

# THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

Dated : 17<sup>th</sup> May, 2023

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SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

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FAO No.01 of 2023

**Appellants** : Mr. Palden Ongchu Pazo and Another

**versus**

**Respondents** : Mrs. Sonam Dolkar and Others

An Appeal under Order XLIII Rule 1(r) of the Code of Civil Procedure, 1908.

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**Appearance**

Mr. A. Moulik, Senior Advocate with Mr. Ranjit Prasad, Advocate for the Appellants.

Mr. Karma Thinlay, Senior Advocate with Mr. Yashir N. Tamang, Advocate for the Respondent Nos.1 and 2.

Mr. Yadev Sharma, Government Advocate with Mr. Sujan Sunwar, Assistant Government Advocate for the State-Respondent Nos.3 to 5.

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## **JUDGMENT (ORAL)**

Meenakshi Madan Rai, J.

**1.** The Plaintiffs/Appellants herein impugn the Order dated 22-08-2022, in Title Suit No.13 of 2022, of the Court of Learned District Judge, Special Division – II, Gangtok, Sikkim, by which the Learned Trial Court while deciding an application under Order XXXIX, Rules 1 and 2, read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter, the "CPC"), filed by the Appellants vacated the Order of stay, dated 03-06-2022, *inter alia* on grounds that the Appellants had failed to make out a *prima facie* case.

**2.** Assailing the Order, Learned Senior Counsel for the Appellants canvassed the contention that the Respondent Nos.1 and 2 claim to have owned 3.90 acres of land of which 3.28 acres was acquired by the Government earlier in time. From the said 3.28 acres, the Government could not take possession of 5033 sq.

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ft of land as it was in the occupation of squatters. However, since the Government had acquired the land, although it was not paid for, it belongs to the Government, as the land was not re-acquired by the Respondent Nos.1 and 2, but the stance of the Respondent Nos.1 and 2 now is that 5033 sq. ft of land belongs to them. It is urged that, when admittedly the squatters continue to occupy the area measuring 5033 sq. ft, there is no question of the Respondent Nos.1 and 2 constructing on the said portion of land, thereby proving that the Respondent Nos.1 and 2 have encroached on the land of the Appellants and have constructed a building thereon. Learned Senior Counsel for the Appellants submits that a Document of 1934 establishes that the area on which the construction is being taken up by the Respondent Nos.1 and 2, in fact belongs to the Appellants. That, the said Document categorically mentions that the boundary of the land of the Appellants, on the east extends to "*Terso Bato leading to the Kothi of Libing Kazi from the Kothi of Bermoik Kazi*". That, accordingly, Schedule 'D' property described in the Plaint, is also the property of the Appellants, inasmuch as the eastern boundary of Schedule 'D' extends till Kazi Road, in terms of the said document. It is thus clear that the Respondent Nos.1 and 2 have encroached on the land of the Appellants on the eastern boundary, on a portion of Schedule 'D', as indicated in Annexure - 2, at Page 11, of I.A. No.01 of 2023. Hence, the Appellants have a *prima facie* case in the matter, the balance of convenience and inconvenience is tilted in their favour and the Appellants shall suffer irreparable loss and injury if the impugned Order *supra* is not set aside.

**3.** *Per contra*, Learned Senior Counsel for the Respondent Nos.1 and 2 submits that in the first instance no urgency has been

shown in the matter. That, the Appeal against the impugned Order has been filed belatedly, on which ground alone the Appeal deserves to be dismissed. That, in fact as per the Survey Operations of 1951-52, five plots of land were recorded in the name of 'Youthok Rani' being Plot Nos.1162, 1166, 1167, 1168 and 1169. That, Plot No.1169 upon which the building is being constructed belongs to 'Youthok Rani'. That, the Appellants for their part, have failed to produce any document to establish that Plot No.1169 was ever registered in their names or that of their ancestors. That, the Document of 1934, is a vague document which merits no consideration by any Court. That, in fact the five plots of land measures a total of 3.90 acres. Of the said 3.90 acres, 3.28 acres was acquired by the Government at the first instance, out of which only 3.16 acres was taken, leaving the Respondent Nos.1 and 2 with 0.335 acres of land (approximately 14,616 sq.ft). That, the disputed construction is within the area of 14,616 sq.ft and hence the Appellant has no *prima facie* case. That, as the Respondent Nos.1 and 2 have invested crores of rupees in the construction, the balance of convenience and inconvenience is tilted in their favour. Should the impugned Order not be upheld, the Respondent Nos.1 and 2 will also suffer irreparable loss and injuries. Hence, the Appeal being devoid of merit, be dismissed.

