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## IN THE HIGH COURT OF SIKKIM

Civil Writ Petition No.7 of 2000

Date of Decision : 28<sup>th</sup> August 2000.

Prayag Chand Periwai  
Son of Shri Satnaryan Periwai  
resident of M.G. Marg,  
Gangtok, East Sikkim. ... Petitioner.

- versus -

1. The State of Sikkim through the  
Commissioner-cum-Secretary,  
Urban Development & Housing  
Department, Government of Sikkim,  
Gangtok, East Sikkim.
  2. The Commissioner-cum-Secretary,  
Govt. of Sikkim, Urban Development  
and Housing Deptt. Govt. of Sikkim,  
Gangtok.
  3. Divisional Engineer-cum-Town Planner,  
Urban Development and Housing Deptt.,  
Govt. of Sikkim, Gangtok.
  4. Smt. Bhagya Mani Devi, Wife of Shri  
R.P. Gupta, Resident of M.G. Marg,  
Gangtok, East Sikkim. ... Respondents.
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Coram :

The Hon'ble Mr. Justice Ripusudan Dayal, Chief Justice.  
The Hon'ble Mr. Justice Anup Deb, Judge.

Present : Mr. S.K. Home Choudhury, Senior Advocate with  
Mr. J.K. Chandak, Advocate for the petitioner.

Mr. S.P. Wangdi, Advocate General with Mr. Karma  
Thinlay, Asstt. Govt. Advocate for respondent Nos.  
1, 2 & 3.

Mr. B. Sharma, Advocate for respondent No.4.

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**JUDGMENT**

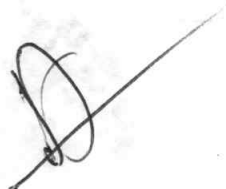
**DEB J.**

This Writ Petition is directed against the order dated 22<sup>nd</sup> November 1999 (Annexure P-10) passed by the Commissioner-cum-Secretary, Government of Sikkim, Urban Development and Housing Department, respondent No.2, by which respondent No.2 regularised the alleged encroached area of Smt. Bhagya Mani Devi, respondent No.4 on receipt of an application from her in prescribed form with bank receipt on being satisfied that the norms required are fully complied with. Before



regularisation, respondent No.2 heard the interested parties including the petitioner.

The petitioner claimed that he owned and held a portion of vacant land measuring 20'x20', that is, 400 Sq.ft. out of plot No.933 situated in the Town area below the property of one Karma Yenten Wanger Bhutia of Khamdong, below Mahatma Gandhi Marg, Gangtok. Annexure-P1 is the copy of Sale Deed in favour of the petitioner and its schedule shows that on the east, the land is butted and bounded by R.C.C. building of Karma Yenten Wanger Bhutia of Khamdong and 5' gully leading towards the purchased land, which adjoins with the Government gully in the north, on the west, it is butted and bounded by Government gully, on the north it is bounded by R.C.C. building of Smt. Bhagya Mani Devi and on the south by Orchid Hotel. The petitioner alleged that the authority, i.e. respondent No.2, regularised the undisputed encroachment and unauthorised construction over 341.25 Sq.ft. by respondent No.4 on payment of regularisation fee and therefore, such regularisation falls outside the plot of Bhagya Mani Devi and the order is ex-facie illegal and without jurisdiction because Regulation 26(b) of the Sikkim Building Construction Regulations, 1991 made under the Sikkim Allotment of House Sites and Construction of Building



(Regulation and Control) Act, 1985, restricts to the power of regularisation of construction beyond Blue Print Plan subject to the condition that such construction is within the allottee's own holding (private). Copy of the Mutation Certificate issued by Registrar, East District Collectorate in respect of respondent No.4, has been filed by the petitioner being Annexure-P2 and the same document has also been filed by respondent No.4 along with her counter-affidavit as Annexure-R3. The Mutation Certificate (Annexures P-2 and R-3) reveals that the land of respondent No.4 measuring 20'x40' below Mahatma Gandhi Marg, Gangtok Bazar is butted and bounded on the east by the land and building of Jetmull Bhojraj sold to one R.C. Mundra and Norbu Bhutia. The petitioner's further case is that respondent No.4 is the owner of adjacent plot of land measuring 20'x40', i.e. 800 Sq.ft., situated north to the petitioner's plot of land and towards the east of the plot of land purchased by respondent No.4, there has all along been a 5' wide gully in the north south direction running parallel to the eastern boundary of her plot of land. The 5' wide gully as aforesaid links the plot of land purchased by the petitioner through the Government gully on the north. The said 5' wide gully is the only means of ingress and egress and was never sold to anybody by the original owner. The petitioner further stated "that sometimes after the petitioner purchased the plot of land respondent No.4 started unauthorised



