

**(2023) 08 SIK CK 0029**

**In the Sikkim High Court**

**Case No :** Second Appeal From Appellate Other No. 01 Of 2023

Roma Kanti Alley

APPELLANT

Vs

Tenzing Chopel Bhutia

RESPONDENT

**Date of Decision :** 07-08-2023

**Acts Referred:**

Code Of Criminal Procedure, 1973 — Section 145, 147

Code Of Civil Procedure, 1908 — Section 149, 151

Code Of Civil Procedure, 1908 — Order 39 Rule 1, Order 39 Rule 2

**Citation :** (2023) 08 SIK CK 0029

**Hon'ble Judges :** Bhaskar Raj Pradhan, J

**Bench :** Single Bench

**Advocate :** B. Sharma, Umesh Ranpal, Sajal Sharma, Shreya Sharma, Karma Thinlay Namgyal, Yashir N. Tamang

**Final Decision :** Dismissed

## Judgement

Bhaskar Raj Pradhan, J

1. This is a second appeal against the order dated 24.04.2023 passed by the learned Principal District Judge in Title Appeal No.02 of 2023 filed by the respondent (the defendant) against the appellant (the plaintiff). The impugned order set aside the ex-parte order dated 17.12.2022 granting ad interim injunction restraining the defendant from making any further construction on the suit land and permitted it as the plaintiff could be sufficiently compensated in terms of money if the suit decrees in her favour. The learned Principal District Judge also held that the irregularity of the plaintiff not having deposited the court fees as per the rules could not curtail the right of the plaintiff and set right the irregularity by directing the defendant to deposit the court fees.

2. The plaintiff had filed a suit for declaration, injunction, recovery of possession and other consequential relief against the defendant. It was the Plaintiff's case that her mother-in-law late Santa Maya Alley was the absolute owner of plot no.548 measuring an area of 0.56 acres situated near Church Road, DPH area,

Gangtok (Schedule 'A' property). The plot was purchased by her from late Bandana Raini in the year 1953 and the Plaintiff was furnished the khasra khatiyan dated 17.01.2022 which reflects that the (Schedule 'A' property) is recorded in the name of late Santa Maya Alley.

3. It is the Plaintiff's case that she is now the head of the family and therefore, the suit has been filed with the consent of the other members of the family as a power of attorney holder.

4. It is the Plaintiff's case that she has been in vacant and peaceful possession of the entire Schedule 'A' property covered by plot no.548 measuring 0.56 acres. She relies upon the sale deed dated 12.05.1953 as well as the parcha khatiyan dated 17.01.2022.

5. The Plaintiff asserts that she made two applications dated 01.02.2021 and 23.03.2022 for verification and demarcation of her land. However, the authorities did not do so, compelling her to move another application on 29.09.2022 for spot verification pursuant to which notice was issued to boundry holders to be present on 03.11.2022. However, the spot verification was not conducted due to Panchayat election.

6. On 04.11.2022 the defendant started illegal construction on a portion of Schedule 'A' property which he had allegedly purchased from Tsukhlakhang Trust Private Estate. The defendant although reluctant to show any document to the plaintiff started clearing the land. On inquiry the plaintiff learnt that the defendant was about to start excavation in order to raise construction. The plaintiff showed the defendant her registered sale deed which reflected that the northern boundry of their land was the jhora coming from the hospital area. The defendant however, continued his illegal work. The defendant started construction in the portion of Schedule 'A' property which measures 30 feet by 15 feet = 450 square feet = 0.01 acres which is the suit property and described as Schedule 'B' property.

7. The plaintiff thereafter, filed a complaint under section 145/147 of the Code of Criminal Procedure, 1973 (Cr.P.C.) before the District Magistrate vide application dated 19.11.2022. The Additional District Magistrate however kept the matter pending and issued letter dated 02.12.2022 with a copy of a joint inspection report requiring the plaintiff to approach the court of law as the matter was a civil dispute.

