

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WP227 No. 1075 of 2015**

1. Banwari Lal Sahu S/o Budhram Sahu, Aged About 66 Years
 2. Sayamta Sahu, D/o Banwari Lal Sahu, Aged About 37 Years
- both R/o Koni, Opp. I.T. I. First Gate, Bilaspur, Tah. & Dist. Bilaspur

---- Petitioners/Plaintiff**Versus**

1. Rajkumar Dwivedi S/o Ramdhan Dwivedi, Aged About 46 Years R/o Koni, Opp. I. T. I. First Gate, Bilaspur, Tah. & Dist. Bilaspur (Chhattisgarh)
2. State Of Chhattisgarh Through Collector, Bilaspur

---- Respondent/Def. No. 1 and 2

For Petitioners	: Mr. Ravindra Sharma, Adv.
For R -1	: Mr. K.A. Answare, Sr. Adv. with Mr. M.S.K. Khokhar, Adv
For R - 2	: Mr. Lav Sharma, Panel Lawyer

Order On Board**02/02/2016**

Heard on admission.

2. Brief facts of the case are that the petitioners/plaintiffs had filed a civil suit for declaration and permanent injunction against the respondents before the 10th Civil Judge Class – II, Bilaspur which was registered as Civil Suit No. 218-A/2015. In the said suit, the petitioners filed an interim application under Order 39 Rule 1 and 2 read with Section 151 of the Civil Procedure Code, 1908 (In brevity 'the CPC'). The court below after hearing the parties allowed application for temporary injunction and restrained the respondent No. 1 till final disposal of the suit for any interference in the suit land for its use by the plaintiff as his way to approach his constructed house. The trial Court prima facie held that right of easement exists for the said way. The respondent No. 1 had challenged the said order before 6th Additional Distt. Judge in Misc. Civil Appeal No. 57/2015. The appellate court allowed the appeal and set aside the order passed by trial Court vide its order dated 20-11-2015 and held that the plaintiffs failed to prove the prima facie case, the balance of convenience and irreparable loss is in his favour, he further failed to prove prima facie his easementary right of way. Against the said order, the petitioners have invoked the jurisdiction of this Court under Article 227 of the Constitution of India by filing instant petition praying that the order dated

20-11-2015 be quashed along with other reliefs.

3. Learned counsel for the petitioners submits that in para 3 of the written statement of respondent No.1, in west side, mud house of Ramdhan Dwivedi was shown, also as per para 7 of the pleading in the written statement, there is an admission that there was way to approach the house of Ramdhan Dwivedi. It is further submitted that the plaintiffs had purchased the property in the year 1978 and since then they are using said lane of 5 ft for approach to their house and they have established the right of easement. The trial Court vide para 10 of the order held that there are contradictory statement regarding way to approach hence the documentary evidence becomes important to prove the case. The plaintiffs had filed sale deed and also photographs. The trial Court appreciating the entire facts held that the plaintiffs prima facie shown their case regarding their way to approach their house as easementary right and hence also proved balance of convenience and irreparable loss in their favour. It is submitted that as there is no other way available to the plaintiffs, hence the petition may be admitted for consideration and after hearing the parties the court may quash the order dated 20-11-2015 as the same is not passed on facts and documents as filed before the trial Court.

4. For the purpose of appreciation, the documents annexed and the petition are perused.

5. Minute examination of the facts and other material available in the case goes to show that map of the suit property and other house near the suit property as shown in para 3 of the plaint is not in accordance with the map of the property and other facts regarding house attached in all the directions near the property. Prima facie it appears that that location of the suit property is not same as in the registered sale deed filed by the petitioners. From perusal of para 3 of the written statement, it only appears that in the west side mud house of Ramdhan Dwivedi was situated along with field of Baldau Dubey. It does not demonstrate that 5 ft lane was available to the petitioner for approach road as easementary right. Perusal of para 7 of the written statement goes to show that there is no admission regarding easementary right of the plaintiffs. They have simply stated that a lane of 5 ft width was not left for approach for the plaintiffs. Earlier the tenant student who was residing in the house of Ramdhan Dwivedi was using it

thereby the whole para 7 of the written statement cannot be held as admission for the way or any of the easementary right. From perusal of the location of the suit property as mentioned in para 3 of the plaintiffs, it also goes to show that the plaintiff is specifically locating the house of the plaintiffs and defendant No. 1 by marking their boundaries but on the south side they simply mentioned the house of Ramesh Sahu. They deliberately omitted and not shown boundary of the suit house and the same is unexplained. The trial Court in para 10 of the order held that affidavit given by both the parties are contradictory. I do not see any different situation for the same. Naturally the affidavit filed on behalf of the plaintiffs is regarding easementary right and other facts and on the other hand, the affidavit filed by the defendant is for denial of those facts.

6. So far as documents are concerned, the petitioners had submitted that they have filed registered sale deed and photograph of the spot. From perusal of copy of registered sale deed it does not show any 5 ft lane shown along with purchased property. Also with the photograph, his easementary right itself cannot be proved thereby I find no reason to disagree with the findings of the appellate Court that the plaintiffs failed to demonstrate easementary right by any of the documents. The appellate court also felt that the easementary right can be claimed by way of custom and long use. The plaintiffs had failed to prove a prima facie easementary right, failed to prove custom and long use by way of any document. The plaintiffs also failed to demonstrate that he has no other alternative way to approach his property. For the sake of argument, if some body travels for a very short time to approach to his house, easementary right is not developed for the same.

7. On due consideration, I do not see any illegality or impropriety in the order passed by the appellate court while setting aside the order of the temporary injunction passed by the trial Court.

8. The petition being sans substance deserves to be and is hereby dismissed at motion stage.

Sd/-
(Chandra Bhushan Bajpai)
Judge