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ORDER BELOW EXH. 22 IN R.C.S. NO. 326 / 2014

1] This is an application for rejection of plaint vide Order 7 Rule 11 made by the defendants. The plaintiffs has filed their say at Exh. 23. Heard argument of advocates of both the parties.

2] The advocate for defendants argued that the plaintiff has filed suit for removal of encroachment upon the land of plaintiff bearing gat no. 26 situated in village Erandoli, Tq. Miraj, Dist. Sangli. The plaintiff in the present suit sought relief of recovery of possession of encroached portion of land. But in fact present plaintiff before filing this suit was instituted civil suit bearing no. RCS 157/2010 for measurement, fixation of boundaries and sub-division of gat no. 26. In the said suit plaint was rejected by court on the ground that suit was not within the jurisdiction of the court. Moreover application of present plaintiff for removal of encroachment was also rejected by sub-divisional officer Miraj on the ground that plaintiff failed to prove encroachment upon his land. Therefore advocate of defendant contended present suit is barred by principles of res judicate as contemplated in section 11 of CPC. Hence the plaint is liable to be rejected vide Order 7 Rule 11(d).

3] Thus from submission of advocate of respective parties and documents on record, following point arise for my consideration and I have recorded my finding against it with reasons stated thereunder.

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Points	Findings
1] Whether suit is barred by any law?	No.
2] What order?	As per final order.

REASONS

AS TO POINT NO 1 AND 2

4] The advocate for plaintiff argued that the RCS no. 157/2010 was instituted for the measurement, fixation of boundaries and sub-divisions of gat no. but in the said suit court has rejected plaint after framing preliminary issue, on the ground that division of gat no. or survey no. is exclusively within the power of land record authority and suit is barred by section 36(A) of the Bombay Prevention of Fragmentation and Consolidation Act, 1947 as well as u/s 4 of Revenue Court Jurisdiction Act.

However plaintiffs advocate further submitted that relief claimed in previous suit RCS No. 157/2010 is a different from the relief claimed in present suit which is in nature of removal of encroachment. He relied on the judgment of Hon'ble Apex Court AIR 1987 SC 2167. He further contended that as there is recurring cause of action. Therefore suit is not barred by principles of res judicata. Hence application be rejected.

5] As per Order 7 Rule 11(d) the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. On perusal of the plaint and map filed along-with it. It is a clear that portion marked in map shows that the defendant made

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encroachment upon the suit property gat no. 26 from south side.

6] Moreover document produced by the defendant such as copy of order of court in RCS no. 157/2010 and copy of order of sub-divisional officer in BND No. 1/10 which clearly shows that relief claimed in the previous suit was fixation of the boundaries and sub-division of gat no. but relief claimed in the present suit is recovery of possession of encroached portion of land which is different from each other. Therefore in my considered view it cannot be said that the suit is barred by principle of res judicata. It is true that the plaintiff was made application to sub-divisional officer for removal of encroachment and recovery of possession of 5 R land gat no. 26 and it was rejected by the sub-divisional officer on the ground that applicant failed to prove encroachment. But rejection of the application by sub-divisional officer does not prevent the plaintiff from instituting fresh suit in respect of new cause of action of encroachment. The authority produced by the plaintiff is helpful and assist the fact of the present suit in hand. AIR 1987 SC 2137 E. Achutan Nair Vs. P. Narayanan Nair and another in which Hon'ble Apex Court held that suit for demarcating boundary is maintainable and observed that "A suit for demarcating the boundary of a property is maintainable. In India, the question whether a suit is cognizable by a civil court is to be decided with reference to s.9. If the suit is of a civil nature, the court will have jurisdiction to try the suit unless it is either expressly or impliedly barred. A dispute regarding identification of boundary between two adjacent land owners is certainly a dispute of a civil nature and it is not barred either expressly

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or impliedly. The technicalities of English law and the distinction made by the English courts between legal estates and equitable estates, cannot be imported into our jurisprudence.” As well as judgment of Bombay High Court Nagpur Bench in the case Manohar Mahadeorao Pagrut v/s Sau Sunanda Ramdas Tharkar 2008(4) ALL MR 718 assist the plaintiff's case.

7] In my considered view considering the averments made in the plaint and map attached with it, it is evident that defendant has made encroachment in the suit property upon 20 R land. A dispute regarding identification of boundary between two adjacent land owners is certainly a dispute of civil nature and it is not barred either expressly or impliedly. Therefore civil court has jurisdiction to entertain and decide the suits of civil nature. Hence present suit is not barred by principle of res judicata. Thus keeping the above fact and legal position in mind I answered point no. 1 in the negative and in answer to point no. 2 I pass the following order.

ORDER

- 1] The application is rejected.
- 2] Costs with cause.

Miraj.
Date: 28/04/2017

Sd/-
(S.M. Kolekar)
Jt. Civil Judge Jr. Dn., Miraj