

CASE NO.:
Appeal (civil) 9265 of 1995

PETITIONER:
M.T.W. Tenzing Namgyal & Ors.

RESPONDENT:
Motilal Lakhotia & Ors.

DATE OF JUDGMENT: 05/02/2003

BENCH:
CJI, S.B. Sinha & AR. Lakshmanan

JUDGMENT:

J U D G M E N T

S.B. SINHA, J :

The appellants herein are successors in interest of late Chogyal Sir Tashi Namgyal of Sikkim.

A suit was filed by Mewang Tobgyal Wangchuk Tenzing Namgyal son of late Chogyal Palden Thondup Namgyal and others against the defendants respondents herein praying for the following reliefs :

- (a) recovery of possession of the encroached portion of the land shown in the annexed plan if required, by demolishing the construction made thereon;
- (b) permanent injunction restraining the defendants from using the aforesaid 12 feet wide passage or making any construction whatsoever over the same;
- (c) pending disposal of the suit an order for restraining the defendants from construction of the flyover or blocking the passage and also restraining the defendants from carrying on with further work of construction on the encroached land shown in the attached plan;
- (d) cost of the suit;
- (e) any other relief or reliefs to which the plaintiff may be found entitled to under law and equity.

Shortly stated, the said suit was filed on the following allegations :

Plot Nos. 1013, 1014 and 1040 (part) situated at Gangtok belonged to late Chogyal Sir Tashi Namgyal of Sikkim were his personal properties forming part of his private estate which upon his death devolved on the original plaintiff and on his death upon the appellants. Allegedly, one pucca building was constructed on Plot No. 1014 situated at New Market Road, Gangtok which was let out to the tenants. On the adjacent land to the same building, there existed a private passage of 12 feet width made of steps and further on the adjacent south thereto, there was another building known as Yuthok building situated on Plot No. 1012. Another passage existed behind the aforesaid two buildings which is said to be a private gully being Plot No. 1013. There are two wooden buildings used as kitchen, latrines and godown for the use of tenants occupying Nayabazar building and Yuthok building.

Allegedly there was a retaining wall on the west of Plot No. 1040 (part) which was the boundary between the land of the Plaintiffs' private estate and the land of defendant No. 2.

According to the plaintiffs, the defendants started construction of a big pucca building for the purpose of running a hotel on the land situated on the south of his land being Plot no.1040 and allegedly the defendants illegally encroached upon about 6,600 sq. ft. therein.

The defendants filed their written statement denying and disputing the allegations made in the plaint. The defendants although admitted the existence of the pucca building and the flight of steps but contended that the latter belonged to Gangtok Municipality which was meant to serve as the exclusive passage to the plot on which defendant No. 2 had been constructing a multi-storeyed building. It was alleged that beyond the structures of the plaintiffs a precipitated hill edge exists on the eastern boundary of the defendants' land and the same was all through in their exclusive possession. The defendants claimed settlement of their land by reason of three documents which were marked as Exhibits D-9, D-10 and D-11 of the years 1961, 1975 and 1977 respectively.

The said suit was initially dismissed by the District Judge, Gangtok by a judgment and decree dated 29th March, 1985 whereagainst the plaintiffs preferred an appeal before the High Court. By a judgment dated 11.8.1986 while setting aside the judgment and decree of the learned District Judge the matter was remanded with a direction to appoint another Commissioner to make local investigation with reference to the cloth survey map and on actual measurement on the spot so as to ascertain the actual area of Plot No. 1040, the area covered by the Denzong Cinema, the Tashi Delek Hotel and the exact location of all other constructions in a map. An opportunity was also given to the parties to re-examine their witnesses to clear the anomalies indicated in the said judgment.

Pursuant to or in furtherance of the said direction contained in the said judgment, the learned District Judge appointed another Commissioner who, inter alia, found that Plot No. 1040 measures 0.69 acres out of which the land allotted to the defendants was 13, 879 sq. ft. and the total area of constructions made by defendant Nos. 1 and 2 being the Denzong Cinema, two shop houses and hotel comes to 13, 616.46 sq. ft., which was accepted by the defendants but according to the plaintiffs the same was 13, 503.60 sq. ft.

