

THE HIGH COURT OF SIKKIM: GANGTOK
(Civil Extraordinary Jurisdiction)

SINGLE BENCH: BHASKAR RAJ PRADHAN, JUDGE.

W.P. (C) No. 01 of 2018

Shri Jangpu Sherpa @ Jampu Sherpa,
S/o late Dawa Tshering Sherpa,
Resident of Dharey, Jawbari,
P.O. Damthang and P.S.Namchi,
South Sikkim.

.... Petitioner

versus

1. Smt. Phurba Lhamu Sherpa,
Wife of late Lakpa Temba Sherpa,
Resident of Dew Damthang,
P/o Damthang, P.S. Namchi,
South Sikkim.

2. Additional District Collector,
Office of the District Collectorate,
Namchi, South Sikkim.

3. District Collector,
Namchi, South Sikkim.

.... Respondents

Application under Article 226 read with Article 227 of the
Constitution of India.

Appearance:

Mr. Zangpo Sherpa and Mr. Jushan Lepcha, Advocates for
the Petitioner.

Mr. William Tamang, Legal Aid Counsel for the Respondent
No.1.

Mr. Karma Thinlay, Senior Government Advocate with Mr.
Thinlay Dorjee Bhutia, Government Advocate for the State-
Respondent nos. 2 and 3.

J U D G M E N T

(16.04.2019)

Bhaskar Raj Pradhan, J

1. The present Writ Petition assails the order dated 14.05.2015 passed by the Additional District Collector/Magistrate (Respondent No.2) directing the record of rights for plot no. 233/234 at Damthang Block (the said plots) to be corrected in the name of the Respondent No.1 after the expiry of three months from the date of the order. The Petitioner was granted the said three months to approach the appropriate forum for relief against the said order. Thereafter, a notice dated 18.03.2016 was issued to the Petitioner by the Respondent No.2. The notice stated that the Respondent No.1 had by a petition dated 02.03.2016 requested for mutation of the said plots in her name. Respondent No.2 issued the notice to the Petitioner requiring him to submit order from appropriate forum or else it was proposed that mutation process would be started from 31.03.2016 for the said plots. This notice dated 18.03.2016 is also impugned. Aggrieved thereby the Petitioner filed Title Suit No. 1 of 2016 before the Court of the Civil Judge, South Sikkim at Namchi. A counter-claim praying for declaration that the Respondent No.1 was the owner of the said plots had also been filed. However, on 31.08.2017 the suit was withdrawn with liberty to the parties to file afresh. Thereafter the present Writ Petition was filed by the Petitioner on the ground that question of title has to be

decided by Civil Courts and not by Executive Magistrates. The Petitioner therefore prays for setting aside the impugned order dated 14.05.2015 and notice dated 18.03.2016. The above factual matrix is asserted in the Writ Petition.

2. The Respondent No.2 and the District Collector of the South District at Namchi (Respondent No.3) have jointly filed a counter-affidavit. The said counter-affidavit narrates the factual details of the passing of the order dated 14.05.2015 and notice dated 18.03.2016. It is stated that the Respondent No.1 filed a complaint to the Panchayat President and Member of 38-Damthang Gram Panchayat Unit (GPU), South Sikkim stating that the said plots were gifted to her as “*Daijo*” by one Norbu Sherpa on 07.05.1980 but the said “*Daijo*” land was subsequently registered in the name of the Petitioner. The Panchayat President and Members of 38 Damthang GPU vide letter dated 10.09.2013 forwarded the matter to the Sub-Divisional Magistrate, South Sikkim stating that the dispute between the parties could not be settled. On 12.09.2013 the complaint was registered as Misc Case No.5/13. The Respondent No.2 thereafter, directed the concerned Revenue Officer/Supervisor to verify the records of the said plots and submit a report as to how the said plots were mutated in the name of the Petitioner. On 25.10.2013 the Respondent No.2 received a report from the Revenue Inspector/Revenue Supervisor stating that the mutation records/file in favour of