8. It is asserted that the joint inspection report also clearly mentions that the defendant had trespassed into the Schedule 'B' land.

9. The plaintiff asserts that the Government of Sikkim has constructed a link road dissecting a major portion of plot no.548 and a small remaining portion towards the hospital jhora (i.e. the suit property) in the year 1981-83.

10. It is the case of the plaintiff that the records obtained by the plaintiff from the District Registrar reveals that the sale transaction and the registration of the

sale deed between Chogyal Wangchuk Namgyal (Private Estate) and the defendant was illegal.

11. The plaintiff therefore, prayed for a declaration that Schedule 'B' property forms part and parcel of Schedule 'A' property and that defendant has no right title and interest over the Schedule 'B' property. The plaintiff also sought for declaration that the construction in the Schedule 'B' property is illegal and liable to be stopped and for demolition. The plaintiff further sought for khas and peaceful vacant possession of the suit land as well as permanent injunction restraining the defendant from doing any further construction.

12. The plaintiff moved an application under Order 39 Rule 1 and 2 read with section 151 of the Code of Civil Procedure (CPC) which was decided by the learned Civil Judge on 31.12.2022.

13. The learned Civil Judge took note of the joint inspection report which was held to have revealed that the construction stood on plot nos.548 and 579; that the sale deed dated 16.06.1952 reflected that plot no.548 measuring 0.56 acres extended up to the hospital jhora and the pleading in the plaint that the link road from Hotel Hungry Jack to DPH road passed through plot no.548 dissecting the Schedule 'A' land below the road and concluded that the plaintiff had made a prima facie case. The learned Civil Judge was of the opinion that balance of convenience/inconvenience was tilted more in favour of the plaintiff than the defendant and if the construction of the suit property was allowed, plaintiff and her family would be deprived of their lawful right over the property thereby causing irreparable loss which cannot be compensated monetarily.

14. Aggrieved by the order dated 31.12.2022 passed by the learned Civil Judge the defendant preferred an appeal before the learned Principal District Judge who vide impugned order dated 24.04.2023 opined that it would not be proper to stall construction activities at the expense of the plaintiff who should be permitted to continued the construction since the plaintiff could be sufficiently compensated in terms of the money if the suit decrees in her favour. The learned Principal District Judge came to this conclusion inter-alia on examination of a hand written joint inspection report dated 21.11.2022 prepared by the concerned authorities and comparing it with the typed copy of the inspection report filed along with the plaint.

15. Aggrieved by the impugned order dated 24.04.2023 the plaintiff has preferred the present appeal. Notice was issued on 10.05.2023 which was accepted as the learned Senior Advocate had appeared on caveat on that day. This Court deemed it fit to direct status quo.

16. On 30.05.2023 this Court directed the Additional District Collector to forward the entire records which were complied with and continuation of the status quo which continues till date.

17. On 15.06.2023 considering I.A. No. 01 of 2023 for stay, the reply thereto,

the nature of dispute and on agreement by the learned counsel for the parties a joint inspection was directed by the concerned authorities on 28.06.2023. This Court further directed that the District Collector shall depute a senior officer of the Directorate with two Senior Amins for the joint inspection and further that the District Collector may also take assistance of an officer of the Land Revenue and Disaster Management Department, Government of Sikkim. A comprehensive and independent report was directed to be placed before this Court on or before 30.06.2023 which shall include the following:

“(i) The extent of area and boundary of plot no. 548 which according to the parcha khatiyani issued on 11.07.1990 in favour of Santa Maya Alley is 0.56 acre.

(ii) The boundry of plot no.548 should be clearly demarcated and the report should also indicate whether the part of plot no.548 falls below the road as well and if so, the exact area thereof.

(iii) The extent of area and boundry of plot no.579/P which according to the sale deed document dated 26.06.2021 in favour of Tenzing Chopel Bhutia is 0.01 acre.

