(2003) 09 SHI CK 0005

In the High Court Of Himachal Pradesh

Case No : C.W.P. No. 2488 of 1995

Smt. Santosh Malhotra APPELLANT

Vs

State of H.P. and Others RESPONDENT

Date of Decision : 17-09-2003

Acts Referred:

Himachal Pradesh Tenancy and Land Reforms Act, 1972 — Section 118, 118(1), 121A
Himachal Pradesh Tenancy and Land Reforms Rules, 1975 — Rule 38B
Himachal Pradesh Town and Country Planning Act, 1977 — Section 13, 16, 31, 39, 39(6)
Registration Act, 1908 — Section 33

Citation : (2003) 3 ShimLC 342

Hon'ble Judges : L.S. Panta, J

Bench : Single Bench

Advocate : G.C. Gupta and Mohinder Gautam, for the Appellant; M.S. Chandel, General and J.S. Guleria, Law Officer., for the Respondent

Final Decision : Allowed

Judgement

Lokeshwar Singh Panta, J.—In both these writ petitions common questions of fact and law are involved for consideration, hence they are disposed of by this common judgment.

2. In C.VV.P. No. 2488 of 1995, the Petitioner Smt. Santosh Malhotra has prayed for quashing order dated 20.2.1995 (Annexure P-2) passed by Collector, Shimla, Order of Appellate Authority dated 30.6.1995 (Annexure P-3) and notices dated 4.2.1994 (Annexure P-4) dated 3.7.1995 (Annexure P-5) issued by Executive Engineer, town and Country Planning Department.

3. In CWP No. 1167 of 1996, Petitioner Jai Dev Malhotra seeks to quash and set aside the order dated 20.2.1995 (Annexure P-2) passed by Collector, Shimla, order of the Appellate Authority dated 30.6.1995 (Annexure P-3) and order of the Financial Commissioner (Revenue) dated 6.6.1996 (Annexure P-4).

4. The facts common in these writ petitions are that one Suresh Kumar Shukla is

the owner of land comprising Khasra No. 1487/1306/1257/2, measuring 256 Sq. Yards situate in village Badhai (popularly known as Kachi Ghati), Tehsil and District Shimla. Suresh Kumar Shukla executed a General Power of Attorney dated 7.11.1991 (Annexure P-1) duly registered in the office of Sub-Registrar, Shimla in favour of Smt. Santosh Malhotra (Petitioner in CWP No. 2488 of 1995) to look after, manage, sell and raise construction on the above said land. The Petitioner with the help of her son namely, Jai Dev Malhotra (Petitioner in CWP No. 1167 of 1996), raised construction on the land which was completed in the year 1993, however, the internal finishing of the building remains to be done. The Collector, Shimla through Tehsildar (Rural), Shimla exercising powers of Assistant Collector 1st Grade instituted an inquiry against Petitioner Jai Dev Malhotra to find out whether on the basis of the execution of General Power of Attorney in favour of Petitioner Smt. Santosh Malhotra, illegal transaction in contravention of Section 118(1) of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 (here-in-after referred to ''the Act'') has been made in favour of a person who is not an agriculturist in the State of H.P. The Tehsildar after holding inquiry submitted his report to the Collector, who issued notice to Petitioner Jai Dev Malhotra to show cause why the land in dispute should not be ordered to be vested in the State Government under the provisions of ''the Act'' and Rules framed thereunder. Jai Dev Malhotra appeared before the Collector and stated that he had nothing to do with the construction which had been raised by his mother Smt. Santosh Malhotra, who is the holder of General Power of Attorney of the owner of the land. The Collector, Shimla recorded order dated 20.2.1995 (Annexure P-2) in case No. 1 of 1994 holding that Jai Dev Malhotra acquired the land in violation of Section 118(1) of ''the Act'' and constructed the building on it. Further the land in dispute alongwith the building constructed thereon is ordered to be vested in the State Government directing the Tehsildar (Rural), Shimla to take possession of the land together with structure/building or other attachment forthwith on the spot within one month.