The learned District Judge, Gangtok by a judgment and decree dated 26.2. 1988 decreed the suit. A Division Bench of the High Court, however, in appeal reversed the said judgment and decree by a judgment dated 30th June, 1994.

The appellants are before us in appeal questioning the correctness or otherwise of the said judgment.

Mr. G.L. Sanghi, learned senior counsel appearing on behalf of the appellants, inter alia, submitted that the High Court committed a serious error in construing the Khasra (Exhibit P-36) in so far as it held that entries appearing in the name of Sir Tashi Namgyal did not belong to his private estate. The learned counsel would contend that the High Court further fell in error in holding that his Plot No. 1040 being situated within the bazar area was acquired for a sum of Rs. 1,50,000/-. It was submitted that as there had been no transfer of title from the plaintiffs to the private estate in any manner whatsoever, the Government of Sikkim did not derive any title thereto.

Mr. Sanghi would contend that the purported acquisition of the suit land said to have been proved by Exhibits D-7, D-14 and D-23/12 does not show that there had been any transfer of property within the meaning of Section 54 of the Transfer of Property Act which was applicable to the State of Sikkim and in absence thereof the ownership of the plaintiffs in respect of Plot Nos. 1013 and 1040 continued with the plaintiffs. Drawing our attention to certain findings of the High Court in Civil Appeal No. 2 of 1985, the learned counsel would argue that the High Court in its judgment arrived

at an erroneous conclusion that as 'private estate' had not been mentioned against the Plot Nos. 1013 and 1040 in Exhibit P-36, the same had vested in the State of Sikkim.

Mr. Mitra, the learned senior counsel appearing on behalf of respondent no.1, on the other hand, would submit that the conspectus of events found by the High Court in the judgment under appeal would clearly establish that the defendants have constructed the hotel building in accordance with the sanction accorded by the competent authorities. It was submitted that most of the documents, whereupon reliance had been placed by the High Court were produced by the plaintiffs and/or received from the custody of their witnesses. Mr. Mitra would contend that having regard to the facts and circumstances of this case no presumption can be raised as regards correctness of the entries made in Khasra (Exhibit P-36). In support of the said contention, strong reliance has been placed on Sita Ram Bhau Patil vs. Ramchandra Nago Patil (Dead) By L.Rs. and Another [(1977) 2 SCC 49].

Mr. Bhaskar Gupta, the learned senior counsel appearing on behalf of respondent No. 2 would submit that as in the instant case, the plaintiffs have not been able to prove their title over Plot No. 1040, an independent investigation thereof with reference to the defendants' title was not necessary. The learned counsel in support of the said contention placed strong reliance on Nagar Palika, Jind Vs. Jagat Singh, Advocate [(1995) 3 SCC 426].

The Plaintiffs' predecessor in interest was late Chogyal Sir Tashi Namgyal of Sikkim. There is, therefore, no question of plaintiffs' having any document of title.

The only document of title which was produced by the plaintiffs in support of their claim is the aforementioned Khasra (Exhibit P-36). In Exhibit P-36 entries against different plots, inter alia, have been made in the name of 'Sarkar' as also in the name of 'Shri Panch Maharaja Sir Tashi Namgyal of Sikkim'. Certain plots have also been recorded as 'Private Estate. Plot No. 1013 has been recorded in the name of Shri Panch Maharaj Sir Tashi Namgyal. Plot Nos. 1014 and 1040 have also been recorded in his name. In none of the entries the area of the plots is mentioned. It is relevant to note that the plaintiffs in their plaint claimed ownership in respect of Plot nos. 1013, 1014 and 1040 (part). No claim had been made in the plaint that the entire plot No. 1040 belonged to the plaintiffs.