(iv) The boundry of plot no.579/P should be clearly demarcated and the report should also indicate whether the construction made by Tenzing Chopel Bhutia is within plot no.579/P or whether part of the construction has encroached upon any part of plot no.548 falling below the road and if so, the exact area thereof.

(v) The report shall be prepared and submitted in typed form which shall be signed by all the officers taking part in the joint inspection and the joint inspection report shall be verified to be true and correct by them.

(vi) The joint inspection shall be conducted in the presence of the parties or their authorized representatives and their presence shall also be marked in an attendance sheet to be signed by them which shall form part of the joint inspection report.”

18. Pursuant to the said direction the Revenue Officer, District Collectorate has forwarded a joint inspection report conducted on 28.06.2023 (joint inspection report). The joint inspection report records that it was conducted in the presence of the plaintiff and the defendant along with officials from Land Revenue Department Head Office and District Administrative Centre, Gangtok on 25.06.2023 and also annexes attendance sheet of the persons present during the joint inspection. The joint inspection report records the following:-

“1. That the area of plot No. 548 which is situated above the road measuring 0.56 acre as per parcha/Khatiyani issued on 11/07/1990. However upon inspection it is found that the appellant is the possession of 0.84 acres of land, bearing plot no.548.

2. That the land bearing Plot no. 548 is found extended in a triangular shape on the southern side hence the said land is measured in two parts to get the exact and correct dimension/measurement which are butted and bounded as follows:-

East: Church Compound-150'

East: Church Compound-57'

West: Link Road-182'

West: Own Land -12'

North: Link Road & Footpath-241'

North: Own land-30'

South: Jhora and Neil Tara Academy-186' South : Jhora-87'

(Total area 37,459 sq.ft or 0.85 acres).

The Plot No. 548 does not fall below the road as per the map and land record of Gangtok Station Block.

3. That the construction site of respondent Mr. Tenzing Chopel Bhutia which falls under plot No.579/P is butted and bounded by:-

East: Vacant land of Private Estate – 19'

West: Vacant land of Private Estate – 23'

North: Jhora – 38'

South: Link Road-38'.

(Total area 789 sq.ft or 0.01 ½ Acres)

4. That the construction of the respondent Mr. Tenzing Chopel Bhutia is within Plot no.579/P which is situated below the road. It is also found that there is no encroachment on the part of plot No.548.

However, during the inspection the following claims were made by the appellant. She showed her boundary physically and we have measured and found as follows:-

(a) That the area above the road measures 0.85 acres which falls under plot No. 548.

(b) That the appellant claimed that the road also is part of her property. Inclusive of the road her area measures 1.01 acres however road as per map and land record falls under the portion of plot No. 579.

(c) That the appellant also claimed land below the road on which the new construction of the respondent is taking place. Her area inclusive of the land as claimed above measure 1.10 acres, however land below the road falls under portion of plot No 579 as per the land record of Gangtok Station block.

The total area as claimed by appellant (Smt.Roma Kanti Alley measures 1.10 acres on the ground. However in the land record she only possesses 0.56 acre.

(d) However, it is found that on the sale deed document of the appellant shows following boundaries:-

North- Jhora from Hospital

South- Police Station Jhora

East - Church Compound

West- Rented Compound of Shri Panch Maharaja and Sir Tashi Namgyal”.

19. Although the parties had, as reflected in the order dated 15.06.2023, agreed for the joint inspection, on receipt of the joint inspection report the plaintiff filed written objection. The objections were :-

(i) The mother-in-law of the plaintiff had purchased plot no.548 in terms of seeds and not in terms of acres or hectares. The report showed that it measured only 0.56 decimals which are lesser in area than what she had purchased in the year 1952.

(ii) The survey team had conducted the measurement in two parts which creates confusion and resulted in their conclusion that plot no.548 did not fall below the road.

(iii) Although the defendant states that he had purchased 0.01 acres the report suggest that he had purchased 0.01/2 acres. There is no clarity in the boundaries to the east and other boundaries.

