

HIGH COURT OF CHHATTISGARH, BILASPUR**WP227 No. 349 of 2021**

Gulam, S/o Budhru, Aged About 65 Years, Caste Koshta , Occupation Farmer, R/o Village Jaibel 2, Tahsil Bakawand, District-Bastar Chhattisgarh

---- **Petitioner**

Versus

1. Principal Secretary, Department of Revenue, Mantralaya Mahanadi Bhawan, Atal Nagar Naya Raipur, Raipur Chhattisgarh.
2. Collector, Through : State Government, District Office, Jagdalpur District- Bastar, Chhattisgarh.
3. Tahsildar Bakawand, Tahsil Office, Bakawand, District-Bastar, Chhattisgarh.
4. Sarpanch, Village Panchayat Jaibel 2, Tahsil Bakawand, District-Bastar, Chhattisgarh.

---- **Respondents**

For Petitioner : Mr. Varun Sharma, Advocate.

For State/Respondent No.1,2 & 3 : Mr. Alok Nigam, Govt. Advocate.

For Respondent No.4 : Mr. Tarendra Kumar Jha, Advocate.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

Order On Board

15/09/2021

1. This petition under Article 227 of the Constitution of India has been brought being aggrieved by the order dated 30.06.2021, passed in Civil Appeal No.01/2021, by the Court of District Judge, Bastar at Jagdalpur dismissing the appeal and upholding the order of the trial Court by which the application of the petitioner under Order 39 Rule 1 & 2 C.P.C. was dismissed.

2. The petitioner has filed a civil suit, which is registered as Civil Suit No.15A/2020, praying for relief of declaration and permanent injunction. The suit property is khasra No.217 measuring 1.020 hectare situated in village-Jaibel, which is admittedly a Government land. It is pleaded that the petitioner is in possession of the suit land since about 50 years raising crops and enjoying the fruits, on this basis he has become the title holder of the suit property. The respondents have proposed for constructing a new Panchayat Bhawan over the portion of suit property on which petitioner is not in possession. The revenue case was registered against the petitioner for illegal possession of the suit property for which he was penalized. The petitioner has paid the penalty and receipt of the same are produced as Annexure-P/2.
3. It is submitted that petitioner had moved an application before Tahsildar-Bakawand, praying for relief against the actions of respondents, but the same was dismissed vide order dated 21.7.2020. The petitioner then preferred appeal before the Commissioner, Bastar Division. The Commissioner vide order dated 4.8.2020 granted stay order restraining the construction over the suit land until the next date of hearing. Subsequent to that the Commissioner was transferred & the post remained vacant. The petitioner then preferred a W.P.(C) No.2713/2020, which was disposed of on 06.11.2020 by this Court by granting interim protection to the petitioner, until the Presiding Officer to the post of Commissioner resumes duty. It is submitted that the Officer, who took charge of the post of Commissioner of Bastar Division has not extended the stay order, because of which the petitioner was compelled to file the civil suit. It is submitted that the application filed under Order 39 Rule 1 & 2 C.P.C. has been dismissed

by the trial Court and the same order has been upheld by the appellate Court. Both these orders are erroneous, illegal and arbitrary. It is submitted that the claim of the petitioner is based on Section 4 of the Indian Easements Act, 1882 (in Short “the Act, 1882”) and it is claimed, that the petitioner has acquired right on the basis of prescription. Section 35 of the Act, 1882 provides, that an injunction can be granted to restrain the disturbance of the easement available to a party.

4. Reliance has been placed on the judgment of Supreme Court in the case of **Ramkanya Bai and another v. Jagdish and others**, reported in **(2011) 7 SCC 452**, in which it is held that the Civil Court has jurisdiction to decide the issue of easementary right. It is submitted that the petitioner has the *prima-facie* case in his favor, he is likely to suffer irreparable loss if interim relief is not granted to him and, therefore, the balance of convenience is also in his favor. Hence, it is prayed that the impugned order be set aside and the petitioner be granted relief.
5. Learned counsel for State appearing for respondents No.1, 2 & 3 opposes the petition and the submissions made in this respect. It is submitted that admittedly the land on which the petitioner is claiming his possession is government land. The easementary right do not create any title over the suit property, therefore, the suit itself is not maintainable according to the pleadings present in the plaint. The trial Court and appellate Court both have not committed any error in passing the impugned orders, therefore, this petition may also be dismissed.

