

THE HIGH COURT OF SIKKIM: GANGTOK

(Civil Extra Ordinary Jurisdiction)

SINGLE BENCH: HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

W.P. (C) No. 47 of 2020

Tenzing Samchok Bhutia,
S/o Late Pema Rinzing Bhutia,
R/o Sela Inn Lodge, Phaka, Lachung,
P/S Lachung,
North Sikkim.

*Presently residing at Indira Bye Pass,
Gangtok, East Sikkim.*

..... **Petitioner**

Versus

1. Health Care & Family Welfare Department,
Government of Sikkim,
Through the Secretary,
Tashiling Secretariat,
Gangtok, Sikkim 737101.
2. Land Revenue & Disaster Management Department,
Government of Sikkim,
Through the Secretary,
Tashiling Secretariat,
Gangtok, Sikkim 737101.
3. District Collector,
North District Administrative Centre,
Mangan, North Sikkim 737116.
4. Chief Medical Officer, North
Mangan District Hospital,
Mangan, North Sikkim, 737116.
5. Sub Divisional Magistrate,
Chungthang Sub-Division,
Chungthang, North Sikkim 737120.
6. State Public Information Officer,
Health Care & Family Welfare Department,
Tashiling Secretariat,
Gangtok, Sikkim 737101.

..... **Respondents**

Application under Article 226 of the Constitution of India.

Appearance:

Mr. Kazi Sangay Thupden, Mr. Varun Pradhan and Mr. Sudhir Prasad Advocates for the Petitioner.

Mr. Sudesh Joshi, Additional Advocate General with Mr. Sujan Sunwar, Assistant Government Advocate for the respondents.

Date of hearing : **08.11.2021.**

Date of pronouncement : **22.11.2021.**

J U D G M E N T**Bhaskar Raj Pradhan, J.**

1. The petitioner belongs to a Scheduled Tribe. He is a resident of Phaka, Lachung, North Sikkim. According to him in the year 2018 he learnt, while initiating construction in his property i.e. plot no.588, that the respondents had constructed three structures in his property measuring 0.1480 Hectares (Ha) (15,930 square feet) by acquiring an area approximately 0.1050 Ha (11,302 square feet) without following the provisions of the Land Acquisition Act, 2013. The writ petition has been filed by the petitioner seeking a mandamus against the Health Care and Family Welfare Department (respondent no.1) and Land Revenue and Disaster Management Department (respondent no. 2) of the Government of Sikkim to initiate proceedings under the Land Acquisition Act, 2013 for paying compensation and to allow access to the remaining land belonging to him of plot no.588.

2. The petitioner avers that when he learnt about the construction he made a representation on 18.09.2018 to the Sub-Divisional Magistrate (respondent no.5) pursuant to which a spot verification report dated 23.10.2018 was prepared by the Revenue Surveyor stating that the respondent no.1 had encroached an area of 0.1050 Ha and constructed two RCC structures and one wooden structures in the property bearing plot no.588 recorded in the name of the petitioner. It was further stated that as per the land records the plot has a total area of 0.1480 Ha out of which 0.1050 has been encroached by the respondent no.1. This fact was informed by the respondent no.5 to the District Collector (respondent no.3) vide file noting dated 02.11.2013. As per the direction of the respondent no.3 a sketch map was also prepared showing the area acquired by respondent no.1 and the construction laid therein. On 7.01.2019 the respondent no.3 informed the respondent no.2 about the representation made by the petitioner and the observation of the joint inspection conducted on 25.10.2018 in which it is recorded that neither the office of respondent no.5 nor his office has any records of acquisition of the said plot. On 22.01.2019 the respondent no.2 wrote to the respondent no.1 to forward all the relevant documents pertaining to the said plot. On 11.02.2019 another joint inspection was conducted in which it was also found that the respondent no.1 had occupied a portion of land from plot no.588 measuring 0.1050 Ha recorded in the name of

the petitioner as per the land records and two RCC structures has been constructed in the year 2017-2018 and that there was an old existing wooden structure. The petitioner wanted more information and sought for it from the State Public Information Officer of the respondent no.1 by his application dated 24.01.2020, however, to no avail in spite of reminder dated 06.10.2020 compelling the petitioner to approach this court.