How the plaintiffs claimed title in respect of a part of Plot No. 1040 has also not been disclosed. The said Khasra was prepared in the year 1954. However, admittedly a suggestion to acquire the said land was mooted to the effect that a lump-sum payment may be made to the 'private estate' in lieu of the bazar area with all the income accruing therefrom upon payment of a sum of Rs. 1,50,000/- to the private estate, so that the same may vest in the Sikkim Darbar.

The said proposal was put up for approval and sanction of the Chogyal. On 22nd June, 1959, the said proposal was accepted. Requisite steps for payment of the said amount to the private estate were taken on 26th June, 1959. Exhibit D-7 contains an entry in the cash book of the Finance Department of Sikkim regarding payment of Rs. 1,50,000/-. Exhibit D-8 is a classified abstract showing the expenditure of the Government of Sikkim for the year 1959-60 regarding payment of Rs. 1,50,000/-. Both Exhibits D-7 and D-8 are dated 07.12.1959.

The High Court recorded a finding to the effect that all lands which were entered in the Khasra (Exhibit P-36) in the name of Sir Tashi Namgyal did not belong to his private estate. The said finding, however, may not be correct in view of the fact that admittedly his lands in suit were subject matter of acquisition.

We, therefore, may proceed on the assumption that the said finding of the High Court is incorrect.

The question which, therefore, ought to have been raised was not that as to how the said property was treated prior to 24.6.1959 but how the said property has been treated thereafter. It is not in dispute that the Sikkim Darbar granted settlement of piece and parcel of land measuring (166' x 66' + 24'/2 x 16') in favour of the first respondent for construction of Cinema Hall on 10-4-1961. Several letters appear to have been passed between the Executive Officer, Bazar Department of Government of Sikkim and the respondents herein with regard to the constructions on the said land. Admittedly the original plaintiff held shares in Denzong Cinema Limited. It is also beyond any dispute that construction of the Cinema Hall started in the year 1969. The State of Sikkim merged with the Union of India in terms of an agreement on 26th April, 1975.

Article 371 F(h) of the Constitution of India reads thus:

"371F. Special provisions with respect to the State of Sikkim. Notwithstanding anything in this Constitution, -

(h) all property and assets (whether within or outside the territories comprised the State of Sikkim) which immediately before the appointed day were vested in the Government of Sikkim or in any other authority or in any person for the purposes of the Government of Sikkim shall, as from the appointed day, vest in the Government of the State of Sikkim;"

After merger of Sikkim in the Union of India, the proposal to construct a hotel started. The records of the case clearly demonstrate that for the purpose of construction of hotel the defendants not only sought for but also were granted additional lands. They took permission for construction of the hotel from the appropriate authorities.

In this connection, it will be relevant to notice the following important documents:-

1.

24-6-76 to

22-7-76:

Ex. P-24, P-25 and P-26 are extracts taken out from N.S. page 29 of File No.4(6)1962-63, 76-77 which contain the request of Managing Director, Denzong Cinema Ltd., Gangtok for grant of permission for running a hotel in the extension of the back side block of cinema premises and for diversification of investment of the Denzong Cinema towards hotel business and the recommendations of the Secretary, Finance, Chief Secretary and the Chief Minister thereon.

2.

24-7-76

Ex. P-23 is the letter written by Secretary, Finance, Government of Sikkim to the Managing Director, Denzong Cinema Ltd. informing that the Government of Sikkim gave its concurrence to their proposal for running of a hotel. The Management was requested to obtain formal permission therefor.

3.

23-8-76

Ex. P-1 is the letter from the Managing Director, Denzong Cinema Limited to the Chairman, GMC for according permission for extension to the present construction of Denzong Cinema complex to construct a tourist hotel.

4.

23-8-76

Ex. P-1 contains the comments offered by the Executive Officer of the GMC, recommending the proposal of extension to the present construction of Denzong Cinema complex.

5.

10-9-76

Ex. P-2 is the site plan for addition and alteration to the Hotel Building (5th and 6th floors) which was approved by the GMC.

6.

15-9-76

Ex. P-3 is the letter from the Executive Officer, GMC to the Managing Director, Denzong Cinema Ltd. informing that GMC approved their BP Building Plan and permitted construction on certain terms and conditions.