construction of the 5' wide Gully". Respondent No.4 had built a six storied building on the plot of land purchased by her before the petitioner purchased the adjacent plot of land and at the time of purchase of land by the petitioner, 5' wide gully was situated towards the east of the land and building of respondent No.4 and it was open and free for ingress and egress to the petitioner's plot of land. It is further alleged that respondent No.4 had made construction over 1141.25 Sq.ft. and thereby made unauthorised construction over 5' wide gully and part of the petitioner's land measuring 341.25 Sq.ft.

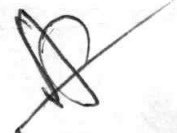
Respondent Nos.1 to 3 contested the case by filing counter-affidavit and denied all the material allegations.

Respondent No.4 by filing counter-affidavit denied all the material allegations made in the Writ Petition. Respondent No.4 has filed copy of her Sale Deed being Annexure-R1 and the Schedule of the land shows that on the east, it is butted and bounded by land and building of Jetmull Bhojraj sold to one R.C. Mundra and Norbu Bhutia. On the west, it is bounded by footpath, on the north it is bounded by footpath and on the south by the land of Jetmull Bhojraj sold to one S. Bhattacharjee. In paragraph 11 of the counter-affidavit, respondent No.4 stated as follows :-



"11. That with reference to the statement made in paragraph 2 of the writ petition it is a matter of records through this respondent has purchased bigger land then the area which is shown in the Sale Deed, it appears that the area has been given less, it may be because of topographical reason and location of the land because this respondent has purchased a stiff land and when he dug the earth for foundation the land is found to be bigger then what has been described in the Sale Deed. It is worth mentioning that non of the four boundary holders claim the land of this respondent and non of the boundary holders so far stated that their land has been included in the land of this respondent."

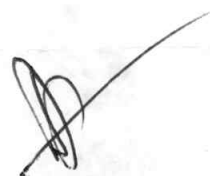
In paragraph 13 of the counter-affidavit, respondent No.4 denied existence of 5' wide gully towards the eastern side of the building of respondent and denied that it used to be ingress to and egress from petitioner's plot of land. In paragraph 19 of the counter-affidavit, respondent No.4 denied the existence of 5' wide gully and stated that the construction had been done strictly in accordance with law. It is stated that there was some mistake in mentioning the area in the Sale Deed and other documents. It is further stated that for the first time, the petitioner took plea that part of land measuring 341.25 Sq.ft. belonged to him and covered by private gully and the construction was completed as back as in the year 1992-93. Copy of the rough sketch (Annexure-R6) as mentioned in paragraph 7 of the counter-affidavit was not specifically disputed by the petitioner in the affidavit-in-reply. In paragraph 24 of the counter-affidavit,



respondent No.4 stated that the map issued by the Land Revenue Department, Government of Sikkim being Annexure-R9 does not indicate any gully. The petitioner in the affidavit-in reply could not deny the case made out by respondent No.4.

Mr. S.K. Home Choudhury, learned Senior Advocate, appearing for the petitioner, argued that respondent No.2 purported to regularise the undisputed encroachment and unauthorised construction over 341.25 Sq.ft. made by respondent No.4 which falls outside the plot of land of respondent No.4. Therefore, the order dated 22<sup>nd</sup> November, 1999 is ex-facie illegal and without jurisdiction in as much as Section 26(b) of the Sikkim Building Construction Regulation 1991, limits the power of regularisation of construction beyond approved Blue Print Plan subject to condition that such construction is within the allottee's own holding.

