

(2010) 06 SHI CK 0012
In the High Court Of Himachal Pradesh
Case No : CWP No. 1489 of 2009

Jagan Nath Barowalia

APPELLANT

Vs

The State of H.P. and Others

RESPONDENT

Date of Decision : 22-06-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Constitution of India, 1950 — Article 226
Himachal Pradesh Town and Country Planning Act, 1977 — Section 17(4), 17(5)

Citation : (2010) 06 SHI CK 0012

Hon'ble Judges : V.K. Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

V.K. Sharma, J.—In order to understand the controversy raised by the Petitioner in the present petition, under Article 226 of the Constitution of India, it shall be appropriate to first notice the substantive reliefs claimed by him, vide para 21(a) and (b) (relief clause) of the petition, which are to the following effect:

21. (a) This Hon"ble Court may kindly be pleased to issue of a writ of Certiorari quashing communication dated 4th July 2008 and sanction letter dated 16.9.2008 appended with the petition as Annexure P11 and P12 respectively, vide which development permission and construction permission for construction of residential house has been granted in favour of Respondent No. 4 by Respondents 1 to 3 on khasra No. 1153/625 at Mauja Kali Bari Shimla, Tehsil and District Shimla, Himachal Pradesh.

(b) This Hon"ble Court may kindly be pleased to direct Respondents 1 to 3 by way of issuance of writ of mandamus to explain to this Hon"ble Court as to how development and construction permission was granted by them in favour of Respondent No. 4 in violation of the provisions of Interim Development Plan for Shimla Planning Area prepared by Himachal Pradesh Town and Country Planning Department with further direction to Respondents 1 to 3 not to grant any

development and construction permission in favour of Respondent No. 4 in violation of the provisions of Interim Development Plan for Shimla Development Area.

2. The Petitioner and Respondent No. 4 are neighbours. Whereas, the former is owner in possession of land measuring 240.95 square meters, comprised in Khata No. 29, Khatauni No. 40, Khasra Nos. 622 and 1150/625, situate at North Bank Estate, Upmohal Kali Bari, Station Ward Bara Shimla, Tehsil and District Shimla, Himachal Pradesh, Respondent No. 4 is recorded as owner in possession of the adjoining land measuring 190.68 square meters, comprised of Khata No. 30, Khatauni No. 41, Khasra No. 1153/625, situate within the same estate/mohal. According to the Petitioner, he has constructed a building on a part of the land belonging to him comprised of Khasra No. 622 keeping more than 25% of the land as open space adjoining the building. It is alleged that the land of Respondent No. 4 is much less in area at the spot than depicted in the record of rights. The land presently possessed by her out of Khasra No. 1153/625 abuts the land owned and possessed by the Petitioner.

3. It is apparent from further averments set up by the Petitioner, vide paras 4 to 8 of the petition that litigation has been going on between him and Respondent No. 4 with regard to a portion of land measuring 26.50 square meters, forming part of khasra No. 1153/625 belonging to the latter qua which the former has filed Civil Suit No. 102-1/08 titled Jagan Nath Barowalia v. Smt. Nirmala Devi, which is pending adjudication in the Court of learned Civil Judge (Senior Division) Court No. II, Shimla. In that suit, the Petitioner is seeking a declaration along with perpetual injunction against Respondent No. 4 to the effect that he has become owner of the aforesaid land measuring 26.50 square meters by way of adverse possession and that Respondent No. 4 be restrained from causing any interference with the same either herself or through her agents, labourers etc. and from raising any construction on the aforesaid plot of land belonging to her bearing Khasra No. 1153/625 in violation of the provisions of the Himachal Pradesh Town and Country Planning Act, Himachal Pradesh Municipal Corporation Act and Building Bye Laws framed thereunder. In that suit, the learned trial Court, vide an order dated 14.01.2009, had granted an ad interim injunction order in favour of the Petitioner, which on appeal at the instance of Respondent No. 4 was varied by the learned Additional District Judge, Shimla. Being aggrieved, the Petitioner took the matter to this Court by way of CMPMO No. 273 of 2009, titled Jagan Nath Barowalia v. Smt. Nirmala Devi, wherein the following operative order was passed by an Hon"ble Single Judge of this Court on 09.04.2009:

I find that this is a case in which if an order of maintenance of status qua as it exists today is not passed, it will lead to multiplicity of litigation between the parties. The corpus of the suit needs to be protected. In the facts and circumstances of the case, this petition is disposed of with the following directions:

i) The order passed by the Courts below restraining the Defendant-Respondent from raising any construction, except in accordance with the Municipal Byelaws does not call for any interference;

ii) The other part of the order of the learned appellate Courts refusing injunction on 26.50 square meters of land as claimed cannot be sustained. It is directed that during the pendency of the suit, the parties shall maintain status qua as it exists today, that is to say, the Plaintiff shall not be dispossessed by the Defendant from the constructed portion on which stair case, garden and fountain serving the building of the Plaintiff exists, except in accordance with law.

