Date : 20.01.2020

(R.B.Pol)
Jt. Civil Judge, J.D., Uran