5. Petitioner Jai Dev Malhotra carried the matter in appeal before the Commissioner Shimla Division, who has upheld the order of the Collector by order dated 30.6.1995 (Annexure P-3). The Petitioner could not succeed before the Financial Commissioner (Revenue), who by order dated 6.6.1996 (Annexure P-4) dismissed his appeal.

6. The Executive Engineer, Town and Country Planning Department issued notice dated 4.2.1994 (Annexure P-4) to Shri B.N. Malhotra husband of Petitioner Smt. Santosh Malhotra and father of Petitioner Jai Dev Malhotra u/s 39 of the Himachal Pradesh Town and Country Planning Act, 1977 (for short ''the Planning Act'') calling upon him to restore the land in dispute to its original condition existing before the said development work as the construction was raised by him without the permission of the Town and Country Planning Department u/s 16 of ''the Planning Act''. Mr. B.N. Malhotra submitted his reply stating that he had no concern with the construction of the building and accordingly notice be withdrawn. However, another notice dated 3.7.1995 (Annexure P-5) was issued

by the Executive Engineer, Town & Country Planning Department to Mr. B.N. Malhotra u/s 39 of ''the Planning Act'' directing him to remove/ demolish the building works under objection/discontinue objectionable use of land within one month of the date of service of notice, failing which action would be taken against him u/s 39(6)(b) of ''The Planning Act''. According to Smt. Santosh Malhotra Petitioner, she was not impleaded party in the proceedings initiated by the Revenue Authorities against her son or by the Town and Country Planning Department nor her name finds mentioned in the list supplied by the Director, Town and Country Planning Department to the High Court in CWP No. 1215 of 1993 titled as Baljeet Malik v. State. Smt. Santosh Malhotra has prayed that the order passed by the Revenue Authorities against her son and the show cause notices issued by Town and Country Planning Department to her husband deserve to be quashed as they have been passed in violation of the principles of natural justice and against the mandate of Section 118 of ''the Act''. Petitioner Jai Dev Malhotra has also challenged the vires of Section 118 and Section 121-A of the Himachal Pradesh Tenancy and Land Reforms (Amendment) Act, 1994 and Rule 38-B framed under ''the Act'' being ultra vires, illegal and violative of the basic structure of the Constitution of India.

7. Both the writ petitions were admitted in the year 1996. In reply-affidavit filed on behalf of Respondent Nos. 1, 3, 4 and 5 in CWP No. 1167 of 1996. Collector Shimla has justified the orders passed by the authorities against Petitioner Jai Dev Malhotra. He stated that Jai Dev Malhotra had constructed the building on the land in dispute in utter disregard and in violation of the provisions of Section 118 of ''the Act'' because transaction by way of General Power of Attorney executed by Suresh Kumar Shukla in favour of Smt. Santosh Malhotra is prohibited u/s 118. He also stated that the General Power of Attorney is against the spirit of the provision of Section 33 of the Indian Registration Act, 1908. Jai Dev Malhotra contributed a sum o Rs. 55,000/- to the construction of the building on the land in dispute as per his own statement furnished by him to the Income Tax Authority for the Assessment Year 1993-94 and a further sum of Rs. 1.35 lacs had been spent by him as reflected in the Income Tax Return filed by him for the Assessment year 1994-95. It is also stated that the executant Suresh Kumar Shukla and Smt. Santosh Malhotra mother of the Petitioner were rightly not associated in the proceedings initiated by the revenue authorities against Jai Dev Malhotra as a sum of Rs. 1,90,000/ - in all has been proved to have been spent by him on the construction of the building.