4. Another aspect highlighted by the Petitioner in support of his case is that way-back in 1989, Respondent No. 4 had filed a suit for possession, being Civil Suit No. 149/1 of 1989 against one Smt. Raj Kumari and Shri Narender Kumar Sharma, on the averments that they had encroached upon land measuring 111 square meters, out of the plot of land, bearing Khasra No. 1153/625 belonging to her, meaning thereby that she was not in actual and physical possession of the entire land belonging to her. However, she later on withdrew that suit unconditionally, vide order dated 11.06.2007.

5. The permission for development and construction of residential house in khasra No. 1153/625 granted in favour of Respondent No. 4 by Respondents No. 1 to 3, vide communication dated 4th July, 2008 (Annexure P-11) and sanction letter dated 16.09.2008 (Annexure P-12) has been challenged by the Petitioner mainly on the grounds that the plot belonging to Respondent No. 4 falls within the Core Area. The land use of the land owned by Respondent No. 4 is "Public and Semi Public". The minimum plot size is 250 square meters and change of land use is "Not permissible". However, while granting permission for development and construction in favour of Respondent No. 4, Respondents No. 1 to 3 have violated the provisions of the Himachal Pradesh Town and Country Planning Act, 1977, Interim Development Plan for Shimla Planning Area and the Himachal Pradesh Municipal Corporation Act, 1994, inasmuch as that apart from permitting change of land use from "public and semi public" to "residential", relaxation to the extent of 0.50 meters in left side set back has also been granted. Apart from this, Respondent No. 4 also does not fulfil the requirement of minimum plot size being 250 square meters.

6. The petition is contested by the Respondents. Whereas Respondents No. 1 and 2 have filed a joint reply, separate replies have been filed on behalf of Respondents No. 3 and 4.

7. According to Respondents No. 1 & 2, the plan of the proposed building was submitted by Respondent No. 4 to the Municipal Corporation, Respondent No. 3, which after considering the same submitted to the replying Respondents for grant of planning permission because the area falls in the Core Area of Shimla Planning Area and the same was approved, vide communication dated 04.07.2008 (Annexure P-11), keeping in view all the bye laws for that area. It is

denied that the permission was accorded in violation of the provisions of interim development plan for Shimla Planning Area and instead it is asserted that the same is in accordance with law and as per the provisions of the regulations framed under the said plan.

8. The stand taken by Respondent No. 3 is akin to that of Respondents No. 1 and 2. In addition, it is stated that as the planning permission was granted by the Respondent-State, being the competent authority for grant of sanction in the Core Area, the answering Respondent had rightly conveyed the same to Respondent No. 4.

9. By way of preliminary submissions, Respondent No. 4 has raised objections regarding maintainability of the petition, suppression of material facts, the petition being mala fide and having been filed in gross abuse of the powers/process of the Court.

10. On merits, besides raising objections in the nature of preliminary objections regarding locus-standi and bar under Order 2 Rule 2 Code of Civil Procedure, it is admitted that the Petitioner is owner in possession of the adjoining plot of land measuring 240.95 square meters, fully detailed and described in para 2 of the petition. However, it is denied that the Petitioner has kept 25% of his land as open space adjoining the building and instead it is pleaded that a perusal of the copy of Jamabandi for the year 2004-2005 (Annexure R-6) would go to show that the Petitioner has raised construction on entire khasra No. 622 and only Khasra No. 1153/625, measuring 9.57 square meters has been shown to be open space. It is also denied that on the spot the area of the plot of the replying Respondent is much less than the one depicted in the record of rights. It is submitted that during the pendency of the aforesaid Civil Suit No. 190/1 of 1989 filed by the replying Respondent against the aforesaid Smt. Raj Kumari and Shri Narinder Kumar Sharma, a Local Commissioner was appointed by the Court for demarcating the land of the replying Respondent and as per demarcation report (Annexure R-8) she was found to be in possession of the land measuring 190.68 square meters on the spot and no encroachment was found to have been made by the aforesaid persons. This fact was further affirmed by the Field Kanungo, vide report dated 20th July, 2006 (Annexure R-7). Accordingly, the suit was withdrawn.

