

**HIGH COURT OF CHHATTISGARH, BILASPUR****Second Appeal No.289 of 2010**

1. Sant Kumar Thakur, aged 51 years, S/o Shri Sitaram,
2. Basant Kumar Thakur, aged 47 years, S/o Shri Sitaram,

Both are residents of Mangla, Tahsil and District Bilaspur (C.G.)  
 (Respondents/plaintiffs)  
 ---- Appellants

**Versus**

P. Anthony, aged 65 years, S/o Shri P. Sitaiya, R/o Mangla, Tahsil  
 and District Bilaspur (C.G.)  
 (Appellant/defendant)  
 ---- Respondent

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 For Appellants / Plaintiffs: -

Mr. Somnath Verma, Advocate.

For Respondent / Defendant : -

None present though served.  
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**Hon'ble Shri Justice Sanjay K. Agrawal**

**Judgment On Board**

**05/01/2021**

1. This second appeal preferred under Section 100 of the CPC by the appellants herein / plaintiffs was admitted for hearing on 18-10-2013 by formulating the following substantial question of law:-

“Whether the finding of the lower appellate Court in reversing the well reasoned judgement of the trial Court on the basis of finding which is contrary to the pleadings, is correct?”

[For the sake of convenience, parties hereinafter will be referred as per their status shown and ranking given in the suit before the trial Court.]

2. The plaintiffs / appellants herein instituted a suit for permanent injunction simpliciter in respect of the lane adjacent to the plot

bearing Survey No.893/2, area 0.21 acre held by him. The defendant purchased land and house bearing Survey No.893/4, area 7 decimal, from the mother of the plaintiff. Both the lands held by the plaintiffs and the defendant are adjacent. It is the case of the plaintiffs that they had left a lane for use within the area of Survey No.893/2 and were using the same as usual, but in the year 2002, the defendant started creating disturbance and attempted to take the said lane in his possession unlawfully which led to filing of suit for permanent injunction. Thereafter, during the pendency of suit, the plaintiffs also amended the suit seeking the relief of possession from the defendant by way of mandatory injunction. The defendant by filing written statement controverted the averments made in the plaint stating that he has not encroached the land held by the plaintiffs and is in possession of land held by him.

3. The trial Court after appreciation of oral and documentary evidence available on record decreed the suit and granted decree for permanent injunction in favour of the plaintiffs and on appeal preferred by the defendant, the first appellate Court reversed the judgment & decree of the trial Court and dismissed the suit of the plaintiffs against which the plaintiffs have preferred this second appeal under Section 100 of the CPC in which substantial question of law has been formulated which has been set-out in the opening paragraph of this judgment for the sake of completeness.
4. Mr. Somnath Verma, learned counsel appearing for the plaintiffs / appellants herein, would submit that the first appellate Court is absolutely unjustified in holding that the plaintiffs have failed to

prove the encroachment allegedly made by the defendant on the lane left by the plaintiffs for their use by recording a finding which is perverse to the record, as by demarcation Ex.P-3 conducted by the Revenue Inspector, the area encroached has clearly been demarcated and marked. As such, the appeal deserves to be allowed by setting aside the judgment & decree of the first appellate Court and by restoring the judgment & decree of the trial Court.

5. None present for the respondent herein / defendant, though served.
6. In order to prove that the defendant has encroached upon the land held by the plaintiffs in shape of lane, the plaintiffs apart from oral evidence have filed demarcation report Ex.P-3 which has been conducted by the Revenue Inspector on 31-12-2002 in which the area alleged to have been encroached by the defendant has been shown in red ink, but the revenue officer who has conducted demarcation has not been examined to prove the said demarcation report. Once the plaintiffs have got the demarcation conducted, they ought to have examined the said Revenue Inspector to prove encroachment by the defendant which has not been done. The first appellate Court has held that the plaintiffs have failed to prove that the land said to have been encroached by the defendant is the land held by the plaintiffs.
7. Since the plaintiffs have not examined the Revenue Inspector who conducted demarcation, the fact of encroachment by the defendant has not been established by documentary evidence by the plaintiffs. Even otherwise, oral evidence brought on

record is not sufficient to grant decree in favour of the plaintiffs, particularly decree for permanent injunction / mandatory injunction in favour of the plaintiffs. Even the suit is for permanent injunction and decree for declaration has not been sought by the plaintiffs.

8. In that view of the matter, the first appellate Court is absolutely justified in holding that the plaintiffs are not entitled for decree for permanent injunction / mandatory injunction and as such, the first appellate Court has rightly set aside the judgment & decree of the trial Court. The substantial question of law is answered accordingly. I do not find any merit in the second appeal, it deserves to be and is accordingly dismissed. No order as to costs.

9. However, Mr. Verma, learned counsel for the appellants herein / plaintiffs, submits that the plaintiffs may be granted liberty to file suit for declaration of title, if any. Since the earlier suit was only for permanent injunction / mandatory injunction, the plaintiffs are at liberty to file suit for declaration of title / possession in accordance with law, if any.

10. Appellate decree be drawn-up accordingly.

Sd/-  
(Sanjay K. Agrawal)  
Judge