

IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MEGHALAYA, MANIPUR,
TRIPURA, MIZORAM AND ARUNACHAL PRADESH)
SHILLONG BENCH

W.P.(C) No. 99(SH) of 2010.

Allan W Kharkongor
R/o Riasamthiah, Bock-1, Shillong
East Khasi Hills District,
Meghalaya

- Petitioner.

-VS-

1.The State of Meghalaya
represented by the Chief
Secretary to the Govt. of Meghalaya,
Shillong.

2. The Principal Secretary
Revenue Department,
Meghalaya, Shillong

3. The Secretary to the Govt. of
Meghalaya, Revenue and Disaster
Management Department
Meghalaya, Shillong.

4. The Under Secretary to the Govt. of
Meghalaya, Revenue and Disaster
Management Department
Meghalaya, Shillong

5. The Deputy Commissioner (Revenue)
East Khasi Hills District,
Shillong Meghalaya.

6. The Addl. Deputy Commissioner (Revenue)
East Khasi Hills District,
Shillong Meghalaya

7. Shri Rishan Rapsang
The Managing Director,
Ferndale Rapsang (P) Ltd
Ferndale Compound,
East Khasi Hills District
Shillong

8. Shri Narayan Agarwal
C/o Shri Rishan Rapsang
The Managing Director, Ferndale Rapsang
(P) Ltd Ferndale Compound
East Khasi Hills District,
Shillong.

Respondents

**BEFORE
THE HON'BLE MR JUSTICE T VAIPHEI**

For the Petitioner:	Mr. B Bhattacharjee, Mr S Changkija, Ms B Das, Advocates
For the Respondents:	Mr KS Kynjing, Advocate General Mr ND Chullai, Sr GA Mr VGK Kynta, SC, KHADC Mr R Kar, Adv. For respdt No. 8
Date of hearing	: 21.02.2011.
Date of judgment	: 22.03.2011

JUDGMENT AND ORDER

In this writ petition, the petitioner is aggrieved by the denial of permission to him by the State-respondents to purchase flat No. S-302 of Ferndale Apartments situate at M.G. Road, Shillong, which, according to him, is in gross violation of the provisions the Meghalaya Transfer of Land (Regulation) Act, 1971 ("the Act" for short) and the Meghalaya Transfer of Land (Regulation), Rules, 1974 ("the Rules") and of the grant of permission for in favour of the respondent No. 8, who is a non-tribal.

2. For better appreciation of the controversy, I may briefly refer to the material facts of the case as projected by the petitioner in his writ petition. In the year 2002, the respondent No. 7 started a project for construction of flats at Ferndale Compound, M.G. Road, Shillong. He accordingly filed an application on 30-8-2002 to the Deputy Commissioner (Revenue), East Khasi Hills District, Shillong (respondent 5) seeking a certificate for allowing him to transfer the flats

to prospective buyers. The respondent No. 4 thereafter by his letter dated 22-10-2002 informed the respondent No. 5 that the Government had no objection to his proposal to transfer the flats as the same falls within the European Ward. Subsequently, the respondent No. 7 by his letter dated 12-9-2008 informed the respondent No. 5 about the completion of the construction of the flats and sought for his approval for registration of the same. The application accompanied by a list of prospective flat owners, the flat numbers and the value of the flats was forwarded to the respondent No. 4. The respondent No. 7 by the letter dated 15-5-2009 submitted a fresh list of purchasers of the flats with the area and the rate per flat to the respondent No. 5. This was followed by the issuance of the notice under Rule 6(1) of the Rules by the respondent No. 6 vide Memo dated 18-5-2009 inviting intending purchasers among the tribals in respect of flat No. S.302 measuring about 1754 square feet at a quoted price of `15,83,520/- and giving 30 days' time to respond to the notice and to give in writing the intention of the purchasers to purchase the same.