3. The respondent nos. 1 to 6 has filed a joint counter-affidavit in which they aver that plot no.588 was originally recorded in the name of the petitioner's father. Since there were no medical facility in Lachung, the petitioner's father came forward along with the then 'Pipon' of Lachung 'Zumsa' and proposed to gift his land to the Government of Sikkim for the establishment of the Primary Health Sub-Centre (PHSC). Accordingly, the Government of Sikkim in the year 1987-88 established a PHSC on plot no.588 by constructing a wooden structure. The respondents are since then owners of the property gifted by the petitioner's father. During the earthquake of September, 2011 the wooden PHSC suffered severe damage and was found to be unfit for use because of which the cabinet vide memorandum no.920/HC, HS & FW/12-13 dated 07/06/2012 approved the reconstruction of Lachung PHSC and Class II double unit quarter for an estimated cost of Rs.1,29,82,643/- from the funds made available from the Prime Minister's Relief Fund. The respondents awarded the work of the construction of

the new PHSC at Lachung to one local contractor Dewang Wangchuk Lachungpa on the recommendation of the Lachung 'Zumsa'. The reconstruction of the PHSC commenced on 25.01.2013; was completed on 19.03.2018 and inaugurated on 23.07.2018. Although the plot had been gifted by the petitioner's father, the land continued to be recorded in his name in the record of rights. Respondents plead that although the petitioner was aware of the gift he caused the mutation of plot no.788 in his name in the year 2018 and started claiming it from the year 2020. It is the respondent's case that the gift was an oral gift.

4. The petitioner has chosen not to file rejoinder.

5. Mr. Kazi Sangey Thupden, learned counsel for the petitioner submits that the act of the respondents of illegally taking over the petitioner's land and constructing the structures thereon is in the teeth of Article 300A of the Constitution of India. He further submits that the unverifiable claim of the respondents that his father had made an oral gift of plot no.588 to the Government of Sikkim for the construction of PHSC is not only without any proof thereof but barred by Section 123 of the Transfer of Property Act, 1882. Relying upon the judgment of the Supreme Court in **Vidya Devi vs. State of Himachal Pradesh**¹ he argued that in a case like the present one of continuing cause of action, plea of delay and laches cannot be raised and

¹ (2020) 2 SCC 569

compensation can be granted. It was further argued that adverse possession as a plea of the State justifying forcible expropriation of a private property by the State without following any procedure or compensation cannot be countenanced. He referred to ***Jilubhai Nanbhai Khachar vs. State of Gujarat***² in which the Supreme Court had explained the phrase “deprived of his property” in Article 300A of the Constitution of India.

6. The learned Additional Advocate General reiterated the facts stated in the counter-affidavit in which it was claimed that plot no.588 had been gifted by the petitioner’s father and the very fact that the petitioner had not taken exception to the construction of the PHSC till 2020 when he approached this court does reflect that he was in fact aware of the oral gift. He further submitted that since the present case involves disputed question of facts the petitioner should be directed to approach the civil court instead.

7. The relevant facts are however, not in dispute. That plot no. 588 is recorded in the name of the petitioner and earlier in the name of his late father is not disputed. The ‘*parcha khatiyan*’ filed by the petitioner records the name of the petitioner as a right holder of plot no.588. The ‘*parcha khatiyan*’ was evidently prepared on 19.03.2018. The spot verification report dated 25.10.2018 records the encroachment of an area of 0.1050 Ha

² (1995) Supp 1 SCC 596

from plot no.588 by respondent no.1 and construction of two RCC structure and one wooden structure therein. So does the sketch map prepared by the Revenue Surveyor and the joint inspection report dated 11.02.2019. It is also not disputed that the respondent no.1 had in fact started constructed of the PHSC on a portion of plot no.588 in the year 2013 and completed the same in the year 2018. The State Public Information Officer under the Right to Information Act, 2005 under the respondent no.1 chose silence over divulgence of information which was his statutory duty in spite of the reminder dated 06.10.2020.

8. The Supreme Court in ***Gomtibai (Dead) & Ors. Vs. Mattulal (Dead)***³ examined whether an intention to give the land by gift created valid title in law and held that gift of immovable property should be made only by transferring the right, title and interest by the donor to the donee by a registered instrument signed by or on behalf of the donor and must be attested by at least two witnesses. It was further held that in the absence of any registered instrument of gift and acceptance thereof by the donee, the said property could not be said to have been legally transferred in favour of the person as the gift is not complete in the eye of law.

³ AIR 1997 SC 127

9. In *Renikuntla Rajamma vs. K. Sarwanamma*⁴ the Supreme Court held that Section 123 regulates the mode of making a gift and, *inter alia*, provides that a gift of immovable property must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. Section 123 makes transfer by a registered instrument mandatory, this is evident from the use of the word “transfer must be effected” used by Parliament in so far as immovable property is concerned.

10. In *Daulat Singh (Dead) vs. State of Rajasthan*⁵ the Supreme Court held that Section 123 provides that for a gift of immovable property to be valid, the transfer must be effectuated by means of a registered instrument bearing the signature of the donor and attested by at least two witnesses.

