

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.14 of 2011**

1. Hembai @ Hemu Kunwar W/o Alakhdas Aged About 52 Years R/o Garhumariya, Tah. Pussore, Distt. Raigarh C.G.
2. Usat Das S/o Alakhdas, Aged about 25 years, R/o Village Garhumariya, Tahsil Pussore, District Raigarh
3. Bheklal S/o Alakhdas, aged about 22 years, R/o Village Garhumariya, Tahsil Pussore, District Raigarh
4. Minor Keshav Das Mahant W/o Alakhdas, aged about 17 years, Through His Mother Hembai R/o Village Garhumariya, Tahsil Pussore, District Raigarh

---- Appellants**Versus**

1. Khema Rajkumar, S/o Ambalal Mahant Aged About 39 Years R/o Behind District Court, Raigarh, Tah. & Distt. Raigarh C.G.
2. The Commissioner Municipal Corporation, Raigarh

---- Respondents

Shri RK Pali, counsel for the appellants.
None for the respondents.

Judgment On Board**15/9/2015**

Heard on admission.

2. The instant second appeal filed under Section 100 of the Code of Civil Procedure is directed against judgment and decree dated 08.11.2010 passed by 3rd Additional District Judge (FTC), Raigarh in Civil Appeal No.7A/10 and 11A/10 whereby and whereunder the defendants/appellants' First Appeal No. 11A/10 has been dismissed along with connected civil appeal filed by respondent No.1 bearing number Civil Appeal No.7A/10 affirming the judgment and decree dated 30.3.10 passed by First Civil Judge Class-II, Raigarh in Civil Suit No.10A/09.
3. Brief facts necessary for disposal of the appeal are that respondent No.1/plaintiff has filed a civil suit before trial court for confirmation of possession and perceptual injunction for the suit land -

pasra (the land belongs to Municipal corporation owned and controlled by the municipal corporation and after obtaining fee permitted by the municipal corporation to sell vegetables). The trial Court on close scrutiny of the material placed on record dismissed the suit vide its judgment and decree dated 13.3.10 and held that the plaintiff failed to prove that he was in possession of *pasra* since 17 years and also failed to prove that defendants attempted to dispossess him from *pasra* or threatened to vacate the *pasra* and held that since no document filed regarding possession thereby the plaintiff is not entitled for the relief claimed in the plaint. Against the impugned judgment, present appellant and the plaintiff both filed appeal No.11A/10 and 7A/10. The First Appellate Court after reappreciation of the entire evidence on record, dismissed the appeal filed by both the appellants and affirmed the findings recorded by the trial Court.

4. Against said judgment and decree passed by the First Appellate Court, the plaintiff has not preferred any second appeal. The defendant/appellant of Civil Appeal No.11A/10 filed the instant second appeal and has taken the ground that as the appellants categorically prayed for the possession of the suit land in their written statement and also there was finding by the learned trial Court in this regard that the appellants were in possession of the suit land. Even after the finding, the trial Court acted illegally by not granting possession in favour of the appellants/defendant 1 to 4. The learned First Appellate Court committed error in holding that the defendants 1 to 4 have not filed counter claim to take over the suit land and not paid any court fee in this regard and said relief prayed in the written statement could not be granted. The trial Court and the first appellate court failed to appreciate and consider the provisions of law applicable in the peculiar facts of the

case. Hence, it is prayed on behalf of the appellants to set aside the judgment and decree passed by the first appellate court in Civil Suit No.11A/10 and prayed that substantial question of law are required to be framed, the appeal may be admitted after formulation of substantial question of law and also admitted for the relief prayed in the instant second appeal. As per the proposed substantial question of law in the memo of appeal it is prayed that the instant second appeal may be admitted and the relief, as prayed, may be granted.

5. I have heard learned counsel appearing on behalf of the appellant on admission under Order 42 Rule 11 read with Order 42 Rule 1 of the CPC and perused the judgment and decree including the records of the both the courts below.

6. Learned counsel for the appellants supported the ground taken in the second appeal and submitted that the substantial question of law need to be formulated along with admission of the appeal. Learned counsel further submits that as the question of law regarding no any relief granted under Order 41 Rule 33 read with 151 of the CPC, the first appellate court is empowered to grant relief of re-possession to the appellants/defendants without there being any counter claim for the same. Further submitted that proposed substantial questions of law, as mentioned in the memo of appeal, may be considered and formulated along with admission of the instant second appeal.

7. After perusal of the entire facts, it appears that as an admitted position, *pasra* means an open place with the title and ownership of the Municipal Corporation wherein after obtaining certain licence if some one is permitted to sell vegetables or other small business in the open land for the time and manner permitted by the Municipal Corporation, the owner and title holder of the such open land. It is admitted position

that the plaintiff failed to prove the factum of possession for last 17 years, he has not filed any document to prove the suit filed by him. It is also admitted that no any cross suit has been ever filed by the present appellants/defendants for any counter claim and no any court fee paid for the same. The title and ownership undisputedly is with the Municipal Corporation, no one proved the title and ownership in their name, even no any client attempted for the undisputed title of Municipal Corporation and their ownership. On behalf of the appellants, attention drawn on the provisions of Order 41 Rule 33 of the CPC. Order 41 Rule 33 read as follows:

“33. **Power of Court of Appeal** – The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or an of the decrees, although an appeal may not have been filed against such decrees. [Provided that the Appellate Court shall not make any order under Section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order]”

8. At the very outset, neither any possession nor any ownership title were proved by any of the parties before the trial Court since the land belongs to Municipal Corporation and near the road it is only permitted for small business like selling vegetables for limited period in open place. There is no any permission to erect or construct any structure and the same has to kept as it is open as it was. In the

present facts and circumstances, provisions of order 41 Rule 33 does not attract since the appellants also failed to prove the lawful possession of any right for the same. Any will by the earlier holding the business may not creates any authority over the land where permission for taking small business is renewable day today.

9. In the considered view of this Court, the appellants failed to demonstrate any substantial question of law required to be formulated for hearing the second appeal. Whatever proposed substantial question of law mentioned in the second appeal cannot be held and termed as substantial question of law involved in the matter.

10. This court cannot proceed to hear the second appeal without there being any substantial question of law involved in the appeal. Existence of substantial question of law is the *sine-qua-non* for the exercise of the jurisdiction under the amended Section 100 of the CPC. Learned counsel appearing for the appellants failed to point out any substantial question of law which may arise for determination in the case. In the absence of any substantial question of law arises for determination of this Court, this Court has no option but to dismiss the appeal.

11. In view of the above, since no substantial question of law arises for determination in the instant case, this is not a fit case for admission. Consequently, the appeal is dismissed at motion stage itself under the provisions of Order 41 Rule 11 read with Order 42 Rule 1 of the CPC. No order as to cost.

Sd/-
(Chandra Bhushan Bajpai)
JUDGE