

(2014) 02 SIK CK 0004

In the Sikkim High Court

Case No : C.M.A. No. 28 of 2014 in F.A.O. No. 01 of 2014

State of Sikkim

APPELLANT

Vs

Smt. Sem Sodeun Wangdi and Shri Sanjay Kumar Agarwal

RESPONDENT

Date of Decision : 27-02-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2 151
Forest (Conservation) Act, 1980 — Section 2

Citation : (2014) 02 SIK CK 0004

Hon'ble Judges : N.K. Jain, C.J

Bench : Single Bench

Advocate : J.B. Pradhan, A.A.G., S.K. Chettri and Pollin Rai, D.K. Siwakoti, Rita Sharma, Legal Counsel Forest Dept., Madan Kr. Sundas and Tashi D. Bhutia, for the Appellant; A. Moulik, K.D. Bhutia, Advocate for Respondent No. 1, Ms. Chenga Doma Bhutia, Pema Doma and Jigdal G. Chankapa, Advocates, for the Respondent

Judgement

N.K. Jain, J. (C.J.)

1. Heard learned counsel for the parties on the stay application. The defendants no. 1, 3 and 4/appellants have preferred an appeal against order dated 17.02.2014, passed by the learned District Judge, Special Division-II at Gangtok, East Sikkim, on an application under Order 39 Rule 1 and 2, read with Section 151 CPC, filed by plaintiff/respondent No. 1, whereby application for injunction filed by plaintiff has been allowed and defendants No. 1 and 2 have been restrained from making any further changes/constructions in Schedule "B" property until further orders. The appellants have also filed the present stay application along with appeal with a prayer to stay the operation of the impugned order passed by the trial Court during the pendency of the appeal.

2. Briefly stated, the facts of the case are that the plaintiff/respondent No. 1 filed a suit for declaration, injunction and consequential reliefs in the trial Court along with an application for temporary injunction in respect of property in dispute. The

plaintiff in her application prayed that an order of injunction against defendants No. 1 and 2 be passed, restraining them from proceeding with any construction activities over the Schedule "B" land, as shown in the rough sketch, annexed with the plaint, till final disposal of the suit. The defendant No. 1, 3 and 4 have filed their written reply/objection to the application separately and submitted that the injunction application be dismissed. The plaintiff, thereafter, filed rejoinder to the objection/reply filed by defendant No. 4 to the application. It is also relevant to mention that defendant No. 1 also filed its written statement to the plaint.

3. Learned trial Court, after hearing the learned counsel for the parties, allowed the application for temporary injunction filed by the plaintiff and directed that all the parties should maintain the status quo over Schedule "B" property and defendants No. 1 and 2 were restrained from making any further changes/constructions in Schedule "B" property. Being aggrieved with the same, the defendants No. 1, 3 and 4 have preferred an appeal before this Court along with present stay petition.

4. Submission of Mr. J.B. Pradhan, learned Addl. Advocate General, appearing on behalf of appellants, is that the appellants decided to construct a "Skywalk" from Deorali Junction to Namnang for use of general public and work order of the same was placed on 09.03.2011. Some of the lands for raising the construction of the "Skywalk Project" were falling in Namnang Reserve Forest. Therefore, a proposal was moved by the appellants before the Central Government for grant of approval u/s 2 of the Forest Conservation Act, 1980 (for short, "the Act of 1980"). The approval-in-principal was granted on 23.09.2011, subject to fulfillment of certain conditions, which were fulfilled by appellants, and thereafter, a final approval was granted by Central Government u/s 2 of the Act of 1980 on 09.01.2012. Thereafter, handing and taking over of land in dispute took place on 21.01.2012. He submitted that land in dispute, as per Revenue Record was shown as "Namnang Reserve Forest" and it was nowhere recorded as "Private Estate" as claimed by the plaintiff. He referred the Land Record for the year 1950-52 and submitted that from the basic revenue record of the year 1950-52, the land in dispute was entered as "Namnang Reserve Forest" and not "Private Estate". He submitted that due approval, as required u/s 2 of the Act of 1980, was required to be obtained from the Ministry of Environment and Forest, Government of India, which was obtained and, only thereafter, the Project work was started in land in dispute in January, 2012.

5. Mr. Pradhan submitted that the plaintiff is claiming her right on the basis of so called unregistered Gift Deed dated 23.07.2007, the said Gift Deed was submitted to the concerned Department for its registration, which was refused and the order refusing to register the Gift Deed was not challenged by the plaintiff and till date, the name of the plaintiff has not been entered in the Revenue Record. He also submitted that neither the name of the donor nor the name of the donee, i.e. the present plaintiff, was ever entered in the Revenue

Record.

