

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

SA No. 413 of 2015

1. Dinesh Nirmalkar S/o Late Gorelal Nirmalkar, aged about 29 years,
2. Purrey Nirmalkar S/o Late Gorelal Nirmalkar, aged about 27 years,
3. Jetiya Bai W/o Dinesh Nirmalkar, aged about 25 years,
4. Badra Bai Wd/o Late Gorelal Nirmalkar, aged about 51 years,
All R/o Ramnagar, Tikripara, District – Bilaspur – (C.G.)

---- Appellants

Versus

1. Budhram Nirmalkar S/o Late Rewaram Nirmalkar, aged about 62 years,
Caste – Dhobi, R/o Ramnagar Tikripara Takhatpur, District Bilaspur
Chhattisgarh Through Power of Attorney Nandkumar Nirmalkar S/o
Budhram Nirmalkar, aged about 39 years, R/o Ramnagar Tikripara,
District Bilaspur Chhattisgarh

---- Respondent

For Appellants – Shri Sushobhit Singh, Advocate.
For Respondent – None, the respondent not noticed.

Judgment on Board

23-07-2015

1. Heard on admission.
2. The instant second appeal under Section 100 of the CPC is directed against the judgment dated 20-04-2015 passed by the 7th Additional District Judge, Bilaspur in Civil Appeal No.155-A/2014 whereby and whereunder the plaintiff's appeal has been allowed reversing the judgment and decree dated 28-08-2014 passed by the Civil Judge Class II, Takhatpur, District Bilaspur, C.G., in Civil Suit No.49A/13.
3. Facts in brief necessary for disposal of this appeal are that the respondent/plaintiff filed a suit before the trial Court for permanent injunction that defendants/appellants be restrained for plaster to be performed by the plaintiff. The trial Court on close scrutiny of the evidence led, submissions made and

material placed on record, dismissed the suit vide its judgment dated 28-08-2014 and held that the plaintiff is not entitled to make plaster on the wall below his house. Consequently, the trial Court by dismissing the suit also denied the prayer for permanent injunction in this behalf.

4. Against the said judgment and decree passed by the trial Court, the plaintiff/respondent preferred the first appeal. The first appellate Court after re-appreciating the entire evidence available on record, set aside the judgment and decree passed by the trial Court and passed a permanent injunction that appellants/defendants are restrained for plaster on wall shown in schedule A.

5. Against the said judgment and decree passed by the first appellate Court, the appellants/defendants have preferred this second appeal inter alia on the ground that no title is proved, even then the first appellate Court passed the judgment and decree. The trial Court dismissed the suit of the plaintiff/respondent as no title for the same is proved. Without proper appreciation of the evidence led, the first appellate Court reversed the judgment and decree of the trial Court. The first appellate Court erred since without prayer for declaration of title, prayer for permanent injunction is not maintainable; there is no issue regarding declaration of title in the plaint, hence, subsequent prayer is not acceptable. The appellate Court vide its para 15 of the judgment held that the title is with the plaintiff/respondent, but there was no pleading for declaration of title, without any such pleading, the finding of the first appellate Court in para 15 of the judgment is not on proper facts, hence, it be rejected. The appellants/defendants by filing this second appeal prayed that substantial question of law may be formulated as to whether without there being any pleading for title finding of the first appellate Court as in para 15 is proper and lawful or not. It is further prayed that the appeal may be allowed and the judgment and decree passed by the first appellate Court may be set aside.

6. I have heard the counsel appearing for the appellant on admission under Order 41 Rule 11 read with Order 42 Rule 1 of the CPC and perused the

judgment and decree of both the courts below.

7. Learned counsel appearing for the appellants supported the grounds taken in the second appeal and submitted that substantial question of law needs to be formulated along with admission of the instant second appeal. He would further submit that as the substantial question of law is involved as mentioned in the memo of appeal, the appeal may be admitted for hearing and be disposed of accordingly.

8. After perusal of the material available along with memo of appeal, it goes to show that the plaintiff/respondent filed a civil suit for a prayer that defendants/appellants be permanently restrained for making any interference for plaster on the suit wall shown in the annexure. The learned trial Court held that since the plaintiff/respondent is not the owner of the vacant place (आंगन), hence he is not having right of easement to enter for the plaster of the wall. After holding this, the trial Court in furtherance of other appreciation dismissed the suit. Learned first appellate Court held that since the question of plaster on the backside of the wall only is involved and after appreciation of attending circumstances reversed the judgment and finding of the trial Court and restrained the appellants/defendants for any obstruction regarding the plaster/whitewash in the suit wall.

9. On close examination, it was not the case of the plaintiff/respondent regarding declaration of title, he was before the civil court to allow him for the plaster work on the wall. After appreciation of the entire evidence, the first appellate Court allowed the prayer and permanently restrained the defendants/appellants for any obstruction regarding plaster and whitewash. There was no cloud on title; the defendants/appellants has not come up with a cross suit that the impugned wall belongs to them. In the absence of any other prayer, facts simplicitor remains that for plaster work, whitewash, the opposite party may be restrained; for this, the first appellate Court while appreciation

passed the judgment and decree.

10. Upon perusal of the entire evidence, there is no any substantial question of law requires to be formulated for hearing of this second appeal.

11. This Court cannot proceed to hear a 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 Civil Procedure Code. Learned counsel appearing for the appellant 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 this appeal.

12. In view of 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.

13. No order as to cost.

Sd/-
(Chandra Bhushan Bajpai)
JUDGE