7.

7-12-76

Ex. D-20 is the letter from the Under Secretary, Local Self Govt. Dept. Gangtok, to the Managing Director, Denzong Cinema Ltd. conveying the proposal to allot a site measuring 43' x 10' and 24' x 30' for hotel behind Denzong Cinema.

8.

7-1-77

Ex. D-11 is the letter from the Joint Secretary, Local Self Government Department, Gangtok to M/s Denzong Cinema Ltd. allotting additional site for extension of the hotel under construction.

9.

18-1-77

Ex. P-11 is the letter of the counsel for the appellant to Respondent No. 1 regarding encroachment of his client's land. (Note that there is no complaint regarding encroachment into Private Estate)

10.

27-1-77

Ex. P-12 is the letter for an on behalf of Prince T.G., Vapshi Yuthok to the Secretary, Local Self Government, Gangtok, regarding encroachment on the boundary of Yuthok building:
(Note that no complaint that construction was on Private Road).

11.

29-01-77

Ex. P-10 is the letter of P.W.2, Executive Officer, GMC to the District Magistrate, Gangtok regarding violation of approved BP Plan and unauthorized construction. (Note no mention of

encroachment on Private Estate: Only complaint is that construction was being made not according to approved plan).

12.

31-1/2-2/77

Ex. P-13 contains notings of the Chairman, GMC, E.O., D.M.: BP plan for construction of the hotel on the additional site was approved by the GMC.

13.

31-1-77

Ex. D-1 is the letter from the Executive Officer, GMC to M/s Denzong Cinema Ltd, Gangtok. P.W. 2 communicated approval of the BP Plan to the Defendant.

14.

5-2-77

Ex. D-4 is the copy of the BP plan as sanctioned by the GMC

15.

18-3-77

Ex. P-15 is the letter from Respondent No.2 to the Minister for Local Self Government, Sikkim. Defendant complained to GMC regarding removal of barbed wire fencing from the gully.

16.

19-3-77

Ex. P-15 is the noting of E.O. Endorsement on the letter by the Chairman that the gully belonged to the Government, and as such unauthorized construction of barbed wire fencing has to be removed at the earliest.

17.

30-6-77

Ex.D-2 is letter from P.W. 2, Executive Officer of GMC, enclosing therewith a report of the Corporation Engineer. D-3 is the report of the Corporation Engineer indicating that construction of the hotel Building and the ramp are according to plan.

18.

12-10-77

Ex. D-12 is the rough sketch of the site allotted to Respondent No.1 by the Government on 7.1.1977 and D-13 is the letter from the Under Secretary, Local Self Government Department, Gangtok to Respondent no.1 forwarding the same to him.

The High Court discussed the evidence brought on records by the parties in great details. On cogent and sufficient reasons it did not accept the statements of the witnesses examined on behalf of the plaintiffs. Relying on or on the basis of various documents, it came to the conclusion that even if the private estate said to be belonging to late Chogyal had any interest in Plot Nos. 1010 and 1013, the same was acquired by the Government and, thus, ceased to be the private estate on and from 1959. The High Court further took into consideration various documents as to how the Government had treated Plot No. 1040 as belonging to it and not to the 'estate', both before and after merger of Sikkim with Government of India. It, as noticed

hereinbefore, further held that the constructions raised by the defendants were within the land settled in favour of the respondents by Exhibits D-9, D-10 and D-11.

The High Court in its judgment also took into consideration the report of the Second Advocate Commissioner and relied thereupon.