the Petitioner was not traceable. On verification it was found that the mutation of the said plots were carried out from Norbu Sherpa to Dawa Tshering Sherpa vide O.O. No. 373/AD(S) dated 11.03.1985 and thereafter it was mutated in favour of the Petitioner from Dawa Tshering Sherpa vide O.O. No.128/DC(S) dated 05.07.1993. However, the name of the Respondent No.1 was found recorded in the remarks column as having got "*Daijo*" in the computerised land record of the said plots. The Respondent No.2 thereafter issued summons to the Petitioner as well as the Respondent No.1 directing them to appear before him on 21.11.2013. During the proceedings it was found that the said plots were found mutated in the name of the Petitioner without the consent of the Respondent No.1. The counter-affidavit filed by the Respondent Nos.2 and 3 further states that the said plots "*belong to Respondent No.1 since the same was received by her as "Daijo" from Norbu Sherpa in the year 1980 and it was wrongly mutated in the name of the Petitioner.*" It is averred that in order to ascertain the facts of the case two witnesses *viz.* Pema Ongchu Sherpa, resident of Damthang-W1 and Sriman Chettri, resident of Damthang-W2 were also examined. Pema Ongchu Sherpa stated on affidavit that in the year 1977 late Norbu Sherpa had gifted the said plots measuring approximately 5 acres to her adopted granddaughter i.e. the Respondent No.1. The said witness also deposed that in the year 1978 Dawa Tshering

Sherpa made the Respondent No.1 her sister and gifted the said plots to her. Thereafter, she had settled in Dew, Namchi, South Sikkim. Sriman Chettri stated that she knew the Respondent No.1 who once resided in the land of Norbu Sherpa (Darey Bajey) and she had left the place twenty years ago.

3. The counter-affidavit of the Respondent Nos.2 and 3 also states that on 14.5.2015 three issues were framed as under:

- “(i) was the land in question i.e. plot no.233/234 under Damthang block, South Sikkim given as “Daijo” to the FIRST party?*
- (ii) whether with the mere abandonment of land the right of the FIRST party is extinguished?*
- (iii) whether FIRST party is entitled to correction in records of rights of plot no.233/234 under Damthang block, South Sikkim?”*

4. The counter-affidavit of the Respondent Nos.2 and 3 further avers that with regard to issue no.(iii) it was found that the mutation order transferring the said plots to the Petitioner should not have been executed without the No Objection Certificate from the Respondent No.1 as it was given as “Daijo” to the Respondent No.1 by late Norbu Sherpa and therefore the record of rights was liable to be rectified in favour of the Respondent No.1. It is stated that the Respondent No.2 heard the matter in the presence of the Petitioner as well as the Respondent No.1 and the order dated 14.05.2015 was passed

after considering the facts, statements and affidavits of the witnesses. It is also stated that it was only after a lapse of ten months thereafter that the Respondent No.2 issued the notice dated 18.03.2016 for mutation of the said plots.

5. The Petitioner has filed a rejoinder to the counter-affidavit filed by the Respondent No.2. It is submitted therein that the order dated 14.05.2015 and notice dated 18.03.2016 are illegal and without jurisdiction.

6. The Respondent No.1 has also filed a counter-affidavit. It is stated that Dawa Tshering Sherpa, father of the Petitioner left his native place Dharey Jaubari, Damthang, South Sikkim and started living along with his wife in Nepal where the Petitioner was born. The Petitioner's father expired in Nepal. After the demise of her parents' Respondent No.1 started living with late Norbu Sherpa (grandfather of the Petitioner) until his death in the year 1983. Respondent No.1 took care of Norbu Sherpa until his demise as she would have her own parents. She made every effort to keep Norbu Sherpa happy during his last moments. Due to her untiring love, care and support Norbu Sherpa gifted the said plots as "*Daijo*" to the Respondent No.1 in the presence of witnesses. The document granting "*Daijo*" was submitted at the office of the Respondent No.2 and 3. She had constructed a "*kacha*" house on the said plots. Norbu Sherpa lived there till his demise in the year 1983. However, since the said plots were not suitable for