6. Learned counsel for respondent No.4 opposes the submissions made in this respect. It is submitted that there is concurrent finding of the two Courts below. The petitioner is not in possession of the suit property as the same has been already occupied by the respondent No.4. The petitioner has claimed the relief of declaration of his title under the provisions of the Act, 1882. The Act, 1882 provides, only for the easementary rights and it does not provide for declaration of any title over the landed property, therefore, the suit itself is not maintainable.
7. Reliance has been placed on the judgment of Supreme Court in the case of **Justiniano Antao and others v. Bernadette B. Pereira (Smt)**, reported in **(2005) 1 SCC 471** and it is submitted that the petitioner does not have any *prima-facie* case in his favor, therefore, the impugned order and the order of the trial Court both are sustainable, the petition be dismissed.
8. I have heard the learned counsel for the parties and perused the documents placed on record.
9. Considered on the submissions. The suit land is government land that is not a disputed fact. The petitioner/plaintiff has pleaded that he is enjoying possession of the suit land since about 50 years. As per the pleading and the submissions, the petitioner has claimed easementary right which is defined under Section 4 of the Act, 1882. Section 4 of the Act, 1882 is reproduced as here under :-

“4. Easement” defined. – An easement is a right, which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.”

10. As per the definition it is very clear that an easement is a right, which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own. When the person claims to be in possession of certain land, then it does not remain a case of easmentary right.
11. The easementary rights, which can be acquired by the prescription under Section 15 of the Act, 1882, which is as follows.

“15. Acquisition by prescription. – Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years,

and where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or by things affixed thereto, as an easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, support or other easement shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.”

12. This provision does not mention that that a title over a property in long and continuous possession of a person can be acquired under Section

15 of the Act, 1882. The extent of easement have been provided under Section 28 of the Act, which is as follows :-

“28. Extent of easements. -With respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect:-

Easement of necessity. -An easement of necessity is co-extensive with the necessity as it existed when the easement was imposed.

Other easements. -The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties, and the purpose for which the right was imposed or acquired.

In the absence of evidence as to such intention and purpose-

(a) **Right of way.** – A right of way of any one kind does not include a right of way of any other kind;

(b) **Right to light or air acquired by grant.** – The extent of a right to the passage of light or air to a certain window, door or other opening, imposed by a testamentary or non-testamentary instrument, is the quantity of light or air that entered the opening at the time the testator died or the non-testamentary instrument was made;

(c) **Prescriptive right to light or air.** – The extent of a prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used;

(d) **Prescriptive right to pollute air or water.** – The extent of a prescriptive right to pollute air or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose; and

(e) **Other prescriptive rights.** – The extent of every other prescriptive right and the mode of its enjoyment must be determined by the accustomed user of the right.

13. The judgment of Supreme Court in case of **Ramkanya Bai and another (supra)** does not appear to be applicable in the present case.
14. The pleading in the plaint of the petitioner do not appear to be based on the correct law, as the claim of the title over landed property can not be made under the provisions of the Act, 1882. The pleadings do not mention of any easement as mentioned in the provisions here-in-above, which was being enjoyed by the petitioner. Therefore, I am of this view that the finding of the learned trial Court and the appellate Court that there is no prima-facie case present in favour of the petitioner does not suffer from any infirmity.
15. In the matter of praying for temporary injunction under Order 39 Rule 1 and 2 of C.P.C., the plaintiff has to establish his title or at least shadow of title over the suit property, which must be permissible under law. Therefore, I do not find any reason to interfere with the impugned order and the order of the learned trial Court.
16. Accordingly, this petition has no merit and is dismissed and disposed off.

Sd/-
(Rajendra Chandra Singh Samant)
 Judge