

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.174 of 2015**

Bahorik Prasad Mardikal, S/o. Balister Prasad Aged about 40 years, R/o. Kasturba Nagar Sindhi Colony, Bilaspur Civil & Revenue Bilaspur Tah. & Distt. Bilaspur (CG)

---- Appellant

Versus

1. Smt. Bhagwati Singh, W/o. Ram Swarup Singh, aged about 64 years, R/o. Kasturba Nagar, Near Jatiya Talab Bilaspur Tah. & Distt. Bilaspur (CG)
2. State of Chhattisgarh through Collector Bilaspur Dist. Bilaspur (CG)
3. Municipal Corporation Through Commissioner, Municipal Corporation Bilaspur (CG)

---- Respondents

Shri Amit Kumar, counsel for the appellant.
Ms. Pushpa Dwivedi, Panel Lawyer for the State/respondent No.2.

Order On Board

20/8/2015

Heard on admission

2. The instant second appeal, under Section 100 of the Code of Civil Procedure, 1908, has been filed against judgment and decree dated 25.9.2014 passed by Fourth Additional District Judge, Bilaspur in Civil Appeal No.29A/14 whereby and whereunder the plaintiff's appeal has been dismissed affirming the judgment and decree passed by the Third Civil Judge Class-I, Bilaspur, in Civil Suit No.167-A/11.

3. Facts in brief necessary for disposal of this appeal are that the appellant/plaintiff filed a civil suit before the trial Court for permanent injunction to restrain the defendants from making any interference in the suit house and also prayed for declaration of the title over the suit house. Before the trial Court, the defendant No.1 filed written statement along with cross suit with a prayer to restore possession of

the land of 1.05 x 3 x 38.05 sq. ft. and also to demolish the construction.

4. The trial Court, after close scrutiny of the submission and material placed on record, passed the judgment and decree as above mentioned. The plaintiff filed an application under Order 23 Rule 1 of the CPC for withdrawal of the suit. The same was allowed vide order dated 08.3.2010 and the plaint was returned to the plaintiff. Thereafter the trial Court allowed the cross suit filed by defendant No.1 and directed that encroachment and construction made by the plaintiff be demolished and defendant No.1 is entitled to get the possession. The plaintiff was given two months time to remove the construction. The trial court also decreed the suit as per para 20 of the judgment.

5. Against the said judgment and decree passed by the trial Court, the plaintiff preferred an appeal. The First Appellate Court after reappraisal of the entire facts and evidence, dismissed the appeal and affirmed the findings recorded by the trial Court.

6. Against the said judgment and decree passed by the first appellate Court, the plaintiff preferred the instant second appeal on the ground that he prayed before the trial Court for return of the plaint which was allowed by the trial Court prior to the incident as narrated by the defendant. He removed the encroachment and possession on the prayer made in this behalf by the defendant and thereafter a report regarding measurement (Ex-D/8) prepared by Revenue Inspector and on the basis of said report, the defendant filed cross suit that the plaintiff has encroached the land. Written statement was filed along with counter claim by the defendant No.1. The appellant was not required to prove issue No.1 & 2 as he had already prayed for

withdrawal of the suit which was allowed and the defendant No.2 pleaded that initially the plaintiff removed the encroachment and thereafter in the year 2008 he made encroachment on the same land. The trial Court held that issue No.1 & 2 was not required to be proved by the plaintiff as he has already withdrawn the suit, hence, there was no necessity to prove issue No. 1 & 2. Findings of the both the Courts are based on Ex-D/8 and concerned the Revenue Inspector was not examined hence, the same is not proved. There is no material to prove that the plaintiff/appellant again encroached the same land and he was not required to prove the case as the plaintiff has withdrawn his suit and no findings are required as the plaintiff already withdrawn the suit. By filing the instant second appeal, it is prayed that the appeal may be admitted and heard finally and the judgment and decree of both the Courts may be set aside.

7. I have heard learned counsel appearing for the appellant on admission under Order 41 Rule 11 read with Order 42 Rule 1 of the CPC. Perused the judgment and decree including the records of both the Courts below.

8. Learned counsel for the appellant supported the ground taken in the second appeal and submitted that substantial question of law need to be formulated along with admission of the appeal. He would further submitted 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.

9. After perusal of the entire facts, as an admitted position, the appellant/plaintiff filed a suit for declaration and permanent injunction along with pleadings. The same was withdrawn by the plaintiff and the

trial Court as above mentioned allowed the application made under Order 23 of the CPC and returned the plaint to the plaintiff. The prayer for return of plaint made after settlement of the issues and the case was fixed for evidence. The Court is required to appreciate and decide the issues, as there was no evidence adduced, no pleadings were made and no any document admitted in the evidence, the trial Court very rightly decided the issue No.1 & 2 as not proved. So far as other pleadings made in the cross suit the evidence adduced on behalf of the parties discussed and appreciated and on the basis of the entire evidence, the trial Court allowed the cross suit and the prayer made in this behalf. If the plaintiff is not at all presently encroached any part of the suit land as prayed in the cross suit then there was no any necessity to assail. The trial Court after appreciating the entire facts and evidence, allowed the cross suit which was subsequently accepted by the first appellate Court. The first appellate court affirmed the judgment and decree passed by the trial Court. On perusal of the entire evidence, there is no any substantial question of law required to be formulated for hearing the instant second appeal.

10. 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.

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