(iv) There are various anomalies since the survey team did not make the report on the basis of boundaries as the case of the plaintiff has always been that her land was bounded by two jhoras.

20. Mr. B. Sharma, learned Senior Counsel for the plaintiff insisted that the plaintiff had a prima facie good case against the defendant and the balance of convenience/inconvenience was also in his favour. Drawing attention of the sale deed dated 16.06.1952 the learned Senior Counsel submitted that the boundaries mentioned therein clearly reflected that the Schedule 'B' property was also part of Schedule 'A' property belonging to the plaintiff. It was argued that the area of land mentioned therein was equivalent to "one pathi, four manas" which would also reflect that Schedule 'B' property is part and parcel of Schedule 'A' property as reflected in the sale deed dated 16.06.1952.

21. The learned Senior Counsel also drew attention to a document dated 30.06.1956 relating to a dispute regarding construction of irrigation canal by one Gyaltsen Tshering in the land of late Santa Maya Alley and Private Estate regarding dispute of the boundary. The learned Senior Counsel relied upon Maharwal Khewaji Trust (Regd.), Faridkot vs. Baldev Dass (2004) 8 SCC 488.

22. In Maharwal (supra) the appellant therein had filed a civil suit for possession of the schedule property with an application under Order 39 Rule 1 and 2 CPC seeking injunction restraining the respondent from alienating the suit property

and putting up any construction thereon. The Trial Court granted an order of temporary injunction. The appeal filed by the respondent before the learned District Judge came to be allowed holding that alienation made, if any, will be subject to the law of *lis pendens* and constructions, if any, put by the respondent will have to be removed at his own risk and costs in the event the suit being decreed. The Supreme Court held that unless and until a case of irreparable loss and damage is made out by a party to the suit, the court should not permit the nature of the property being changed which also includes alienation or transfer of the property which may lead to loss or damage being caused to the party who may ultimately succeed and may further lead to multiplicity of proceedings. In the facts of the case it was held that the lower Appellate Court and the High Court were not justified in permitting the respondent to change the nature of the property by putting up construction as also by permitting the alienation of the property, whatever may be the conditions on which the same is done. In the event of the appellant's claim being baseless ultimately, it is always open to the respondent to claim damages or, in any appropriate case, the court may itself award damages for the loss suffered, if any, in this regard. Since the facts of the case did not make out any extraordinary ground for permitting the respondent to put up construction and alienate the same, the High Court and the lower Appellate Court had erred in making the impugned order which was accordingly set aside. The learned Trial Court order was restored.

23. In *Maharwal (supra)* when the appellant therein had filed a civil suit for injunction there was no construction on the land. In the present case before us it is also the plaintiff's case that the defendant had started construction and therefore, she prayed for a declaration that the construction in the Schedule 'B' property was illegal and liable to be stopped. The plaintiff further prayed for permanent injunction restraining the defendant from doing any further construction. The facts in *Maharwal (supra)* are different than the facts before this Court in the present case.

24. In *Mandali Ranganna & Ors. vs. T. Ramachandra & Ors.* (2008) 11 SCC 1 the appellant therein was aggrieved by the judgment and order passed by the High Court by which the private respondents were allowed to make constructions on the suit land subject to final decision therein. A further direction that any alienation or creation of any interest by the defendants would be subject to the decision of the suit was also passed. The Supreme Court noted that rightly or wrongly construction had come up and therefore, they cannot be directed to be demolished at this stage. It was also noted that respondent no.7 is said to have spent three crores of rupees and if that be so, the Supreme Court opined, it would not be proper to stop further construction. The Supreme Court therefore, opined that the interest of justice would be subserved if while allowing the respondents to carry out constructions of the buildings, the same is made subject to the ultimate decision of the suit. It was directed that the suit is decided as early as possible; if any third party interest is created upon completion of the constructions, the deeds in question shall clearly stipulate that

the matter is sub judice and all sales shall be subject to the ultimate decision of the suit. The respondents were required to furnish sufficient security before the learned Trial Judge within four weeks which was assessed at rupees one crore.

