

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.442 of 2015**

Goverdhan, S/o. Brinda Prasad Gouraha, R/o. Village Pendraavan PC
No.20, RI Circle & Up Tehsil Bhatgaon Tehsil Bilaigarh District
Baloudabazar-Bhatapara (CG)

---- Appellant

Versus

1. Dinesh S/o. Badri Prasad Chandra R/o. Village Pendraavan PC
No.20, RI Circle & Uup Tehsil Bhatgaon Tehsil Bilaigarh District
Baludabazar-Bhatapara (C.G.)
2. State of Chhattisgarh Through Collector Baloudabazar District
Baloudabazar- Bhatapara (CG)

---- Respondents

Shri BN Nande, counsel for the appellants.
Smt. Shobha Kashyap, Dy. GA for the State/respondent No.2.

Judgment On Board

22/9/2015

Heard on admission.

The instant second appeal filed under Section 100 of the Code of Civil Procedure is directed against judgment and decree dated 22.4.15 passed by 3rd Additional District Judge, Baloda Bazar in Civil Appeal No.H-37A/14, whereby and whereunder the plaintiff's/appellant's appeal has been dismissed and affirmed the judgment and decree dated 26.4.14 passed by Civil Judge Class-II Bhatgaon in Civil Suit No.06A/2011.

2. Facts in brief necessary for disposal of the appeal is that the plaintiff/appellant has filed civil suit for declaration and easement of rights against the defendants and also demolition of construction erected by defendant No.1 and thereby to remove the obstruction and to issue a mandatory injunction. The trial Court on close scrutiny of evidence, submission made, material placed, dismissed the suit vide judgment and decree dated 26.4.14 and held that the plaintiff failed to

prove obstruction for his easementary right by construction of house on the suit land i.e. land belongs to the State and recorded as gross land. The trial Court also held that the suit is a non joinder of the parties as the State is necessary party.

3. Before the trial Court the admitted fact that the suit land is a Government land recorded as gross land.

4. Against such judgment and decree passed by the trial Court, the plaintiff preferred the first appeal. The first appellate court after reappraisal of the entire facts, dismissed the appeal and affirmed the findings recorded by the trial Court.

5. Against such judgment and decree passed by the First Appellate Court, the plaintiff has preferred second appeal, inter alia, on the ground that both the Courts below erred in holding that the State is a necessary party as the land was open place used by the plaintiff, with the doctrine of grant he acquired right of easement and the state was not objected in any way for the use by the plaintiff and the defendant No.1 encroached and constructed the house thereby only defendant No.1 was necessary party, the State was formal party and even the State has not objected and contested the instant civil suit remains ex-parte on 21.3.14. On 27.01.2014 the plaintiff filed necessary application for amending the suit and impleaded the State as formal party and thereafter interim application were allowed by the trial Court. Registered notice were issued to defendant No.2, not returned served or unserved and the same was deemed served as per the provisions of law. On behalf of the appellant it is argued that both the Courts erred in holding that no right of easement has been created but as applicability of doctrine of grant both the courts below committed error of law. Further taken the ground that the plaintiff before the trial Court filed an

application under Section 26 read with Section 9 of the CPC for issuance of Commission for local inspection of the site regarding the report of length and width of the constructed house and also regarding the spot. The same as dismissed. The appreciation of both the Courts below are perverse for issue No.5. Defendant No.1 encroached the open land, constructed the house on the gross land, encroachment was proved and not removed the encroachment even after the order by the revenue authorities and thereafter the plaintiff filed the suit. It is prayed that as for the right of easement created with the doctrine of grant and the facts mentioned, substantive question of law may be formulated and appeal may be admitted for hearing. Further prayed that second appeal filed by the plaintiff may be allowed and prayer is made in the plaint be allowed and appropriate judgment and decree as prayed by the appellant may be passed.

6. I have heard learned counsel 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 including records of both the courts below.

7. Learned counsel for the appellant supported the ground taken in the memo of appeal and submitted that as both the Courts erred in holding the easement of rights created, both the courts denied the prayer made by the plaintiff, substantial question of law need to be formulated along with admission of the appeal. There was further submission that as the substantial question of law is involved as mentioned in the memo of appeal, the appeal may be admitted and disposed of accordingly.

8. Learned counsel has placed reliance on **AIR 1987 Rajasthan 169 Nathulal and Others vs. Swaroop and others** wherein the

learned Single Bench of Rajasthan High Court appreciated the matter wherein the plaintiff filed suit for perpetual injunction and he was lessee of the shop belongs to the State and there was an open land in front of the plaintiff's shop. The defendant's proposal to construct shop towards open land thereby plaintiff's rights of enjoyment of their shop and in the open land interfered. The Court held that the defendant must be restrained from making construction and further held that incidence of easement and that of lost grant are almost same. The learned court denied for any interference and dismissed the appeal as preferred.

9. Learned counsel for the appellant further placed reliance in **AIR 1973 Mysore 151 Hirachand vs. Syed Basheeruddin** where in the Hon'ble Single Bench of Mysore High Court held that if a person using *sarband* as path for over 30 years held that he had perfected his right irrespective of the fact that servient owner is Government or individual.

10. Learned counsel for the appellant prayed that as the both the case law cited are applicable, hence, substantial question of law may be formulated, appeal may be admitted for hearing as relief claimed may be granted.

11. After perusal of the entire facts, it appears that the land on which easement of rights are claimed belongs to the State recorded as gross land. After the dismissal of the prayer made by the plaintiff for appointment of local commissioner, the plaintiff has not challenged the order of the rejection by way of revision. Upon perusal of the spot map (Ex-P/3) and further evidence, discussed and appreciated by both the Courts below goes to show that the plaintiff failed to prove that no any other alternative way is available as the entire land is open land and also recorded as gross land. The learned trial Court held that other

ways are available to the plaintiff. In the present case, the State was formal party only. No relief has been sought from the State. As the land is open as per provisions of the Land Revenue Code, every villager has a right to use the open land for commuting any place subject to the admissibility with this. If the plaintiff is also using the land for his commuting and as other way to pass is also available, the doctrine of grant cannot be held as proved. The plaintiff has to prove that he was specifically granted to use certain land for his approach to his own land. This court unable to accept the arguments as submitted on behalf of learned counsel for the appellant that with the doctrine of grant the state was merely a formal party not a necessary party. In the present case, looking to the entire facts and circumstances, no doctrine of grant is available and created in favour of the plaintiff. If the defendant encroached the gross land belongs to the State it is a matter between the State and the encroacher. The appellant has no any locus to file civil suit for demolition of construction as he failed to prove the obstruction in his right of easement. The facts of the instant matter is different with both the case law cited by the appellant and the same is not of any help of the appellant for formulation of any substantial question of law .

12. Upon perusal of the entire evidence in the considered view of this Court, the plaintiff failed to demonstrate for formulation of any of the substantial question of law require for hearing of the second appeal.

13. 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 of the CPC. Learned counsel 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 laws arises for determination of this Court, this Court has no option but to dismiss the appeal.

14. 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