6. The learned counsel for appellants also submitted that the suit was highly belated; the work order for "Skywalk Project" was issued on 09.03.2011, a copy of which was placed on record by the plaintiff herself, the construction work in land in dispute had also started in January, 2012 soon after receipt of approval from Central Government. The plaintiff was in knowledge of ongoing construction work from the very beginning. Plaintiff submitted her representation to appellants in May, 2012, admitting a fact that the construction work of "Skywalk Project" was going on. Learned counsel for appellants referred the representation dated 29.06.2012 filed by the plaintiff/respondent No. 1 before Government, wherein she has given a reference of her earlier letter of May, 2012. She waited for about two years and only on 27.11.2013 the present title suit along with application for temporary injunction was filed in the trial Court, when more than 80% work of the Project had already been over. He also submitted that the approval granted by the Central Government u/s 2 of the Act of 1980 has not been challenged by the plaintiff/respondent No. 1. He also referred to a document dated 18.03.2010, whereby the Divisional Forest Officer (S & D), Department of Forest, Environment & Wildlife, Government of Sikkim has certified that the land proposed for the diversion of 0.225 ha of forest land along Deorali to Namnang for the creation of covered walkway and Allied Facilities is recorded as "Reserve Forest" as per the Survey Record of 1950-52. He also referred a Status Report dated 18.11.2012, wherein it was mentioned that the status of land required for the purpose of construction of walkway and view point along Kenshiraj Pradhan Marg (Nam Nang Road) from Deorali junction to main turning along on the downhill side has been verified. The said land falls within the "Namnang Reserve Forest" beyond the boundary of Gangtok Station block as per the survey map of 1951-52 of Gangtok block. He also referred two maps, wherein the land has been described as "Forest Land Namnang". He also referred one Joint Inspection Report dated 30.03.2011 consisting of Forest Department, Land Revenue Department and User Agency, wherein the land has been described as "Reserve Forest". He also referred the reply filed by defendants No. 3 and 4, wherein the land in dispute has been described as "Forest Land" and not "Private Land". He also referred the handing and taking over memo dated 21.01.2012 and submitted that from these documents it is clear that the land in dispute is a forest land and it was handed over on 21.01.2012. He also referred to Top-sheet Map wherein the land in dispute has been shown as "open mixed jungle at Namnang". Jungle means forest.

7. Mr. J.B. Pradhan, learned Addl. Advocate General also submitted that the finding of the learned trial Court in respect of "Prima facie case" is absolutely illegal and perverse. He submitted that the above referred documents were neither referred nor considered in the impugned order and only on the basis of few inspection reports available on file, given by different officers, have been relied upon, and on that basis it has been held that there is a prima facie case in favour of plaintiff, whereupon from the above referred facts and documents it is

clear that there is no prima facie case in favour of the plaintiff. He also submitted that the learned trial Court itself has recorded the findings of "balance of convenience" in favour of the defendants/appellants. He submitted that only on the basis of findings in respect of "prima facie case", the injunction cannot be and should not be granted in favour of plaintiff. In support of his submission he relied upon a judgment of the Hon'ble Apex Court in Best Sellers Retail (India) Pvt. Ltd. Vs. Aditya Birla Nuvo Ltd. and Others, He further submitted that the suit has been filed at the fag end of the construction, admittedly, 80 to 85 % construction has already been completed, about Rs. 16.00 crores have also been invested, therefore, it was not proper on the part of trial Court to grant injunction at this juncture. He, therefore, submitted that the order passed by the learned trial Court be stayed during pendency of the appeal.

8. Mr. A. Moulik, learned Senior Counsel appearing for respondent No. 1 supported the impugned order passed by the learned trial Court and submitted that in facts and circumstances of the case, the learned trial Court was absolutely right in granting the injunction in favour of the plaintiff. Mr. Moulik submitted that findings of the learned trial Court in respect of "prima facie case" in favour of the plaintiff is legal, justified as it is based upon documents and evidence. He submitted that Schedule "A" property is not a "Reserve Forest" but it is "Private Estate". He also submitted that Schedule "B" property is also not "Reserve Forest" but "Private Estate Forest".

