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THE HIGH COURT OF SIKKIM : GANGTOK

WRIT PETITION (C) NO. 21 OF 2003

In the matter of a petition under Article 227 of the Constitution of India read with sections 115 and 151 of the Code of Civil Procedure, 1908.

Shri Govind Prasad Sharma,
S/o late R. P. Sharma,
R/o Sukhapul,
Upper Sichey Busty,
P.O. Sichey,
East Sikkim

.... **Petitioner**

VERSUS

1. Shri Bishnu Kumar Rai,
S/o late G. B. Rai,
R/o Sukhapul,
Upper Sichey Busty,
P.O. Sichey,
East Sikkim.

2. State of Sikkim
represented by Chief Secretary,
Government of Sikkim,
P.O. Gangtok,
East Sikkim.

3. The Divisional Forest Officer (Territorial),
Government of Sikkim,
Forest Department,
Above Norkhil Hotel,
P.O. Gangtok,
East Sikkim.

.... **Respondents**

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For the petitioner : Shri A. Moulik with Shri N. G. Sherpa, Advocates.

For the respondent 1 : Shri S. Sarkar, Senior Advocate and B. K. Rai, Advocate.

For the respondents 2 & 3: Shri S. P. Wangdi, Advocate General assisted by Shri J. B. Pradhan, Government Advocate and Shri Karma Thinlay, Assistant Government Advocate.

**PRESENT: THE HON'BLE SHRI JUSTICE R. K. PATRA, CHIEF JUSTICE.
THE HON'BLE SHRI JUSTICE N. SURJAMANI SINGH, JUDGE.**

Date of judgment: 2nd April, 2004.

J U D G M E N T

R. K. PATRA, C.J.

Defendant no.1 has filed this petition under Article 227 of the Constitution of India challenging the validity of the order of the trial Judge in striking out issue no. 7 which reads as follows:-

“Whether the purchased land by the plaintiff from Chewang Dorjee Lama or Basant Bir Lama is valid in the eye of law”.

2. Respondent no.1 has filed civil suit no. 4 of 2002 in the court of Civil Judge, East at Gangtok against the petitioner arraying him as defendant no.1 claiming the following substantial reliefs:

- (i) to declare that he has the right of way as easement of necessity through and over the carpeted motor road/thoroughfare and defendant no.1 has no right to put any obstruction on his right.
- (ii) to permanently injunct restraining the defendant no. 1 from keeping the iron gate at the entrance of the disputed road under lock and key.

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- (iii) a decree requiring the defendant no. 1 to remove the iron gate.

The respondent no.1's suit is founded on the following averments.

In the year 1977 he acquired land measuring 60 ft. x 50 ft. from one Chewang Dorjee Lama which is a part of plot no. 631 (re-numbered as plot no. 631/1287). It is situated at Sukhapul under Block Sichey, P.O. and P.S. Gangtok. Later he constructed a 'pucca' building thereon and has been residing there with members of his family. The house is located at a distance of about 150 ft. from the main public motor road known as Sichey main road. There was a strip of land from the main Sichey road to his house and was being used as a pathway and thoroughfare for his ingress and egress. The said strip of land runs over plot no. 628 and plot no. 631 (re-numbered as plot no. 631/1147). Plot no.628 belongs to the state government and plot no. 631 (re-numbered as plot no. 631/1147) belonged to one Basant Bir Lama from whom he purchased two strips of land measuring 100 ft. x 12 ft. and 6ft. x 60 ft. for the purpose of motor road leading to his house subject to right of easement of others. For the beneficial enjoyment, he has carpeted the said approach road at his own expenses for his personal use as well as for the use of other residents of the locality. Adjacent south of the said pathway on plot no. 628 and facing the

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main Sichey road the defendant no.1's house is situated. The carpeted pathway is used as thoroughfare by the plaintiff and other residents of the locality including the defendant no.1. Sometime in the year 1996-97, defendant no.1 constructed an iron gate at the entrance of the said carpeted road and the plaintiff had been enjoying and using the thoroughfare as of right by way of easement of necessity as ingress and egress to and from his house and from the main road all throughout the day and night and defendant no.1 never locked the iron gate. Later defendant no.1 started to keep the iron gate under lock and key completely obstructing the movements of the vehicles of the plaintiff and others. It was a clever device on his part to prevent the plaintiff and others to ply their vehicles through and over the disputed carpeted road. The defendant no.1 is a highly placed officer of the government of Sikkim and taking advantage of his official position he has not acceded to the request of the plaintiff and others to remove the iron gate. Finding no other alternative he has filed the suit claiming the reliefs mentioned above.