8. Sh. J.C. Chauhan, Collector, Shimla in counter affidavit filed in CWP No. 2488/1995 has tried to justify the orders passed by the authorities below on the identical defence as taken by him in the affidavit-in-reply filed in CWP No. 1167/1996. In affidavit-in-reply filed by Sh. C.P. Pandey, Director, Town and Country Planning on behalf of Respondent No. 4. It is stated that the Executive Engineer of the Department was authorised to issue notice u/s 39 of the Planning Act to Sh. B.N. Malhotra as he started unauthorised construction of 10 storeyed huge building at Kachhi Ghati without the permission of the authority u/s 31 of

''the Planning Act''. He contended that the area falls under Shimla Planning Area constituted u/s 13 of ''the Planning Act'' during the year 1977 and the land use of the area was adopted and frozen on 14.3.1978. After 15.4.1978 no person could change the use of any land or carry out any development of the land in the area without written permission of the Director, Town and Country Planning and the notices issued to Sh. B.N. Malhotra by the Executive Engineer were valid and legal.

9. In rejoinder to the affidavit-in-reply filed by Respondent No. 4, the Petitioner has stated that Sh. B.N. Malhotra in reply to the notices had clearly stated that he was neither the owner of the land nor the construction was raised by him, therefore, the notices should have been issued to the rightful owner. Despite the specific stand of Shri B.N. Malhotra, no notice was ever issued to the Petitioner who is the holder of General Power of Attorney of Suresh Kumar the owner of the land. The Petitioner also stated that till 1992 no existing land use map was ever prepared for the planning area of Shimla as such no permission was required either u/s 16 or u/s 31 of ''the Planning Act''. The decision of Respondent No. 4, Director, Town and Country Planning holding the construction to be unauthorised, arbitrary and illegal is against the well settled principles of natural justice as the Petitioner was never served with any notice nor she was heard by the authority concerned in the matter.

10. I have heard learned Counsel for the parties. Mr. G.C. Gupta, learned Senior Counsel at the outset has stated that the Petitioner Jai Dev Malhotra, does not want to press the ground of challenge to the constitutional validity of provisions of Sections 118 and 121-A of the H.P. Tenancy and Land Reforms (Amendment) Act, 1994 and this ground may be treated having been given up. In view of the statement no finding on this issue has been recorded. He contended that Suresh Kumar Shukla the owner of the land has executed General Power of Attorney dated 7.11.1991 in favour of Smt. Santosh Malhotra authorizing her to look after, manage, sell, construct the building on the piece of land, to enter into an agreement, to receive the earnest money etc. etc. and the land in dispute was never sold to her on the basis of the said General Power of Attorney. The authorities below have passed the impugned orders against Jaidev Malhotra who is neither the owner of the land nor he has purchased it being non-agriculturist from Suresh Kumar Shukla therefore, the provisions of Section 118 of ''the Act'' are not attracted in the present case against Jaidev Malhotra. The Executive Engineer of the Town and Country Planning Department has also issued notices u/s 39 of ''the Planning Act'' against Sh. B.N. Malhotra (since deceased) the husband of Smt. Santosh Malhotra who was neither the owner of the land nor he constructed the building on the said land and as such the notices so issued were in violation of the provisions of Sections 14 and 15 of ''the Planning Act''.

11. Per contra, the learned Advocate General contended that from the perusal of the original record it is clear that notices were issued by the revenue authorities to Suresh Kumar Shukla owner of the land; Smt. Santosh Malhotra; Jaidev

Malhotra and Sh.B.N. Malhotra and all of them filed their replies to the said notices and thereafter proceedings were started against the said persons. He stated that from the perusal of the record of the Collector it is clear that Suresh Kumar Shukla in fact had sold the land in dispute to Smt. Santosh Malhotra by executing a General Power of Attorney in her favour and whereupon Shri Jai Dev son of Shri B.N. Malhotra had constructed a house on 0-4 biswas of land and as the transfer of the land on the basis of the General Power of Attorney to a non-agriculturist is in contravention of the provisions of Section 118 of the Act, the authorities below have rightly passed the orders against Jaidev Malhotra which call for no interference in these proceedings.