11. In *Wg Cdr. (Retd) R.N. Dawar vs. Ganga Saran Dhama*⁶ the Delhi High Court held that under Section 123 of the Transfer of Property Act, 1882, a gift of immovable property which is not registered is bad in law and cannot pass any title to a donee. Any oral gift of immovable property cannot be made in view of the provisions of Section 123 of the Transfer of Property Act, 1882. Mere delivery of possession without written instrument cannot confer any title.

⁴ (2014) 9 SCC 445

⁵ (2021) 3 SCC 459

⁶ AIR 1993 Del 19

12. Although the respondents have taken a plea of oral gift by the petitioner's father there is no record to evidence such a gift. In any case, Section 123 of the Transfer of Property Act, 1882 provides that for the purpose of making gift of immovable property, the transfer must be affected by registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. The State, this court is certain, were aware of the law. Oral gifts of immovable property cannot be made and mere delivery of possession without a written instrument cannot confer title. Although the respondent's claim that the oral gift was made by the petitioner's father pursuant to which the PHSC had been built and functioning since 1987-88, the respondents admit that the plot no.588 continued to remain in the name of the petitioner's father until it was mutated in the petitioner's name. If at all such an intention to gift was there, there was no reason for the respondent no.1 not to have the property transferred to their name during the lifetime of the petitioner's father. Even after the death of the petitioner's father when the petitioner caused the entry in the '*parcha khatiyan*' changed to his name, no steps seems to have been taken by the respondent no.1 to have the '*parcha khatiyan*' cancelled. No contemporaneous record has been filed by the respondents to even suggest the correctness of the plea of oral gift as stated in the counter-affidavit. It is quite obvious that no such record is available.

13. The Transfer of Property Act, 1882 was brought into force in Sikkim w.e.f. 01.09.1984 vide S.O. 643(E) dated 24.08.1984. Thus, it is clear that on and from the enforcement of the Transfer of Property Act, 1882 oral gifts would also be prohibited in the State of Sikkim under Section 123 thereof. The respondents being the State are precluded from taking a position contrary to law and in ignorance of law. Thus the very foundation of the respondents stand is based on an illegality.

14. Although the mere entry in the '*parcha khatiyan*' does not confer title upon the petitioner, the respondents have not shown better title. Admittedly, the '*parcha khatiyan*' was earlier in the name of the petitioner's father and thereafter, in the petitioner's name. Quite evidently the respondent has constructed the PHCS on the land owned by the petitioner after encroaching it as per the spot verification report as well as the joint verification report conducted by the officers of the respondents. The fact that neither the petitioner's father nor the petitioner seem to have protested the construction of the PHSC in plot no.588 owned by them over a long period of time does seem to indicate that the respondents were permissive users. However, this is not the stand taken by respondents. Consequently, there has been violation of the petitioner's constitutional right under Article 300A.

15. The only question that remains is the nature of relief which may be granted to the petitioner. In **Anakh Singh vs. State of H.P.**⁷ the High Court of Himachal Pradesh considered a similar case in which the petitioner's land had been used by the respondent State for the construction of the road, but no compensation in accordance with law had been paid to them. The High Court directed the respondent State to issue notification under Section 4 of the Land Acquisition Act, 1894 within a period of three months and thereafter, to complete the entire process within a period of one year. In **Vidya Devi (supra)** the Supreme Court considered the judgment of the High Court of Himachal Pradesh. The State respondent in **Vidya Devi (supra)** was directed to pay compensation on the same terms as awarded by the reference court vide order dated 07.07.2015 in **Anakh Singh (supra)** case along with all the statutory benefit including solatium, interest, etc. within a period of eight weeks, treating it as a case of deemed acquisition. In **Vidya Devi (supra)** the Supreme Court noticed that similarly situated persons [Anakh Singh in **Anakh Singh (supra)**] like the petitioner therein whose land has been taken over by the respondent State for some public purpose had approached the writ court claiming compensation before the High Court which directed the

⁷ (2007) SCC OnLine HP 220

respondent State to acquire the land of the writ petitioner under the Land Acquisition Act, 1894.

16. In the present case also there was no acquisition proceeding. It is not in dispute that the respondents have constructed PHSC on the area encroached by them at a substantial cost. The respondents are therefore, directed to initiate acquisition proceedings under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 for the area of 0.1050 Ha of plot no.588 and pay fair compensation to the petitioner within a period of one year from the date of the judgment. The respondents are also directed to ensure that the petitioner has free ingress and egress to the remaining portion of plot no.588 which stands in the name of the petitioner. The writ petition is allowed. In the circumstances no order as to cost.

**(Bhaskar Raj Pradhan)
Judge**

Approved for reporting: **Yes/No**
Internet : **Yes/No**
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