11. Though the averments set up by the Petitioner with regard to filing of the aforesaid Civil Suit No. 102-1/08 by him against the replying Respondent are not denied, yet it is stated that the suit has been filed on false and frivolous grounds. It is denied that either the Petitioner is in possession of any part of the land belonging to the replying Respondent or he has acquired title to the same by adverse possession.

12. It is submitted that the Petitioner has no locus-standi to challenge the development and building permission granted in favour of the replying Respondent, which is strictly in accordance with law and the provisions of the

Himachal Pradesh Town and Country Planning Act, 1977 and the Interim Development Plan as amended from time to time. It is further submitted that the land in question was purchased by her in the year 1980 and as per Notification, dated 22.08.2002 (Annexure R-9), a proviso was added to the Notification No. PCP-F(S)-10 of 2001 that minimum size of plot in the Core Area purchased up to 28.08.2002 shall be 150 square meters. As such, the allegation of the Petitioner that as per amendment in Interim Development Plan dated 22.08.2002, prepared for Core Area, minimum plot size is to be 250 square meters, is incorrect.

13. In nutshell, the case setup by Respondent No. 4 is that though admittedly the plot belonging to her falls within the core area, yet since the size of her plot is within the minimum permissible limit of 150 square meters and the building proposed to be raised therein is residential, no change of land use was involved and the recital to the contrary contained in the Cabinet Memorandum, dated 26.6.2008 (Annexure P-10) and communication, dated 4th July, 2008 (Annexure P-11), being innocuous, is of no consequence. With regard to relaxation in left side set back by 0.50 meters, it is submitted that it was within the power of the State Government to grant such relaxation, which otherwise is also negligible. The Petitioner has not brought on record any material to show that either the Interim Development Plan has categorized any land falling within Shimla Planning Area as "Public or Semi Public" or that the land use of the plot belonging to the replying Respondent is public or semi public. The Petitioner himself got his plan sanctioned for raising residential construction in the adjoining plot, which also falls within the Core Area.

14. The Petitioner has filed rejoinders to the above replies, wherein while refuting the respective stands taken by the Respondents, the averments set up in the petition have been reiterated. Additionally, in the rejoinder to the reply filed by Respondent No. 4, it is averred that the proposed construction is not going to be raised by her and instead it is intended to be put to use by "Vishav Jagriti Mission of Sidhanshu Maharaj" as is apparent from photocopy of news item (Annexure PR-1) appearing in news paper "Amar Ujala" issue dated 3rd May, 2009, which is based on the statement issued by her General Power of Attorney, Shri Hari Chand Gupta.

15. I have heard the learned Counsel/Deputy Advocate General for the parties and perused the record.

16. Indisputably, the plot belonging to Respondent No. 4 falls within the "Core Area". Vide notification, dated 22.8.2002, Annexure P-9, the following amendment, inter-alia, was carried out in Chapter X of the Interim Development Plan for Shimla Planning Area with regard to Core Area:

1. In Chapter X of the Interim Development Plan for Shimla Planning Area:

(a) for Regulation 10.4.1.2(x)(a) the following shall be substituted, namely:

10.4.1.2.(x)(a) CORE AREA: (i) New construction in core area shall be allowed in respect of residential buildings upto maximum two storeys and ancillary uses thereto with the prior permission of the State Government.

Provided that in case of re-construction of old structure or building shall be permitted by the State Government subject to the condition that the plinth area and number of storeys on old lines shall remain the same as were existing earlier.

(ii) The core area shall comprise of the following, namely:

(a) Central Shimla bounded by the circular Cart Road starting from Victory Tunnel and ending at Victory Tunnel via Chhota Shimla and Sanjauli and the area bounded by Mall Road starting from Railway Board Building to Ambedkar Chowk, covering Museum Hill by road starting from Ambedkar Chowk, on the north side, joining the chowk of Indian Institute of Advanced Studies and following the road joining Summer Hill post office and via upper road to Boileauganj chowk and then joining the Cart Road, along Cart Road to Victory Tunnel.

