



## THE HIGH COURT OF SIKKIM : GANGTOK

### ***RFA No.7 of 2006***

Shri Sonam Gyatso Bhutia,  
Son of Late Dongchen Bhutia,  
R/o Rinchenpong Bazar,  
P.O. Rinchenpong,  
West Sikkim.

..... **Plaintiff/Appellant**

### ***versus***

1. The State of Sikkim,  
Through the Secretary,  
Department of UD&HD,  
Government of Sikkim,  
Gangtok.
2. Shri Ganga Ram Chettri,  
R/o Rinchenpong Busty,  
P.O. Rinchenpong,  
West Sikkim.
3. Shri Ashok Kumar Goutam,  
R/o Rinchenpong Busty,  
P.O. Rinchenpong,  
West Sikkim.
4. The District Collector,  
West District of Sikkim,  
Gyalshing, West Sikkim.
5. The Secretary.  
Land Revenue Department,  
Government of Sikkim,  
Gangtok.
6. Janak Kumari,  
D/o Shri Ganga Ram Chettri,  
R/o Rinchenpong Busty,  
P.O. Rinchenpong,  
West Sikkim.

..... **Defendants/Respondents**

For Appellant : Mr. A. Moulik, Senior  
Advocate with Mr. N. G.  
Sherpa, Advocate.

For Respondent Nos.1, 4 & 5 : Mr. J. B. Pradhan,  
Government Advocate.

For Respondent Nos.2, 3 & 6 : Mr. A. K. Upadhyaya, Senior  
Advocate with Mr. Dhurba  
Tewari, Advocate.

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**Date of hearing : 14<sup>th</sup> May, 2009**

**Date of Order : 14<sup>th</sup> May, 2009.**

**PRESENT : HON'BLE MR. JUSTICE A. P. SUBBA, JUDGE.**

**ORDER (ORAL)**

**A. P. SUBBA, J.**

Heard Mr. A. Moulik, learned senior counsel with Mr. N. G. Sherpa, learned counsel appearing for the plaintiff/appellant and Mr. J. B. Pradhan, learned Government Advocate appearing for the State-respondent Nos.1, 4 and 5. Also heard Mr. A. K. Upadhyaya, Senior counsel with Mr. Dhruva Tewari, learned counsel appearing for the respondent Nos.2, 3 and 6.

**2.** This is an appeal filed by one Sonam Gyatso Bhutia against the impugned order dated 20<sup>th</sup> December, 2005 passed by the learned Court of District Judge, South and West at Namchi, South Sikkim in Title Suit No.1 of 2004.

**3.** In a nutshell, the case of the appellant is that he is the owner of a piece of land covered by plot No.286 of the Rinchenpong Bazar, West Sikkim as per old survey record of 1952. The land in question originally belonged to his father late Dongchen in whose name the land still stands recorded. In the family partition that took place in 1996 the said piece of land fell in the share of present appellant. He has thus been the owner of the property in question since the time of his father. However, in the year 1981 the respondent Nos.2 and 6

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entered into this land and raised two compact RCC buildings. Since such entry of the respondents and their raising of construction on the suit land was without any legal authority the present appellant filed a Civil Suit bearing No.49 of 1999 in the year 1999 against the respondents claiming declaration, confirmation of possession and consequential reliefs. However, because of certain defects in the pleadings the suit had to be withdrawn. Subsequently, a fresh suit was filed in the year 2002 more or less on the same ground as mentioned above. All the respondents contested the suit resisting the claim of the plaintiff. It was their case that plot No.286 (old) corresponds to new plot No.381. New plot No.390 being part and parcel of Rinchenpong Bazar compound and the plots of land allotted to respondent Nos.2 and 6 falling within this plot of land the appellant's land was never touched or encroached upon and as such, no right of theirs has been infringed.

**4.** The main question that arose in the suit in view of the respective pleadings of the parties as narrated above was whether the plots of land allotted to respondent Nos.2 and 6 by the respondent No.1 was out of land covered by plot No.286 of the old survey record and whether the plot No. 390 of the new survey record was different from old plot No.286.

**5.** The learned trial Court on appreciation of evidence adduced by the parties and on hearing the learned counsel for the parties came to the conclusion that plot No.390 (new) being separate piece of land does not correspond to plot No.286





(old). It is plot No.381 (new) which only corresponds to plot No.286 (old). It was accordingly held that the allotment of land from plot No.290 (new) to respondent Nos.2 and 6 by respondent No.1 was exclusively within the domain of the State-defendants. The learned Court was thus of the view that the plaintiff was not entitled to any of the reliefs claimed by him. Aggrieved by this judgment and order of the learned trial Court, the appellant is before this Court.

**6.** Before the appeal was taken up for hearing, the appellant also filed an application under Order XLI Rule 27 read with Section 151 of the Code of Civil Procedure (registered as CMAppl. No.66 of 2006) seeking admission of additional evidence on record. It was stated in the application that the appellant not being satisfied with the conclusion arrived at by learned trial Court regarding identity of the suit land approached Sub-Divisional Officer, Soreng, West Sikkim for spot verification of plot No.286 (old) as well as Plot Nos.390 and 381 (new). The finding of the Head Surveyor as reflected in his spot verification report marked Annexure 1 is to the effect that the piece of land falling within the old plot No.286 is the same as the land falling under new plot Nos.381 and 390. Since such finding has direct bearing on the main issue dealt with by the learned trial Court a prayer has been made for admission of the spot verification report Annexure 1 and the attested copy of the survey map marked Annexure 2 in evidence for proper and complete justice in the case.