9. Mr. Moulik, learned Senior Counsel submitted that the plaintiff is the niece of late Chogyal Palden Thondup Namgyal, the then Maharaja of Sikkim and after his death, his son, Chogyal Wangchuk Namgyal executed a Gift Deed in favour of plaintiff on 23.07.2007, whereby the land described/measuring in Schedule "A" was gifted to plaintiff. This gifted land, mentioned in Schedule "B", has illegally been taken into possession by defendants. He submitted that plaintiff initially approached the respondents to settle the matter amicably and award compensation of the land which they have taken possession illegally, therefore, she waited for their decision and when they refused to settle the matter, then only the suit was filed in the trial Court. Therefore, there is no delay in filing the suit. Shri Moulik also referred lease deed dated 17th June, 2011 executed by defendants in favour of plaintiff, wherein a reference of gift deed was given and submitted that defendants have admitted gift deed of plaintiff. He also submitted that during pendency of the case before the trial Court the construction work was going on. Therefore, the plaintiff is not at fault if substantial work has been completed. He referred number of documents to show that the land in dispute is a "Private Estate" and not "Forest Land". He also raised doubt on Top sheet Map referred by the learned counsel for the appellants. He also referred Joint Inspection Reports dated 17.05.2006, 23.02.2011 and submitted that Government Officers themselves have admitted in their inspection reports that the land in dispute is a "Private Estate Land". Mr. Moulik, submitted that in case the construction is allowed to continue, then the plaintiff will suffer irreparable loss. He, therefore, submitted that prima facie case as well as irreparable injury,

both are in favour of plaintiff. Therefore, the order passed by the learned trial Court should not be interfered with and it should not be stayed. In support of his submission, he relied upon judgments in Gangubai Bablya Chaudhary and Others Vs. Sitaram Bhalchandra Sukhtankar and Others, and Sukkha Singh and Another Vs. Mahal Singh and Another,

10. I have considered the submissions of learned counsel for the parties and examined the pleadings and documents available on record. From the submissions, pleadings of the parties, documents available on record, it appears that Government of Sikkim decided to construct "Walkway" from Deorali Junction towards Namnang and it was described as "Skywalk Project". Most of the land for construction of project was available to Government, but some of land was passing through Namnang Forest Area. The State of Sikkim sent a proposal to Government of India for grant of approval u/s 2 of the Act of 1980 in respect of land falling in Forest Area. The Ministry of Environment and Forest, Govt. of India vide, its order dated 23.09.2011 granted "approval in principal" subject to fulfillment of certain conditions, which were fulfilled by the State of Sikkim and a final approval was granted on 09.01.2012. The work order for "Skywalk Project" had already been given on 09.03.2011, which is clear from the work order available on record. The said work order was placed on record by the plaintiff herself. After grant of approval u/s 2 of the Act of 1980 by the Central Government, the land in dispute was also handed over by the concerned Department on 21.01.2012 to the appellants and thereafter the construction in land in dispute also started.

11. The case of plaintiff is that the suit property was belonging to "Private Estate" of late Chogyal Palden Thondup Namgyal, the then Maharaja of Sikkim and the same was gifted to plaintiff vide Gift Deed dated 23.07.2007 and she came into possession of land in dispute soon after execution of the Gift Deed. She submitted that the Gift Deed was presented to Registering Authority for its registration, but the same was refused on the ground that the status of the Private Estate Properties of the Chogyal has not been settled by the Central Government, State Government and the representatives of the Chogyal. However, she submitted that she was in possession of land in dispute and the defendants had no right to encroach upon the land of plaintiff and start construction on it.

12. I have gone through the findings of the learned trial Court. The learned trial Court has referred some notings, in the shape of Inspection Reports, of the file of defendants and has observed that properties gifted to plaintiff does not fall under forest land and consequently recorded the findings that the plaintiff has a prima facie case, however, the inspection notings available in the file of the defendants referred by learned counsel for the appellants, wherein the land has been described as "forest land" has not been referred and discussed. The other documents placed on record by the defendants have also not been referred and discussed while recording the findings on the issue "prima facie case". It is also a

grievance of the learned counsel for the plaintiff/respondent No. 1 that their various documents, to show their prima facie case, has also not been referred and considered. So far as "balance of convenience" is concerned, the learned trial Court itself has recorded a finding that the project is in progress and if the work is stopped at this stage, it will be more inconvenient to the defendants than to the plaintiff.

13. While discussing the irreparable injury, the learned trial Court has also observed in paragraph 35 of its order that perhaps, she could be compensated with money but the damages that the plaintiff suffers would be irreparable. From the above finding of the learned trial Court, it appears that even if the project is allowed to be constructed and completed then the plaintiff will not suffer irreparable loss and she could be compensated adequately with money. The finding in respect of "balance of convenience" in favour of defendants has been recorded in paragraph 33 by the learned trial Court, which is reproduced as under:-

33. As far as the balance of convenience is concerned, the photographs (Annexure D-2) shows that the project undertaken by defendant No. 1 is at the stage of completion. I am conscious that the concerned agency would suffer financial losses if the work is stopped at Schedule "B" property. The plaintiff would not be in so much inconvenience than the defendants would be if the work is stopped at this stage. The balance of convenience seems to be leaning in favour of the defendants.