3. It is the case of the petitioner that he, in response to the aforesaid notice dated 18-5-2009, forwarded his application dated 10-6-2009 to the respondent No. 5 and conveyed his intention to purchase the said flat and offered to purchase the same at `15,83,520/- as quoted in the notice. The respondent No. 6 then forwarded the application of the respondent No. 7 along with the application of the petitioner to the respondent No. 4 for necessary action. As a tribal purchaser, he had hoped that the permission for the transfer and registration of the said flat would be granted to him, but he did not

receive any communication from the respondent authorities about his application till the second week of December, 2009. When the respondent authorities refused to give information about the fate of his application, he was constrained to file an application under the Right to Information Act on 16-12-2009 seeking information from the Office of the respondents No. 4 and 5. The Public Information Officer of the Office of the respondents No. 4 and 5 ultimately informed the petitioner that the respondent No. 4 had already granted the permission to the respondent No. 8. Surprised by this development, he again filed the application dated 22-1-2010 under the RTI Act to the Office of the respondent No. 4 for supply of some documents and information. It is under the aforesaid facts and circumstances that the petitioner, after those documents and information, filed this writ petition for quashing the permission dated 9-12-2009 granted to the respondent No. 8 for transfer of the said flat and for directing the said respondents to grant the permission to him instead.

4. The writ petition is opposed by the respondent authorities and the private respondents by filing their respective counter-affidavits. The respondent authorities admit in their affidavit that the application of the petitioner was not considered by them and the permission was granted to the respondent No. 8. According to the respondents authorities, the apartment in question is located within the European Ward of Shillong Municipality where even non-tribals can buy any property and the transfer of the said flat in favour of respondent No. 8 is, therefore, permissible in law. It is contended by the answering respondents that the writ petition is not maintainable and is liable to be dismissed as he has not exhausted an alternative remedy of

approaching the Meghalaya Board of Revenue. Both the respondent No. 7 and 8 also support the impugned action of the State-respondents and adopt the stance taken by the respondent authorities.

5. On perusing the materials on record and after hearing all the counsel appearing for the rival parties, the sole question which falls for consideration in this writ petition is whether the permission granted by the respondent authorities to the respondent No. 8 for transfer and registration of the flat in question violates the provisions of the Act and the Rules made thereunder. The contention of Mr. B. Bhattacharjee, the learned counsel for the petitioner is that under Rule 6(1) of the Rules, in the event of sale of immovable property including land, a tribal who is ready to pay the market value of the land or the property is to be given a preference over a non-tribal, but in the instant case, the petitioner who is a tribal and who has offered the market value of the flat as quoted in the notice was not allowed to purchase the same and the same was permitted to be transferred in favour of the private respondent. The permit granted to the private respondent is, therefore, in contravention of Rule 6(1) of the Rules, and thus liable to be set aside. According to the learned counsel for the petitioner, the provisions of the Act and the Rules are applicable throughout the territory of Meghalaya including the areas known as European Ward or normal Shillong. It is further submitted by the learned counsel that both Section 3 of the Act and Rule 6(1) of the Rules are mandatory and binding upon the State-respondents: no law has been made by the State-respondents to relax or exempt the application of Section 3 and Rule 6(1) of the Rules to any area in Shillong. According to the learned counsel, flats or apartments are embedded/attached to earth, they

come within the purview of the definition of the term “land” and as the State-respondents have not enacted any law or rules governing/regulating the transfer of flats/apartments till date, any transfer involving flats or apartments has to be governed by the provisions of the Act and the Rules: the impugned permit is thus contrary to Section 3 of the Act and Rule 6(1) of the Rules and is, therefore, liable to be quashed. These are the contentions of the learned counsel for the petitioner.