(b) From junction of Tribunal road and cart road near Secretariat then along the Tribunal road/path joining Boundary/Dhobi Ghat path and then following Dhobi Ghat boundary path upto the Shimla Junga road near Boundary. Then following Chhota Shimla Himalvi Bhawan path upto house of Sh. Amin Chauhan, then alongwith house of Sh. Amin Chauhan, Sh. Mansa Ram, Block No. 4, 6, 8, 9, 7, 5, 2 (all the blocks of H.P. Housing Board) and house of Sh. Ramesh Negi, Sh. Diwan Chand Gupta, Sh. N.S. Pal, Sh. Indervir Singh Pal, Sh. Ashwani Kumar, Sh. Y.K. Gautam and then along the path joining to the Chhota Shimla-Kasumpti path near AIRA HOMLE'S Public Shool. Following Chhota Shimla Kasumpti path towards Kasumpti upto junction of Shimla-Junga road and SDA Complex road. Then following Shimla Junga road towards Chhota Shimla upto cart road near Ashiana Restaurant. Then following cart road upto junction of Tribunal road and Cart road near Himachal Pradesh Secretariat building.

(iii) The following norms shall be applicable in the CORE Area:

1. Development Permission By the Government of Himachal Pradesh. 2. Land use Residential and ancillary uses thereto. 3. Minimum plot size 250 square meters. 4. Maximum number of storeys 2 (two) 5. Provision for parking Within the permitted two storeys. 6. Maximum Floor Area Ratio 1.00 7. Maximum building height 9.50 meters (including 2.50 meters. Maximum height slopping roof). 8. Maximum width of path/road i) For sub-division of land (i) 5.00 meters. having plots more than five numbers. ii) Otherwise (including (ii) 3.00 meters. pedestrian walkways). 9. Reconstruction Permission subject to the condition that plinth area and number of storeys on old lines shall remain the same as were existing earlier. 10. Change of land use. Not permissible. 11. Sub-division of land. Permissible. Note: Planning permission in CORE AREA shall be granted keeping in view the provisions as contained in Annexure-III appended to these regulations.

17. It is apparent from the above amendment that as per the entries at Sl. Nos. 1 and 2 of Clause (iii) of Regulation 10.4.1.2.(x)(a), the competent authority to grant development permission in "Core Area" is the Government of Himachal Pradesh and the land use is "Residential and Ancillary uses thereto". Against Sl. No. 10, "Change of land use", the corresponding entry is "Not Permissible".

18. The matter with regard to grant of planning permission for the construction of residential building in the plot belonging to Respondent No. 4 comprising of Khasra No. 1153/625 was considered by the Cabinet, vide memorandum, dated 26.6.2008, Ext. P-10. It specifically refers to construction of a residential building. It being so and more particularly, in view of the aforementioned norm at Sl. No. 2 with regard to "land use" in Core Area being "residential and ancillary uses thereto", in fact change of land use from "Public" and Semi Public" to "residential" was not at all involved. This aspect of the matter is further manifest from the above notification, dated 22.8.2002, Annexure P-9, relating to the entries at Sl. Nos. 1 & 2 of Clause (ii) applicable in the "Restricted Area", which are to the following effect:

(ii) The following norms shall be applicable in the restricted area, namely:

1. Development Permission:

i) The Director, Town and Country Planning in cases where no relaxation is required.

ii) The Government of Himachal Pradesh where relaxation is required.

2. Land use: All land uses, that is, Residential, Commercial, Public and Semi Public uses etc.

19. It is apparent from the above norms that grant of development permission in "restricted area" falls within the domain of the Director, Town & Country Planning in cases where no relaxation is required and within the competence of Government of Himachal Pradesh where relaxation is required and the permissible land use is "all land uses" that is, residential, commercial, public and semi public uses etc. Thus, it is manifest that development permission involving relaxation falls within the competence of the State Government which by necessary implication means that the State Government has the power to grant relaxation in suitable and deserving cases and further that land use characterized as "Public" and Semi Public" pertains to restricted area and not to Core Area.

20. Even otherwise, a perusal of Regulation 7.1.3.4 of Interim Development Plan for Shimla Planning Area which is extracted below would go to show that "Public and Semi Public" facilities which are of a local nature and part of a residential neighbourhood have not been separately considered for land allocation in the development plan as these will form part of the overall residential area and appropriate sites would be ear-marked for each of such facilities while preparing detailed plan for these areas:

7.1.3.4. Public and semi-public facilities: Public and semi-public facilities which are of a local nature and part of a residential neighbourhood have not been separately considered for land allocation in the development plan as these will form part of the overall residential area and appropriate sites would be earmarked for each of such facilities while preparing detailed plans for these areas.