cultivation the Respondent No.1 temporarily shifted her residence to Dew, Damthang, South Sikkim in the year 1992 where she started working as a labourer at Public Works Department, Government of Sikkim due to her poverty. Taking advantage of this the Petitioner in her absence transferred and mutated the entire landed property of late Norbu Sherpa in his name without following due procedure. When she came to learn about the illegal transfer in the year 2013 she made a complaint before the Respondent Nos.2 and 3. This complaint was entertained.

7. The Petitioner filed a rejoinder to the counter-affidavit filed by the Respondent No.1 in which the assertion that Norbu Sherpa had given "*Daijo*" of the said plots to Respondent No.1 has been denied. It is also denied that the Respondent No.1 has constructed the house therein. It is averred by the Petitioner that the property was duly mutated in the name of the Petitioner and that the order dated 14.05.2015 and notice dated 18.03.2016 are wholly without jurisdiction, null and void.

8. Heard Mr. Zangpo Sherpa, learned Counsel for the Petitioner, Mr. Karma Thinley Namgyal, learned Senior Government Advocate for the Respondent No.2 and 3 and Mr. William Tamang, learned Legal Aid Counsel for the Respondent No.1.

9. On 25.01.2018 this Court issued notice upon the Respondents and stayed the order dated 14.05.2015 passed by the Respondent No.2. On 27.08.2018 this Court directed the Respondent No.3 to file a detail affidavit pointing out the law as well as the procedure followed while examining issues pertaining to issuance of "*parcha*" or correction/rectification or cancellation thereof applicable in Sikkim.

10. Pursuant thereto the Respondent No.3 has filed an affidavit. It is stated that the procedure as envisaged under the Registration of Document Rule, 1930 are followed for registration of landed property in Sikkim. Once registered necessary rectification is carried out in the "*khasra*" (sale from one individual to another individual) and thereafter a "*parcha*" is issued. "*Parcha*" is issued after registration of the landed property is complete and mutation is carried out in favour of the buyer. Prior to such registration a spot verification is carried out by the concerned amin and a report thereof is submitted to the revenue section of the District Collector. No Objection Certificate from the immediate neighbours is also obtained followed by the No Objection Certificate from the families of the seller. As far as correction of record of rights is concerned, no separate law or rules are presently in force which authorises the Additional District Collector/Sub-Divisional Magistrate to rectify/correct the land records. The Kotha Purnu or Dru Deb and Attestation Rules, 1951

published in the Sikkim Darbar Gazette dated October, 1951 has been repealed by the Sikkim Record Writing and Attestation Rules, 1988 which came into force on 09.09.1988. A copy of the said rules has been annexed to the said affidavit. It is stated that the cadastral survey operation of 1978-82 was conducted under the Kotha Purnu or Dru Deb and Attestation Rules, 1951 as the land record has been prepared in accordance with the provisions contained therein.

11. The Sikkim Agricultural Land Ceiling and Reforms Act, 1977 (14 of 1978) (the said Act) came into force on 22.06.1978 on the issuance of Notification No.3/LR dated 22.06.1978 published in the Sikkim Government Gazette No.86 on the same date in exercise of the powers conferred by Section 1 (3) of the said Act.

12. The Sikkim Record Writing and Attestation Rules, 1988 (the said rules) has been made in exercise of the powers conferred by clauses (1), (j) and (m) of sub-section (2) of Section 36 of the said Act.

13. The said rules came into force on 09.09.1988. The said rules deals with preparation and revision of record of rights **(rule 3 (1) to rule 3 (5))**; carrying out of survey and preparation of survey maps **(rule 4(1) to rule 4(9))**; preparation of “*khasra*” **(rule 5(1) to rule 5(28))**; preparation of “*khatian*” **(rule 6(1) to rule 6(12))**; attestation **(rule 7(1) to rule 7(10))**; appeal and correction of record of rights **(rule 8(1)**

to rule 8(5)); assessment of land rent (**rule 9(1) and rule 9(2));** completion of survey operation and repeal of the Record Writing or Kotha Purnu or Dru-deb and Attestation Rules, 1951 (**rule 11**).