12. I have duly considered the respective contentions of the learned Counsel for the parties. From the perusal of the original record of the Collector, Shimla, it is not in dispute that notices were issued by the Collector to Jaidev Malhotra, Sh. B.N. Malhotra, Smt. Santosh Malhotra and Suresh Kumar Shukla u/s 118(1) of ''the Act'' and Rule 38(B) of H.P. Tenancy and Land Reforms Rules, 1975. All the parties have appeared before the Collector. Sh. B.N. Malhotra made the specific statement that his son Jaidev Malhotra purchased land in Kachhighati on which building had been constructed. Jaidev Malhotra made the statement that the land in dispute belongs to his mother Smt. Santosh Malhotra on which he constructed the building. The Collector Shimla passed the order dated 20.2.1995 (Annexure P-2) in case No. 1/94 against Jaidev Malhotra on the basis of the Income Tax returns filed by him before the Income Tax Department for the assessment years 1993-94 and 1994-95 in which he had shown having spent a sum of Rs. 1,90,000/- on the construction of the building. The Collector Shimla in his order recorded the findings that as the General Power of Attorney (Annexure P-1) has been executed by Suresh Kumar Shukla owner of the land in favour of Smt. Santosh Malhotra keeping in view the fact that no sale deed could be executed in favour of Smt. Santosh Kumar Malhotra as she is not the agriculturist of State of H.P. and Jaidev Malhotra invested a sum of Rs. 1,90,000/- for the construction of the building, therefore, the land has been acquired by him in violation of Section 118 of ''the Act''. The order of the Collector has been affirmed both by the Divisional Commissioner and by the Financial Commissioner in appeal.

13. The State of Himachal Pradesh enacted the H.P. Tenancy and Land Reforms Act, 1972. Chapter XI deals with Control on transfer of land. Section 118 prohibits the transfer of land to non-agriculturists which reads as under :

118. Transfer of Land to Non-Agriculturists Barred.-(1) Notwithstanding anything to the contrary contained in any law, contract, agreement, custom or usage for the time being in force, but save as otherwise provided in this Chapter, on transfer of land (including sales in execution of a decree of a civil Court or for recovery of arrears of land revenue), by way of sale, gift, exchange, lease, mortgage with possession or creation of a tenancy shall be valid in favour of a person who is not an agriculturist.

(2) Nothing in Sub-section (1) shall be deemed to prohibit the transfer of land by

any person in favour of-

(a) to (h) ....

(i) a non-agriculturist with the permission of State Government for the purpose that mays be prescribed:

Provided....

(3) No Registrar or the Sub-Registrar apointed under the Indian Registration Act, 1908 (16 of 1908), shall register any document pertaining to a transfer of land, which is in contravention to Sub-section (1) and such transfer shall be void ab initio and the land involved in such transfer, if made in contravention of Sub-section (1), shall, together with structures, buildings or other attachments, if any, vest in the State Government free from all encumbrances.