The petitioner (defendant no.1) has filed his written statement denying all the allegations made in the plaint. He has pleaded *inter alia* that the plaintiff being a non-Sikkimese does not possess Sikkim Subject Certificate and plot no. 631 being in a rural area he could not have obtained

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any portion of it by way of purchase. Acquisition of the land from Chewang Dorjee Lama or purchase from Basant Bir Lama is thus a nullity in the eye of law. The claim of the plaintiff that he is a lawful owner of the plots in question has been emphatically denied in the written statement.

Upon hearing counsel for parties, the trial Judge framed seven issues including the issue mentioned above. When the matter stood thus, the respondent no.1 filed a petition before the trial Judge under order XIV rule 5 CPC to strike out issue no.7 on the ground that it is not relevant for the purpose of the suit *inasmuch* the suit is primarily for the easement of necessity over and through the iron gate and not for title or possession. The petitioner filed objection contending *inter alia* that issues were framed after hearing all concerned and the issue is a relevant one. No easementary right can be claimed by the plaintiff if he cannot legally own the disputed land *inasmuch* as he cannot acquire or purchase land situated in rural area in view of the fact that he does not possess Sikkim Subject Certificate. The trial Judge has held that suit is only with regard to the iron gate at the entrance of the disputed road and has nothing to do with the land purchased by the plaintiff from Chewang Dorjee Lama or Basant Bir Lama and therefore issue no.7 is irrelevant and by the impugned order dated 25.6.2003 has deleted the said issue.

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3. We have heard counsel for parties. Learned counsel appearing for the respondent no.1 submitted that the present suit not being a declaration of title or possession, issue no. 7 is irrelevant and the learned trial Judge rightly directed to strike it out. He also submitted that the strip of land measuring 100ft. x 12ft. and 6ft. x 60ft. under plot no. 631/1147 is subject-matter of dispute in civil suit no. 8 of 2000 pending in the court of the District Judge (Special Division) wherein right of parties over the said land has to be decided. Counsel for the petitioner submitted the said civil suit no. 8 of 2000 was filed on behalf of the minor sons of Basant Bir Lama challenging the plaintiff's rights over the said area of 100ft. x 12ft. and 6ft. x 60ft. and it has now been decided against the plaintiff and First Appeal is pending in this court.

4. It is true that the plaintiff has not been filed the suit for declaration of right, title or possession over the disputed area but his claim of right of easement is based on his acquisition by way of purchase from Chewang Dorjee Lama and Basant Bir Lama who are/were the real owners having right, title and interest therein. Defendant no.1 alleges that the plaintiff is not competent to acquire the land from either of them as he does not possess the Sikkim Subject Certificate. Therefore incidentally the source and validity of title have to be gone into in the suit. It is well-

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known that even for deciding a suit filed for mere injunction, the plaintiff's right and title over the disputed land are incidentally necessary to be examined. Therefore the question as to whether the plaintiff has got valid title over the disputed patch of land from which his right to easement flows has to be incidentally gone into in the suit. Moreover the suit is at a preliminary stage and parties have not yet led evidence. In the circumstances, none of them will be prejudiced if issue no.7 is decided.

For the reasons stated above, the impugned order passed by the learned trial Judge cannot be sustained in law and the same is liable to be set aside.

5. We may note that another issue needs to be framed and decided in the interest of justice in view of the admitted position that in civil suit no. 8 of 2000 the very disputed land 100ft. x 12ft. and 6ft. x 60ft. appertaining to plot no. 631/1147 was involved. Accordingly we direct the learned trial Judge to frame and try the additional issue which is as follows:-

“Whether the finding recorded by the trial court in civil suit no. 8 of 2000 in respect of the land measuring 100ft. x 12ft. and 6ft. x 60ft. pertaining to plot no. 631/1147 will have any bearing and/or operate as *res judicata* in the present suit?”


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6. Resultantly, the impugned order dated 25.6.2003 passed by the learned trial Judge in civil suit no. 4 of 2002 is hereby set aside. The petition filed by the respondent no. 1 under order XIV rule 5 CPC stands rejected and issue no. 7 shall stand as it is.

7. The writ petition is accordingly allowed. No costs.


(R. K. Patra)
Chief Justice
02.04.2004

I agree.


(N. Surjamani Singh)
Judge
02.04.2004

Dictation taken
&
typed by me
Dipak Saha