14. Under the scheme of the said rules the preparation and revision of record of rights is undertaken as detailed in rule 3(1) to rule 3(9). The process of preparation of “*khasra*” (or index register to the block maps) is undertaken as provided under rule 5. The “*khasra*” is required to be prepared in a form containing various particulars i.e. the name of the block, elakha, district, year of survey (in Christian as well as in Vikrama era), the name of the surveyor, head surveyor, survey inspector and the date of commencement and completion of the survey; plot number corresponding to the map; name of the locality; approximate altitude of the plot in meters; numbers of terraces or “*Garas*” comprising the plot; name, parentage, cast and address of the “*Bustiwalla*”.

15. While preparing the “*khasra*” under rule 5 of the said rules, rule 5(2) provides that “*on establishing the ownership of the claimant, the surveyor shall cause entry in the relevant column of the khasra*”.

16. Rule 5(3) to rule 5(5) deals with disputes at the time of preparation of the “*khasra*”. While preparing the “*khasra*” if any dispute arises the procedure to be followed is provided in rule 5 of the said rules.

17. Rule 5(6) of the said rules provide that *“in case of entry of sale or gift, a valid registered deed shall be demanded and entry shall be made accordingly and registration number thereof shall be shown in the remarks column against the plot number under sale or gift.”*

18. Rule 6 of the said rules provide the method for preparation of the *“khatian”* (record of rights). Rule 6(1) deals with the particulars required while preparing the *“khatian”*. Rule 6(3) provides that *“a parcha in respect of an individual land holder shall be issued after having checked by the head surveyor and the inspector respectively.”*

19. Rule 6(4) provides that *“on completion of preparation of land record of rights, the surveyor shall issue the parcha to the concerned Bustiwala in presence of the members of the Panchayat after duly obtaining the receipt in that behalf from Bustiwala concerned.”*

20. Rule 8 provides for appeal and correction of record of rights. Under Rule 8(1) of the said rules *“if any person is aggrieved by any decision of the Revenue Officer, he may prefer an appeal to the tribunal constituted under Section 13 of the Act within thirty days from the date of such decision.”*

21. The order dated 14.05.2015 records that the said plots were found recorded in the name of the Petitioner in the *“record of rights”*. It is further recorded that as per the office records the said plots were mutated in favour of Dawa

Tshering Sherpa from late Norbu Sherpa in the year 1985 and thereafter in favour of the Petitioner in the year 1993.

22. The Respondent Nos.2 and 3 has also filed copies of the “*parcha khatians*” regarding the said plots. The first “*parcha khatian*” filed records the name of Norbu Sherpa son of Rinzing Sherpa in the column of the name of the “*Bustiwalla*”. In the remarks column there is an entry in Nepali which translated records “*house-Daijo Phurba Lhamu Sherpani wife of Lhakpa Temba Sherpa*”. The said “*parcha khatian*” bears signature of the surveyor dated 07.05.1980. It seems that this “*parcha khatian*” was prepared under the Kotha Purnu or Dru-deb and Attestation Rules, 1951 which was in existence till 09.09.1988 when the said rules were enforced.

23. The second “*parcha khatian*” (computerised record of rights) records the Petitioner as the owner. Amongst the various plots shown owned by him against the said plots in the remarks column the same endorsement showing the house as “*Daijo*” to the Respondent No.1 is recorded. The second “*parcha khatian*” is dated 22.10.2013. However, it is unclear as to whether the “*parcha khatian*” was prepared or the computerised record of rights was obtained on the said date.