21. The Petitioner has also not brought on record any material to the contrary much less to conclusively establish that the land use of the plot belonging to Respondent No. 4 falls within the category of "Public and Semi Public".

22. Thus, the inescapable conclusion that emerges from the above discussion is that reference to change of land use from "Public and Semi Public" to "Residential" in Cabinet Memorandum, dated 26.6.2008, Annexure P-10 and on its basis in communication, dated 4.7.2008, Annexure P-11, being innocuous is of no consequence, whatsoever. Since the plot belonging to Respondent No. 4 falls within the Core Area and the permission for development and construction of a residential house therein granted in her favour by the State Government, vide communication, dated 4.7.2008, Annexure P-11 is in accordance with the provisions of the Interim Development Plan for Shimla Planning Area as amended, vide notification, dated 22.8.2002, Annexure P-9 besides being within the competence of the State Government and its power of relaxation with regard to the left side set back to the extent of 0.50 meters, no fault can be found with the same as also letter dated 16.9.2008, Annexure P-12.

23. In so far as the size of the plot belonging to Respondent No. 4 is concerned, even as per the averments set up by the Petitioner, vide para 3 of the petition, the same is recorded in the revenue record as 190.68 square meters. No doubt, the Petitioner has alleged that in fact the area in her actual physical possession on the spot is much less, but this assertion is belied from the report Annexure R-7, dated 21.8.1993, submitted by the Local Commissioner appointed in the aforesaid Civil Suit No. 149/1 of 1989, titled Smt. Nirmala Devi v. Smt. Raj Kumari and Anr., filed by Respondent No. 4 against the said Smt. Raj Kumari and Shri Narinder Kumar Sharma. Even otherwise, as per the following notification, dated 22.8.2002, Annexure R-9, the requirement of the minimum size of plot in Core Area has been scaled down from 250 square meters to 150 square meters subject to the rider that the plot was purchased or inherited as share in family partition upto 28.8.2002:

In exercise of the powers conferred upon him under Sub-sections (4) and (5) of Section 17 of the Himachal Pradesh Town and Country Planning Act, 1977 (Act No. 12 of 1977), the Governor of Himachal Pradesh is pleased to make the following further amendments in the Interim Development Plan for Shimla Planning Area notified vide notification No. 9-12/72/PW dated 24.3.79 and published in the Himachal Pradesh Rajpatra Extra-Ordinary dated 31.3.1979, namely:

AMENDMENT IN CHAPTER-X

1. In Chapter X of the Interim Development Plan for Shimla Planning Area:

(a) In Regulation 10.4.1.2 (x) (a), in Clause (iii) in serial No. 3 after the figure and words "250 square meters", the sign ":" shall be inserted and thereafter the following provision shall be added, namely:

Provided that the minimum size of plot in core area purchased or inherited as share in family partition upto 28.08.2002 shall be 150 square meters.

(b) For Regulation No. 10.6. the following shall be substituted, namely:

10.6 High Sinking Prone Areas or Sliding Areas:

Two storeys construction with light weight material in sinking and sloping areas shall be permitted on selected basis subject to the condition that for second storey the geological report and inspection report of Director, Town & Country Planning, Himachal Pradesh shall be the basis for grant of denial of such permission subject to fulfillment of other regulations.

By order

Principal Secretary (TCP) to the Government of Himachal Pradesh.

24. Respondent No. 4 has specifically averred, vide para 10 of the reply that the plot in question was purchased by her in the year 1980. The pleadings to this effect have been replied by the Petitioner, vide para 10 of the rejoinder to the reply filed on behalf of Respondent No. 4 as under:

The factum of Respondent No. 4 having purchased the said land in the year 1980 is of no consequence because it is not the case of Respondent No. 4 that her case for grant of construction permission in her favour was pending before the authorities prior to 22nd August, 2002.

25. It is manifest from the above averments set up in the rejoinder that the factum of the purchase of the plot by Respondent No. 4 in the year 1980 stands admitted by the Petitioner expressly as also by necessary implication albeit the rider which is not legally tenable as the relevant date for application of the amended provision was to be prospective with effect from 22.8.2002 and since Respondent No. 4 had applied for grant of permission thereafter, it applied to her case as well.

26. For the foregoing reasons, the petition is dismissed being without any merit.