7. Since determination of the issue so raised in the above CMApl. No.66 of 2006 required a reference to the materials in the main petition of appeal and their evaluation and also keeping in view the pronouncement of the Apex Court in **M/s. Eastern Equipment & Sales Ltd. vs. ING. Yash Kumar Khanna** reported in **AIR 2008 SC 2360** to the effect that an application under Order XLI Rule 27 has to be heard alongwith the main appeal, this petition was taken up for hearing alongwith the main appeal and the learned counsel for the parties were heard on both the matters.

8. The main submission made by Mr. A. Moulik, learned senior counsel for the appellant in the case is that the finding given by the learned trial Court was erroneous in so far as it was not based on proper appreciation of evidence adduced by the appellant in this case. It is his submission that had the evidence adduced by the appellant been properly weighed and appreciated, the learned Court ought to have come to the conclusion that the land allotted to respondent Nos.2 and 6 was part of plot No.286 (old) and that plot No.381 (new) does not cover the whole area falling under old plot No.286.

9. Over and above, further submission made by learned counsel is that the above facts recorded by the surveyor in the plot verification report are material and have direct bearing on the determination of the question as to whether plot No.286 (old) has been bifurcated into two new plot Nos.381 and 390 as per the new survey record and





whether the lands allotted to respondent Nos.2 and 6 is a part and parcel of old plot No.286 (old) and as such, the document if admitted as additional evidence will enable the Court to pronounce judgment on the issue in a more satisfactory manner.

**10.** As can be noticed from the above, the facts recorded in report Annexures 1 and 2 are material in determination of the issue as to whether old plot No.286 has been allotted new plot Nos.381 and 390 and whether the plots of land allotted to respondent Nos.2 and 6 fall within these plots. In view of this, the position that emerges is that the additional evidence which the appellant seeks to bring on record, namely, spot verification report marked as Annexure 1 and survey map marked as Annexure 2 appear to be quite essential and material to come to a correct conclusion with respect to the matter in dispute between the parties.

**11.** Admittedly, the above additional evidence sought to be brought on record by the appellant at this stage is an evidence which came into existence after the original suit was disposed of and after the decree was drawn up. Therefore, the question that arises for consideration is whether the document which came into existence after the disposal of the main suit can be allowed to be brought in as additional evidence on record in an appeal. On this issue, learned senior counsel for the appellant referred to Order XLI Rule 27(b) of the Code of Civil Procedure and submitted that a document which comes





into existence after the disposal of the suit can be admitted in the evidence under this provision if it has a bearing on the question before the parties.

In support of the above submission, learned senior counsel referred to and relied on the following decisions:-

1. ***AIR 1963 SC 1526 K. Venkataramiah vs. A. Seetharama Reddy and Others;***
2. ***AIR 1981 SC 1113 M. M. Quasim vs. Manohar Lal Sharma and Others;***
3. ***AIR 1987 Punjab and Haryana 93 Piara Singh vs. Jagtar Singh and Another;*** and
4. ***AIR 2005 SC 996 Adil Jamshed Frenchman (D) by L.Rs. vs. Sardar Dastur School Trust and Others.***

The above decisions clearly lay down that hearing of an appeal under the procedural law of India is in the nature of re-hearing and therefore in moulding the relief to be granted in a case on appeal, the appellate Court is entitled to take into account even facts and events which have come into existence after the decree appealed against has been passed. The only condition is that a document which comes into existence after the disposal of the suit must be material and if substantiated should have a material effect on the final determination of the issue. Such materials can be admitted in evidence if the Court requires the same to pronounce judgment in a more satisfactory manner.

**12.** The position of law as highlighted above is not seriously disputed by the learned counsel for the respondents.





Conceding to this position in all fairness, the only submission made by Mr. Upadhyaya, the learned senior counsel for the respondent Nos.2, 3 and 6 is that if the additional evidence is admitted in evidence the respondent ought to be allowed an opportunity to test the evidence through the process of cross-examination.

**13.** In view of the above, it must be held that the appellant has been able to make out a case for admission of the documents marked as Annexures 1 and 2 as additional evidence in the peculiar facts and circumstances of the case.

**14.** Consequently, the CMApl. No.66 of 2006 is allowed and it is hereby directed that the documents marked as Annexures 1 and 2 be taken in evidence. However, as pointed out by the learned senior counsel for the respondent Nos.2, 3 and 6, the additional evidence requires to be tested as per the procedure laid down in the Evidence Act.

**15.** In the result, the judgment dated 20<sup>th</sup> December, 2005 and the decree dated 22<sup>nd</sup> December, 2005 passed in Title Suit No.1 of 2004 are hereby set aside and the matter is remanded back to the learned trial Court for holding a fresh trial according to law. It is needless to say that both the parties shall be given due opportunity to test the evidence that has been hereby ordered to be admitted as additional evidence in accordance with the procedure laid down in the Evidence Act.

**16.** It is made clear that the observation made above being only for the purpose of deciding the question of






admissibility of the new material as additional evidence will in no way prejudice the rights and contentions of the parties at the hearing.

**17.** Since this is a old matter the learned trial Court shall hear and dispose of the matter as expeditious as possible.

**18.** With the above, this appeal as well as CMAppl. No.66 of 2006 stand disposed of.

**19.** The records of the lower Court be sent back forthwith.

  
( **Justice A. P. Subba** )  
**Judge**  
14-05-2009