24. The third “*parcha khatian*” is in the name of the Petitioner which relates to plots number 237, 238, 243 and 244. The third “*parcha khatian*” does not have the plot numbers 233 and 234 in it. However, against plot number 243

once again in the remarks column there is mention of “*Daijo*” of the house in favour of the Respondent No.1. There is no clarification regarding this.

25. The counter-affidavit filed by the Respondent Nos.2 and 3 makes it clear that the complaint by the Respondent No.1 was entertained by the Respondent No.2 in the year 2013. The Respondent No.1 enquired from the Panchayat President as to how the said plots had been mutated in the name of the Petitioner although they were gifted to her by her uncle on 07.05.1980. As the Panchayat could not answer this question it was forwarded to the Sub-Divisional Magistrate on 10.09.2013 pursuant to which a case was registered and summons issued to the parties. When the complaint was thus taken cognizance of by the Respondent No.2 the said rules were in force. At that time, it is quite clear, the “*parcha khatian*” in favour of the Petitioner had already been prepared. Under the said rules the “*parcha khatian*” in favour of the Petitioner had to be prepared under rule 6 on the basis of the “*khasra*” prepared under rule 5 thereof. Under the scheme of the said rules once the record of rights has been prepared and issued under rule 6(3) and 6(4) if any person is aggrieved by any decision of the Revenue Officer he may prefer an appeal to the tribunal constituted under Section 13 of the said Act within thirty days from the date of such decision under rule 8. The term “*Revenue Officer*” has been defined in rule 2(p) to

mean any officer appointed by the Government under sub-section (3) of Section 19 of the said Act. Section 19 of the said Act falls under chapter III relating to preparation of record of rights. In exercise of the powers conferred by sub-section (1) of Section 13 read with sub-section (2) of Section 13 of the said Act the State Government issued Notification No.15/LRD (S) dated 16.08.95 constituting the tribunal for hearing appeals under section 13 of the said Act and appointed the Joint Secretary to the Government of Sikkim in the Land Revenue Department as the sole member of the tribunal. Admittedly and it is also evident that the Respondent No.1 has not resorted to rule 8 of the said rules.

26. The Respondent No.1 had however, approached the Panchayat who endorsed the complaint to the Sub-Divisional Magistrate which was taken cognizance of by the Respondent No.2.

27. The Respondent No.2 after taking cognizance of the said complaint seem to have taken evidence and thereafter come to the conclusion that the said plots had in fact been gifted to the Respondent No.1 by one Norbu Sherpa. The Respondent No.2 has recorded in the order that the Respondent No.1 has prayed to the Court that the land in question be transferred to her as she has received the same from Norbu Sherpa in the year 1980 and it was wrongly mutated in the name of the Petitioner.

28. The Respondent No.2 after a detailed examination of the witnesses decided the first issue in the following manner:-

“It is clear to me from the statement of both the parties and witness that the land was indeed gifted to the First Party by one Norbu Sherpa. The Second party has not denied the anything in this regard. The second party has stated that it was gifted but the First Party has abandoned the land in year 1992 and thus due to this act by abandonment, the right of the First party over the land is extinguished. It is also amply clear from the records of right that the land was indeed given a “Daijo”to the First Party by Norbu Sherpa.”

29. The second issue was decided by holding that the Petitioner having failed to produce the No Objection Certificate from the first party before the mutation there were few shortcomings in the office procedure adopted. It was also held that mutation in favour of the Petitioner could not have been done without the consent of the Respondent No.1 in view of the entry “Daijo” in the remarks column of the “*parcha khatian*”.

30. The third issue related to a pertinent question as to whether the Respondent No.1 was entitled to correction in the record of rights of the said plots. The Respondent No.2 decided the said issue holding:-

“In deciding Issue No.3, it appears to me that clearly the mutation order transferring the land to the Second Party with respect to the above land should not have been executed without the NOC from the First Party. Since the land was given as Daijo to the First Party by Late Norbu Sherpa and since Norbu Sherpa has long expired, the land is to be mutated in the name of the First Party after his death since it is clear that the said land was given to the First Party by Norbu Sherpa.