The plaintiffs claimed title over the suit land on the basis of their title thereupon and not on previous possession. Their case, thus, must stand or fall on their own pleadings. As indicated hereinbefore, the plaintiffs proceeded on the basis that they were owners of a part of Plot No. 1040. They did not specify the extent thereof. They did not say how and to what extent a part of Plot no.1040 belonged to them. They did not question the settlements made by the Sikkim Darbar in favour of the respondents and various other persons. In fact, the plaintiffs' predecessor held shares in the defendant No. 2 company. In the facts and circumstances of the case it was obligatory on the part of the plaintiffs to prove that the lands allegedly encroached upon by the defendants belonged to them. Plaintiffs have miserably failed to prove the same. Furthermore, indisputably the bazar area had been acquired by the Sikkim Darbar. Mr. N.K. Rustomji, who was Diwan of Sikkim at the relevant time, examined himself as witness No. 6 for the Plaintiffs. He in no uncertain terms stated:

"I understand the meaning of 'acquisition'. The heading of the file as given on page of the note is "Acquisition of private estate land for Gangtok Bazar and payment of lumpsum compensation Rs. 1,50,000/- to the Private Estate".

The other documents referred to hereinbefore, namely, Exhibits D-7, D-14, and D-23 to D-23/12 are also clear pointers to the fact that certain properties over which late Chogyal of Sikkim had been claiming right as its private estate were acquired by the Sikkim Darbar of which he was the head. The owner of the land accepted the amount of compensation without any demur whatsoever and in that view of the matter he as well as his successors in interest are estopped and precluded from contending that the said properties did not vest in the Sikkim Darbar and consequently in the Government of India.

The submission of Mr. Sanghi to the effect that the plaintiffs continued to have title in respect of the lands in question despite acquisition thereof must, therefore, be rejected.

It is not in dispute that Sikkim prior to its merger with the Union of India was a sovereign State. Chogyal was the owner of the entire properties. Evidently the lands were recorded in different names. If Chogyal of Sikkim exercised his right of 'Eminent Domain' in relation to the suit properties which were said to be belonging to his private estate, no registered deed of sale was required to be executed in his favour.

In any event, once the said lands are held to have vested in the Sikkim Darbar, the same consequently vested in the Government of Sikkim for the purpose of the Government.

The khasra and khatian have not been prepared under a statute. The question as to whether the same would be historical material or instrument of title or otherwise, would depend upon either the statute governing the same or the practice prevailing in the State. In the event, however, the records of right were not prepared under a statute, a presumption of correctness may be raised only in terms of Section 35 of the Indian Evidence Act.

However, ordinarily records of right cannot be treated to have any evidentiary value on the question of title inasmuch as such records are

prepared mainly based on possession.

The entries in the Khasra (Exhibit P-36) must, therefore, be construed keeping the aforementioned principles of law in view.

In Sita Ram Bhau Patil (supra), this Court held :

"With regard to the record of rights Counsel for the appellant said that presumption arises with regards to its correctness. There is no abstract principle that whatever will appear in the record of rights will be presumed to be correct when it is shown by evidence that the entries are not correct. Apart from the intrinsic evidence in the record of rights that they refer to facts which are untrue it also appears that the record of rights have reference to the mutation entry that was made by the Circle Officer on January 30, 1956. Counsel for the respondent rightly contended that no presumption could arise for two principal reasons. First, the oral evidence in this case nullified the entries in the record of rights as showing a state of affairs opposed to the real state of affairs and, second, no notice was ever given to the respondent with regard to mutation proceedings. Therefore the respondent is right in contending that no presumption can validly arise from the record of rights."

Having regard to the fact that the plaintiffs never claimed any right over the entire Plot No. 1040 and further having regard to the fact that only a toilet was said to have existed thereupon, as also having regard to the subsequent events which took place, namely, acquisition of land, we are of the opinion that the entry in Exhibit P-36 is not of much value for the purpose of showing that the plaintiffs continued to have title over the said property.

Furthermore, the plaintiffs claimed title over the suit land. The trial Court in a case of this nature was bound to enquire or investigate into the question of title and could not have decreed the suit merely on the basis of the entries in the revenue records [See Nagar Palika Vs. Jagat Singh (supra)].

For the reasons aforementioned, we are of the opinion that no case has been made out for our interference with the judgment and decree under appeal. This appeal is, therefore, dismissed but in the facts and circumstances of the case, there shall be no order as to costs.