25. In the plaint it was the plaintiff's case that the defendant had started illegal construction and continues with it despite being asked to stop by the plaintiff. It seems that during the period of these proceedings further construction has taken place.

26. Save for the boundry being recorded as hospital jhora on the north the plaintiff has not made out a prima facie case as there is little clarity as to whether the Schedule 'B' land is actually part of plot no.548 beside her pleadings. The argument that the initial purchase of plot no.548 being in seeds and not an area, the actual area would be much more is a matter to be proved during trial. The learned Civil Judge had taken note of the fact that the joint inspection report earlier had recorded that the construction falls under both plot nos.548 and 579. Since extensive arguments were made by the learned Senior Counsel for the parties regarding the discrepancies in the joint inspection report due to the existence of a hand written joint inspection report as well, this Court deemed it fit to direct joint inspection in the presence of parties as stated above. The joint inspection report makes it clear that no part of the construction falls in plot nos. 548. It is not the plaintiff's case that plot nos. 579 is owned by her and her family although it is their case that the construction on Schedule 'B' land is within plot no.548 which is owned by her. The joint inspection report also clearly records that the plaintiff and her family are in possession of plot no.548 with a total area of 0.84 acres of land, which is much more than the area of 0.56 acres as recorded in the parcha khatian obtained by the plaintiff's family in the year 1990. This being the situation the balance of convenience is also not in the favour of the plaintiff. In contract the defendant states that he purchased a Schedule 'B' land falling under plot no.579 from Chogyal Wangchuk Namgyal. The copy of the sale deed registered on 14.02.2022 also reflects the fact. The construction started by the defendant on Schedule 'B' land is pursuant to an approved blue print plan. According to the defendant he has also purchased raw material i.e. cement, rods, chips, stones and timber which are lying in the construction site and if not utilized would be damaged. The balance of convenience/inconvenience would therefore be in favour of the defendant as injecting the further construction in plot no.579 purportedly purchased by the defendant from Chogyal Wangchuk Namgyal who has not been made party defendant by the plaintiff, would cause the defendant loss and injury.

27. Section 149 of the CPC provides that where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fees payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had

been paid in the first instance. The objection of the learned Senior Counsel for the plaintiff that in view of rules 5 (2), (4) and (5) read with Schedule (A) to the Sikkim State Rules Re: Court Fees and Stamps on Documents it was incumbent upon the defendant to have paid the court-fees in advance and since it was not done the impugned judgment could not have been passed by the learned Principal District Judge, is not sound as it would only be a curable irregularity. The learned Principal District Judge having permitted the defendant to pay the court-fees the irregularity of not paying the court-fees in advance before preferring the appeal stood cured. The learned Senior Counsel for the defendant submits that pursuant to the said direction the court-fee was paid on 27.04.2023. Thus, this Court finds that the reasoning of the learned Principal District Judge in considering the objection only an irregularity was correct.

28. This Court is therefore, of the opinion that interest of justice would be subserved if the defendant is allowed to continue the construction of the building at his risk subject to the ultimate decision of the suit. The defendant must furnish sufficient security before the learned Civil Judge to her satisfaction who shall assess the same. Until then status quo order passed earlier shall continue. The learned Civil Judge is requested to hear out and dispose the suit as early as possible. The defendant shall not create third party rights on the disputed property.

29. The appeal is rejected and the impugned order dated 24.04.2023 passed by the learned Principal District Judge in Title Appeal No.02 of 2023 filed by the defendant is modified to the above extent.

30. The observation on facts made in this judgment are made for the purpose of examining the issues raised in the proceedings against the impugned order at this preliminary stage and for the disposal of the present appeal only. The Trial Court shall not be prejudiced by the observations made herein during the trial.

31. Pending interlocutory application is also disposed accordingly. The registry shall return the file received from the Additional District Collector to the authority forthwith.