6. Refuting the contentions of the learned counsel for the petitioner, Mr. K.S. Kynjing, the learned Advocate General, maintains that the flat in question is situate at the European Ward of Municipality of Shillong where the provisions of the Act and the Rules are not applicable and even non-tribals are allowed to buy any property including a land provided a permission for transfer is granted by the competent authority. He denies that a sale of land/property is to be guided by the provisions of the Act and the Rules made thereunder. It is also submitted by the learned Advocate General that the petitioner has not availed of the alternative remedy of approaching the Meghalaya Board of Revenue, and the writ petition is, thus, not maintainable. He, therefore, urges this Court to dismiss the writ petition with costs. Mr. V.G.K. Kynta, the learned counsel appearing for the respondent No. 7, supports the submission of the learned Advocate General and contends that the area in question is known as Ferndale Compound admittedly falling within the European Ward and is not a tribal area, which is an excluded area in terms of the proviso to sub-paragraph (2) of Paragraph 20 of the Sixth Schedule to the Constitution. This is evident from paragraph 4 of the letter dated

15-1-2010 of the Secretary, Revenue Department, Govt. of Meghalaya which unequivocally declared that the Meghalaya Land Transfer Regulation Act, 1971 is not applicable to this area but the petitioner never challenges this letter. The learned counsel draws my attention to paragraph 20(2) which states that any reference in Part 1, II or Part III of the table below to any district shall be construed as a reference to the territories comprised within the autonomous district of that name existing immediately before the day appointed under clause (b) of section 2 of the North Eastern Areas(Reorganization) Act, 1971 (“the Reorganization Act” for short) and the proviso to Para 20(2) of the Sixth Schedule which states that no part of the area falling within the Municipality of Shillong shall be deemed to be within the Khasi Hills District and also Section 1(2) of the Act declaring that the Act extends to the tribal areas within the State of Meghalaya as specified in Part II of the Table appended to paragraph 20 of the Sixth Schedule to the Constitution. The learned counsel also takes me to paragraph 20(2) and the proviso thereto and paragraph 20(3) of the Sixth Schedule as originally enacted in the Constitution excluding any areas for the time being comprised within the cantonment and municipality of Shillong, but including so much of the area comprised within the municipality of Shillong as formed part of the Khasi State of Myllem from the Khasi and Jaintia Hills District and to the proviso thereto declaring that no part of the area comprised within the municipality of Shillong shall be deemed to be within the United Khasi-Jaintia Hills District for the purpose of some clauses of paragraphs 8 and 10 of the Sixth Schedule and finally to paragraph 20(3) stating that any reference to the table below to any district (other than the United Khasi-Jaintia Hills District) or administrative area shall be construed as a reference to that district

or area at the commencement of the Constitution. He, therefore, submits that there is no contravention of any provisions of the Act and the Rules framed thereunder in granting the permission in question to the respondent No. 8, and the writ petition is misconceived and has no merit and thus liable to be dismissed.

7. The learned counsel for the respondent No. 7, further invites my attention to the amendment of paragraph 20 by the North Eastern Areas (Reorganization) Act, 1971 declaring that any reference in the Part II of the Table to any district namely, 1. United Khasi-Jaintia Hills District, (2) The Jowai District and (3) Garo Hills District shall be construed as a reference to the territories comprised within the autonomous district of that name existing immediately before the day appointed under clause (b) of section 2 of the North Eastern Areas (Reorganization) Act, 1971 and also to the proviso thereto which provides that no part of the area comprised within the municipality of Shillong shall be deemed to be within the United Khasi-Jaintia Hills District. He finally draws my attention to the Notification dated 14-6-1973 issued by the Governor of Meghalaya substituting the name "United Khasi-Jaintia Hills Districts" by "Khasi Hills District" and "Jaintia Hills District" thereby amending Part II of the Table referred to earlier. According to the learned counsel, a comparative reading of the provisions extracted above unmistakably shows that the area known as European Ward has never been a part of the erstwhile Khasi Hills District or United Khasi-Jaintia Hills District. He also contends that during the pre-Constitution period, two distinct areas came into existence in the Shillong town, namely, the British area of the town, popularly known as the "Normal Shillong" and the "Shillong Administered Area" which formed part of the