14. The revenue authorities below have mis-directed themselves in applying the above extracted provisions of Section 118 of ''the Act'' in the present case. Suresh Kumar Shukla has not transferred his ownership rights and interest in the property in favour of Smt. Santosh Malhotra by way of General Power of Attorney (Annexure P-1) and the transfer by way of execution of the General Power of Attorney is not incorporated in Section 118(1) of ''the Act''. The transfer of land to non-agriculturist is only barred u/s 118(1) if the transfer is by way of sale gift, exchange, lease, mortgage with possession or creation of tenancy including sales in execution of a decree of a Civil Court or for recovery of arrears of Land Revenue. The General Power of Attorney has been executed on 7.11.1991 by Suresh Kumar Shukla the owner of the property in favour of Smt. Santosh Malhotra in which she has only been authorised to look after, manage, sell or construct the building on the piece of land, to enter into agreement, to sell, to receive the earnest money, to execute or sign on the sale deed etc. etc. On bare reading of the General Power of Attorney it cannot be concluded that Suresh Kumar Shukla has transferred the land by way of sale, gift, etc. etc. envisaged in Section 118(1) of ''the Act'' in favour of Smt. Santosh Malhotra or in favour of Jai Dev Malhotra nor it is proved on record that Smt. Santosh Malhotra has sold the land to her son Jaidev Malhotra on the strength of the General Power of Attorney. The reasoning of the Collector that as Jaidev Malhotra had spent a sum of Rs. 1,90,000/- on the construction of the building on the land as reflected by him in his Income Tax returns will not be a sufficient proof that Suresh Kumar Shukla has transferred the land to Jaidev Malhotra on the basis of the General Power of Attorney executed in favour of his mother. The H.P. Tenancy and Land Reforms (Amendment) Act, 1994 came into force on 22.3.1995 whereas the General Power of Attorney (Annexure P-l) has been executed on 7.11.1991 as noticed above and the Collector passed the order (Annexure P-2) on 20.2.1995 prior to the date of the enforcement of the amended Act. Explanation of Section 118(1) of the Amendment ''Act'' reads as under :

Explanation.-For the purpose of this sub-section, the expression "transfer of land" shall include:-

(a) a benami transaction in which land is transferred to an agriculturist for a consideration paid or provided by a non-agriculturist; and

(b) an authorisation made by the owner by way of special or general power of attorney or by an agreement with the intention to put a non-agriculturist in possession of the land and allow him to deal with the land in the like manner as if he is a real owner of that land.

15. On perusal of the above said amendment, it is clear that an authorisation made by the owner by way of special or general power of attorney or by an agreement with the intention to put a non-agriculturist in possession of the land and allow him to deal with the land in like manner as if he is a real owner of the land has been brought on the statute on 20.2.1995 and this restriction was not the mode incorporated in Section 118(1) of the Principal Act.

16. In that view of the matter, the revenue authorities below have passed the impugned orders against Jaidev Malhotra contrary to the provisions of Section 118 of the Principal Act as the provisions of the Amendment Act cannot be applied retrospectively in the present case.

17. The Executive Engineer of the Town and Country Planning has issued notices dated 4.2.1994 (Annexure P-4) and 3.7.1995 (Annexure P-5) against Sh. B.N. Malhotra u/s 39 of ''the Planning Act'' who was neither the owner of the land on which the building had been constructed nor it is proved on record that he constructed the building as owner thereof. Thus, both these notices are misconceived and issued against a person who is not connected with the construction of the building. Thus, the orders of the authorities below passed against Jai Dev Malhotra as well as the notices issued against B.N. Malhotra (since dead) impugned in the writ petitions cannot be sustained. The authorities below have misdirected themselves in applying the provisions of the Principal Act to the facts and circumstances of the cases in hand.

18. No other point was urged by the learned Counsel for the parties before this Court.

19. For the aforesaid reasons, both the writ petitions are allowed. Order dated 20.2.1995 (Annexure P-2) passed by Collector Shimla in case No. 1/ 94: order dated 30.6.1995 passed by Commissioner, Shimla Division, (Annexure P-3) in Revenue Appeal No. 22/1995 and order dated 6.6.1996 (Annexure P-4) passed by Financial Commissioner (Revenue) in Appeal No. 14/1995 impugned in CWP No. 1167/96 are quashed and set aside. Similarly notices dated 4.1.1994 (Annexure P-4) and notice dated 3.7.1995 (Annexure P-5) issued by Executive Engineer, Town and Country Planning Department against Sh. B.N. Malhotra (since dead) filed in CWP No. 2488/95 are also quashed and set aside. The Respondents are directed to make the consequential change of the revenue entries in the revenue record in the name of the original owner which were changed in the name of the State Government pursuant to the orders of the Collector dated 20.2.1995 (Annexure P-2). The parties are left to bear their own

costs.