**4.** Learned Government Advocate for Respondent Nos.3 to 5 had no submissions to put forth.

**5.** I have given due consideration to the submissions of Learned Counsel for the parties and perused all documents. The dispute pivots around a construction raised by the Respondent Nos.1 and 2 on a portion of land, bearing Plot No.1169, which both

the Appellants and Respondent Nos.1 and 2 stake claim to, as owners, based on documents in their respective possession.

**(i)** The argument of Learned Senior Counsel for the Respondent Nos.1 and 2 that, no urgency was shown in the matter as the Appeal has been filed rather belatedly, in the month of April, 2023 holds no water as records reveal that after the impugned Order was pronounced on 22-08-2022, the Appellants were before this Court in September, 2022 within the period of limitation. The delay thereafter has occurred only on account of Counsel for the Appellants being remiss and callous in the rectification of defects pointed out by the Registry, for which the Appellants cannot be held at ransom and thereby shorn of their rights.

**(ii)** That having been said, it emerges that in the impugned Order *supra*, the Learned Trial court has observed as follows;

**"42.** The land bearing plot number 1162, 1166, 1167, 1168 and 1169 covering a total area of 3.90 acres situated at Namnang under Gangtok Block, Sikkim during settlement operation in the year 1954 were recorded in the name of Youthok Rani @ Princess Pema Choki Yapshi Yuthok (mother of defendant 1). (*copy of the khatiyani parcha and the map are placed on record*).

.....  
**45.** It is surprising that if the disputed land (i.e. plot no.1169 at Namnang under Gangtok Block where the defendant 1 started construction) belongs to plaintiffs then till 2021, what prevented them from raising objection before the competent authority till the land was transferred in favour of of (*sic.*) defendant 1. The plaintiff in paragraph 6 of the plaint has also admitted that system of allotting plot numbers of land owned by the private owner had started only from the year 1950 but on perusal of the gift deed dated 17.01.1959 (Annexure (*sic.*) P3) which was registered in favour of father of the plaintiffs, it is no mention of any plot numbers including the disputed plaintiffs, it is no mention of any plot numbers including the disputed land. Thus taking into consideration the materials placed on record before this Court, *prima facie* case has not been made out by the plaintiffs for confirmation of the stay order passed on 03.06.2022 by this Court against defendants 1 and 2."

**(iii)** It appears from the afore extracted Paragraphs of the impugned Order that, the Learned Trial Court has instead of considering only whether the Appellants have a *prima facie* case, made an observation with regard to *prima facie* title. It is now no more *res integra* that in a Petition for injunction under Order XXXIX, Rules 1 and 2 read with Section 151 of the CPC, the Court is required to only examine whether the Appellants have a *prima facie* case, whether the balance of convenience and inconvenience is tilted in their favour and whether irreparable loss and injury would be caused to them, if the injunction is not granted. The Learned Trial Court cannot at this stage delve into the question of *prima facie* title. It needs no reiteration that *prima facie* case and *prima facie* title are two entirely different concepts. *Prima facie* case means that there is a *bona fide* contest between the parties and serious questions are required to be tried. While considering the balance of convenience, the Court must pertinently consider whether the Appellants will suffer irreparable loss and injury if the injunction is not granted, which means the injury cannot be compensated in material terms/by payment of money.

**(iv)** In view of the submissions put forth, documents relied on by the Appellants, more specifically the Document of 1934 which delineates the boundaries of the property allegedly belonging to the Appellants, I find that the Appellants have made out a *prima facie* case, which requires examination by the Court. The parties ought to be allowed to lead evidence and test their documentary evidence on the anvil of the Indian Evidence Act, 1872. Deciding *prima facie* title at this stage without so much as an opportunity afforded to the parties to establish their claims is not only premature but it extinguishes the right of the Appellants and

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renders the Title Suit infructuous. Should the injunction not be allowed the Appellants are consequently likely to suffer irreparable loss and injury, the balance of convenience and inconvenience is thereby tilted in their favour.

**6.** In view of the above observations, I am constrained to opine that the Learned Trial Court has erred in setting aside the injunction granted on 03-06-2022.

**(i)** The impugned Order dated 22-08-2022 is accordingly set aside.

**(ii)** The Respondent Nos.1 and 2 shall refrain from taking up further construction works on the disputed property, in terms of the Order of the Learned Trial Court dated 03-06-2022.

**7.** Considering the dispute involved, the Learned Trial Court shall endeavour to complete the trial within six months from today.

**8.** Appeal stands disposed of as also I.A. No.01 of 2023.

**9.** Copy of this Judgment be forwarded to the Learned Trial Court for information and compliance.

**( Meenakshi Madan Rai )**  
**Judge**

17-05-2023

Approved for reporting : **Yes**