Mr. S.P. Wangdi, learned Advocate General appearing on behalf of the State, submitted that paragraph 6 of the counter-affidavit filed by respondent No. 2 shows that the legitimate holding of respondent No. 4 is 800 Sq.ft. However, presently respondent No. 4 is occupying 1141.25 Sq.ft. in total without any valid ownership, which is in excess of about 341.25 Sq.ft. It is further stated in paragraph 12 of the counter-affidavit by



respondent No. 2 that he acted in terms of the power conferred under the Regulation 26(b) of the Sikkim Building Construction Regulations, 1991. It is further stated that the interpretation of the Regulation set out by the petitioner is his own perception and misconceived. It is further stated that respondent No. 2 exercised his powers within the ambit of the Rules and passed orders dated 22<sup>nd</sup> November 1999 accordingly. Mr. Wangdi submitted that this Writ Petition involves disputed questions of facts and of title over the disputed land, and therefore, the same may appropriately be resolved by filing a Civil Suit. Mr. Wangdi argued that the evidence of the original owner, i.e. M/s. Jetmull Bhojraj will be necessary to determine the disputes.

Mr. B. Sharma, learned Advocate, appearing on behalf of respondent No.4, has argued that the boundaries given in the Sale Deed of the petitioner do not show existence of any private gully on the eastern side of the land and has placed reliance on Annexure-R6 prepared on the basis of the Annexure-R9 which is a map issued by the Land Revenue Department, Government of Sikkim to show that on the northern side of the land, a Government gully exists. Government gully also exists on the southern side of the gully. The land of the petitioner is situated on the southern side of the land of respondent No.4 and on the southern side also there are gullies. Mr. Sharma



submits that on the eastern side of respondent No.4 and petitioner, the lands of one R.C. Mundra and Norbu Bhutia are situated and there is no existence of gully on the eastern side of the land of respondent No. 4. Respondent No. 2 in Annexure-10 clearly stated that in this matter controversy should be resolved by a Civil Suit. Question of title can be decided in Civil Court only by giving opportunity to the parties to adduce oral and documentary evidence and this is not permissible in writ petition. Mr. Sharma submitted that on the prayer of Mr. Home Choudhury, respondent No.4 produced the original Blue Print Plan which was shown to Mr. Home Choudhury but no such gully could be detected by Mr. Home Choudhury in the original Blue Print Plan of respondent No.4. Mr. B. Sharma, Ld. advocate submitted that there are serious disputed facts which can not be decided in writ jurisdiction.

In the case of *Thansign Nathmal - versus - A. Mazid, Supdt. of Tax*, reported in *AIR 1964 SC 1419* it was held that High Court does not generally enter upon a determination of questions which require an elaborate examination of evidence to establish the right to enforce for which the writ is claimed.

In the case of *State of Rajasthan -versus- Bhawani Singh and others* reported in *AIR 1992 SC 1018* it has been held that disputed questions



relating to title cannot be gone into or adjudicated in writ petition. In this case the question of declaration of title of the parties is involved and, therefore, the writ petition itself is misconceived.

It is held in the case of Union of India and others - versus - S.J. Thanawalla and another reported in (1996) 8 SCC 469 that in a case where dispute as to right and title to the property is involved, the High Court was justified in not going into the question of title and relegating the parties to the decision of the appellate tribunal.


Regulation 26(b) of the Sikkim Building Construction Regulations, 1991 provides that if the construction has taken place beyond the approved blue print plan but within the allottee's own holding (Private), the same shall be regularised on payment of Rs.5/- per Sq.ft. In the present case the petitioner claimed in paragraph 18 of the writ petition "Your petitioner states that respondent No.2 passed the impugned order on 22.11.99, arbitrarily and illegally purporting to regularise the unauthorised constructions made by respondent no.4 encroaching upon an area of land measuring 341 sq.ft. i.e. over the five feet wide gully and other part of petitioner's land." and respondent No.4 specifically denied the same in paragraph 21 of the counter-affidavit. In paragraphs 11 and 19 of the




counter-affidavit, respondent No.4 denied the existence of gully and claimed to be the owner of the area measuring 341 sq.ft.

We are of the view that serious questions of fact and title are involved in the Writ Petition which can appropriately be decided in a Civil Suit and not in exercise of writ jurisdiction. We are, therefore, not inclined to interfere with the order dated 22<sup>nd</sup> November, 1999 passed by the Commissioner-cum-Secretary, Urban Development and Housing Department, Government of Sikkim, being Annexure-10 to the Writ Petition. The petitioner is free to file a Civil Suit, if he so advised.

In the result, the Writ Petition is dismissed. However, in the circumstances there shall be no order as to costs.

  
(ANUR DEB)  
JUDGE  
28.8.2000

  
(RIPUSUDAN DAYAL)  
CHIEF JUSTICE  
28.8.2000