14. So far as "irreparable injury" is concerned, the trial Court itself has observed that plaintiff can be compensated with money. Here is the case, where work order for the project was given on 09.03.2011. The land in dispute was handed over for the project on 21.01.2012. The construction work over the land in dispute was also started in January, 2012. The petitioner was aware of the project and its construction since May, 2012, which is clear from her representation, the present suit was not filed till November, 2013. The suit along with the application for injunction was filed in the trial Court on 27.11.2013. There is no dispute between the parties that 80-85 % of the work has also been completed.

15. It is a well established position of law that while passing an interim order of injunction under Order 39 Rules 1 and 2 CPC, the Court is required to consider:

- (i) whether there is a prima facie case in favour of the plaintiff;
- (ii) whether the balance of convenience is in favour of passing the order of injunction; and
- (iii) whether the plaintiff will suffer irreparable injury if an order of injunction would not be passed as prayed for.

16. The Hon'ble Apex Court in Best Sellers Retail (India) (P) Ltd. vs. Aditya Birla Nuvo Ltd. (Supra) held that even where prima facie case is in favour of the

plaintiff, the Court will refuse temporary injunction if the injury suffered by the plaintiff on account of refusal of temporary injunction was not irreparable. Paragraph 29 of the judgment is reproduced as under:-

29. Yet, the settled principle of law is that even where prima facie case is in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered by the plaintiff on account of refusal of temporary injunction was not irreparable.

17. Hon"ble Apex Court in Best Sellers Retail (India) (P) Ltd."s case (supra) has also relied upon its earlier judgment in Dalpat Kumar and Another Vs. Prahlad Singh and Others, of its judgment, which is also reproduced as under:

30. In Dalpat Kumar and Another Vs. Prahlad Singh and Others, this Court held: (SCC p.721, para 5)

5. ...Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that noninterference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely, one that cannot be adequately compensated by way of damages.

18. I have also considered both judgments referred by learned counsel for respondent No. 1 in the case of Gangubai Bablya Chaudhary and others (supra) and Sukha Singh and another (supra) and after considering the same I am of the view that the same are not applicable in the facts and circumstances of the present case.

19. Looking to the facts referred and discussed above, it is clear that in 1950-52 records, the land in dispute was described as "Reserve Forest Namnang" and it was not recorded as "Private Estate". The status of Private Estate Properties of the Chogyal has not been settled by the Central Government, State Government and the representatives of the Chogyal. There is no document to show that the land in dispute was recorded in the name of Chogyal or his son who donated the same to the plaintiff vide Gift Deed dated 23.07.2007. The Gift Deed is also not registered. Some of the notings on the file of the defendants show that land in dispute has been described as "Private Estate" as per map made available by plaintiff and in some of the notings it was described as "Reserved Forest". These are only internal note sheets and cannot be termed as final verdict on the issue. Approval of the Central Government, as required u/s 2 of the Act of 1980 in respect of land in dispute, which is forest land, has been granted by the Ministry of Environment and Forest, Govt. of India vide orders dated 23.09.2011 and 09.01.2012. The work order of the Project was given way back in June, 2011. After granting approval by the Central Government u/s 2 of the Act of 1980, the

land in dispute was handed over for the project on 21.01.2012, the actual construction in land in dispute also started in January, 2012. The plaintiff was aware about the project and its construction from the very beginning or at least from May, 2012, as admitted by the plaintiff in her representation dated 29.06.2012, which was submitted before the defendants for granting compensation. The suit was filed with a delay of about one and half year and at this stage, the project was at the fag end of its completion. Admittedly, 80-85 % works have also been completed. It is a project worth approximately Rs. 16.00 crores, the public money has already been invested in it, the plaintiff will get compensation if her title suit is decreed and as such she is not going to suffer irreparable injury at present. The land in dispute is not in possession of plaintiff and construction work is going on, which is likely to be completed. In view of above, it is clear that it was not fair, reasonable and justified on the part of the trial Court to grant injunction at this stage in favour of the plaintiff.

20. In view of the above discussion, I am of the view that the order passed by the learned trial Court is liable to be stayed. Consequently, it is directed that the operation of the impugned order dated 17.02.2014 passed by the learned District Judge, Special Division-II at Gangtok, East Sikkim in Title Suit No. 433 of 2013 shall remain stayed during pendency of appeal, F.A.O. No. 01/2014, before this Court.

21. The stay application stands allowed.

22. It is made clear that the above discussion and finding recorded in the order is only an interim discussion and finding, and the same will not come in the way, while deciding the appeal finally. List the appeal, i.e. F.A.O. No. 01/2014 for hearing on 14.03.2014 as prayed by learned counsel for the parties.