Khasi State of Myllem but was comprised in the Shillong Municipality or Cantonment and that the normal Shillong is comprised of European Ward, Police Bazar and Jail Road falling within Ward Nos. 8 to 11 of Shillong Municipality whereas the Shillong Administered Area comprised of that part of Shillong Municipality which belong to the Syiem of Myllem. According to the learned counsel, this is the position which obtains in the case of European Ward, Police Bazar and Jail Road till date, and it is therefore not correct to say that the provisions of the Act and the Rules are applicable to these areas on coming into force thereof. He submits that the writ petition is totally devoid of merits and is thus liable to be dismissed with costs. Mr. R. Kar, the learned counsel for the respondent No. 8 supports the impugned decision and fully endorses the submissions made by the learned Advocate General and Mr. V.G.K. Kynta, the learned counsel for the respondent No. 7 and urges this Court to dismiss the writ petition with compensatory costs for causing vexation to the respondent No. 8.

8. After hearing the learned counsel appearing for the rival parties, the sole question which falls for consideration in this writ petition is whether the provisions of the Act and the Rules are applicable to European Ward where Ferndale Apartment is located. There is no dispute that Ferndale Apartment lies within and forms a part of within European Ward of Shillong Municipality. Undoubtedly, if the provisions of the Act apply to this area, no land can be transferred by a tribal to a non-tribal except with the previous sanction of the competent authority. This takes me to the relevant portions of paragraph 20 of the Sixth Schedule to the Constitution, which reads thus:

“20. **Tribal areas.**- (1) The areas specified in Part I, II, II-A and III of the table below shall respectively be the areas within the State of Assam, the State of Meghalaya, the State of Tripura and the State of Mizoram.

(2) Any reference in Part I, Part II or Part III of the table below to any district shall be construed as a reference to the territories comprised within the autonomous district of that name existing immediately before the day appointed under clause (b) of section 2 of the North-Eastern Areas (Reorganization) Act, 1971:

TABLE
PART II

1. Khasi Hills District.
2. Jaintial Hills District.
3. The Garo Hills District”.

Sub-paragraph (2) of paragraph 20 thus explains that any reference, among others, in Khasi Hills District, Jaintia Hills District and Garo Hills District shall be construed as a reference to the territories comprised within the autonomous district of that name existing immediately before the day appointed under clause (b) of section 2 of the Reorganization Act. Section 5 of the (Reorganization) Act, 1971 deals with the formation of the State of Meghalaya, which says that on and from the appointed day, there shall be formed a new State, to be known as the State of Meghalaya, comprising of (a) the territories which immediately before that day were comprised in the autonomous State of Meghalaya formed under section 3 of the Assam Reorganization (Meghalaya) Act, 1969 and (b) so much of the territories comprised within the cantonment and municipality of Shillong as did not form part of the autonomous State and thereupon the said territories shall cease to be form part of the existing State of Assam. The term “the appointed day” under section 5 means 21-1-1972. This leads

me section 3 of the Assam Reorganization (Meghalaya) Act, 1969, the relevant part whereof reads thus:

“3. Formation of Meghalaya.- (1) On and from the appointed day, there shall be formed within the State of Assam an autonomous State to be known as Meghalaya which shall subject to the provisions of sub-section (2), comprise the following tribal areas, namely:-

(i) The United Khasi-Jaintia Hills District as described in sub-paragraph (2) of paragraph 20 of the Sixth Schedule to the Constitution (exclusive of the proviso thereto) but excluding the areas transferred to the Mikir Hills autonomous district by the notification of the Government of Assam No. TAD/R/31/50/149 dated 13th April, 1951, and

(ii) The Garo Hills District specified in Part A of the table appended to paragraph 20 aforesaid”.

The “appointed date” referred to therein is “2-4-1970”. At this stage, it may be noted that by the Notification dated 14-6-1973 issued by the Governor of Meghalaya, the words “United Khasi-Jaintia Hills Districts” occurring at the end of the proviso to sub-paragraph (2) of paragraph 20 stood substituted by “Khasi Hills District” and “Jaintia Hills District”. As sub-paragraph (2) of paragraph 20 referred to in the Assam Reorganization (Meghalaya) Act, 1969 is obviously the provisions of the Sixth Schedule as first enacted, it will be illuminating to reproduce the relevant portions thereof below:

“20. Tribal areas.- (1) The areas specified in Part A and B of the table below shall the tribal areas within the State of Assam.