Therefore records of rights are to be corrected in favour of the First Party.”

31. The Respondent No.2 has neither adverted to the said rules nor drawn power from it or from any other law while passing the order dated 14.05.2015. Neither the counter-affidavit filed by the Respondent Nos.2 and 3 nor the affidavit dated 05.03.2019 filed by the Respondent No.3 reveal as to whether the said rules were at all followed by the Respondent No.2. The Respondent No.2 has acted as a Court and passed orders as a Court. The records, however, reveal that the Respondent No.2 was totally unaware of the source of his power. If the Respondent No.2 was aware of the said rules he ought to have known the limitations prescribed therein and followed the prescribed procedure, if applicable. The counter-affidavit filed by the Respondent No.2 is completely silent on what procedure was followed. The Respondent No.2 was definitely not exercising its limited powers under the provisions of the Code of Criminal Procedure, 1973 (Cr.P.C.). The said rule does not reflect any role of the Respondent No.2 in its scheme unless he was acting as a Revenue Officer. However, no notification has been placed by the Respondent No.2 and 3 bringing on record any appointment order by the Government under the said Act. The Respondent No.2 and 3 have not pleaded that the Respondent No.2 was exercising powers of a Revenue Officer as appointed by the Government under sub-section (3) of Section 19 of the said Act.

32. Transfer of property is regulated by the Transfer of Property Act, 1882 which is enforced and applicable in Sikkim. The preparation of the record of rights is mainly for the purpose of ascertaining the ownership of the agricultural lands and quantum of revenue payable by the owner for the purposes of the said Act. Section 25 (1) of the said Act provides that every person shall be liable to pay revenue to the State Government for the lands allowed to be retained by him within the ceiling limit. While preparing the "*khasra*" under rule 5 of the said rules the surveyor is required to establish the ownership of the claimant. It is only after establishing the ownership that the surveyor shall cause entry in the relevant column of the "*khasra*" as required by rule 5(2). For the limited purpose the surveyor can examine the issue of ownership. The finding of the surveyor or the other authorities under the said rules regarding the ownership of the agricultural land for the purpose of preparation of the "*khasra*" however, cannot be considered the final determination of title of immovable property. For the determination of title of immovable property the parties must approach the civil Court of appropriate jurisdiction.

33. A perusal of the records placed reveal conflicting claims of title between the Petitioner and the Respondent No.1. The only document relied upon are the "*parcha khatians*". The Respondent No.1 has claimed that the said plots were gifted to

her as “*Daijo*” and that the said document was submitted at the office of the Respondent No.2 and 3. However, neither the copy nor the original was placed before this Court by the Respondents. Contrary thereto in the remarks column of the “*parcha khatian*” there is mention of only a house being given as “*Daijo*” to the Respondent No.1. With these uncertain facts and serious disputes regarding the title of the said plots it was incumbent upon the Respondent No.2 to have directed the parties to the civil Court for the determination of the title of the said plots.

34. The order dated 14.05.2015 passed by the Respondent No.2 also suffers from non application of mind for not having even bothered to consider what was the applicable law and whether he had the power and jurisdiction to decide the issue before him.

35. The Petitioner as well as the Respondent No.1 is at liberty to approach the right forum for appropriate relief if advised. The opinion expressed by this Court regarding the facts and documents placed before this Court in this judgment is only for the purposes of determining whether the order dated 14.05.2015 and notice dated 18.03.2016 passed by the Respondent No.2 were liable to be set aside. This Court makes it clear that the *prima facie* opinion so expressed regarding the materials available shall not in any circumstance be used in

any proceeding instituted for determination of the title of the said plots.

36. The Writ Petition is allowed. The order dated 14.05.2015 as well as the notice dated 18.03.2016 passed by the Respondent No.2 are therefore set aside. No order as to costs.

(Bhaskar Raj Pradhan)
Judge
16.04.2019

to/ Approved for reporting: yes.
Internet: yes.