(2) The United Khasi-Jaintia Hills District shall comprise the territories which before the commencement of this Constitution were known as the Khasi States and the Khasi and Jaintia Hills District, excluding any areas for the time being comprised within the cantonment and municipality of Shillong, but including so much of the area comprised within the municipality of Shillong as formed part of the Khasi State of Mylliem”.

9. A comparative reading of the provisions of the three enactments extracted above unmistakably shows that the cantonment

and municipality of Shillong except so much of the area comprised within the municipality of Shillong which formed a part of the Khasi State of Myllem were excluded from the erstwhile Khasi-Jaintia Hills. After the constitution of Assam into Chief Commissionership in February, 1874, the Assam Secretariat was shifted to Shillong, which became the capital of the new Province on 20-3-1874. With the selection of Shillong as the capital, the need for extension was felt. The Government decided to have areas of Mawkhar and Laban which were situated beyond British territory to be included within the jurisdiction of Shillong Station, as Shillong had become by 1878 under the provisions of the Bengal Municipal Act, 1876. An agreement with Hain Manik, Syiem of Myllem was executed on 15-11-1878 for including Mawkhar and Laban within the Municipality of Shillong subject, however, to the condition that his proprietary and manorial rights and his authority as Syiem within such villages otherwise than necessary to be waived for the purpose of Municipality should not be interfered with. In other words, except for the purpose of Municipality, the Syiem of Myllem did not surrender his ownership of these two villages. It was not until 1910 that Shillong attained full fledged status of Municipality under the Bengal Municipal Act, 1884. Thereafter, the Syiem of Myllem by the agreement dated 9-8-1913 agreed to the extension of this Act to some other areas under him, namely, Malki, Laitumkhrah, Jhalupara and Mawprem. In course of time, the Syiem of Myllem had conceded jurisdiction to the British Government over some other territories also for the purpose of municipal administration (vide the notification No. 44-1, dated 16th January, 1934). From this Notification it also appears that the villages named therein became part of the Shillong Administered Area Municipality. The Notification Nos. 164-1B and 165-

1B both dated 18-8-1937 had defined “Shillong Administered Area” to mean “all areas outside British India in which the Municipal Board of Shillong or the Cantonment Authority for the time being exercised jurisdiction.” – See Justice BL Hansaria’s “Sixth Schedule to the Constitution”, 2nd Edn., at pp. 158-160.”

10. What has emerged from the foregoing discussions is that two distinct areas came into existence during the pre-constitution era, namely:- (a) The British area of the town, popularly known as the “Normal Shillong”; which included European Ward as the name itself would suggest and (b) The Shillong Administered Area” which formed a part of the Khasi State of Myllem but was comprised in the Shillong Municipality. The District Council of East Khasi Hills District does not exercise any power or jurisdiction over normal Shillong by virtue of clause (2) of para 20 of the Sixth Schedule, which excluded “any areas for the time being comprised within the cantonment and municipality of Shillong” from the tribal areas. The normal Shillong is comprised of European Ward, Police Bazar and Jail Road falling in Ward Nos. 8 to 11 of Shillong Municipality, while Shillong Administered Area comprised of that part of Shillong Municipality for the purpose of municipal administration such as Laitumkhrah, Malki, Mawkhar, Jaiaw, Mawprem, Kenches Trace, Laban and Lumparing falling in Ward Nos. 1 to 7 and 12 to 27 of the Shillong Municipality. In other words, though these areas comprised in the Municipality of Shillong for the purpose of municipal administration, they are still governed by the laws and rules framed by the District Council for other purposes. The Shillong Administered Area thus has a dual personality. In the instant case, we are, however, concerned with the apartments located at European

Ward. There is thus no doubt that the flats at Ferndale Compound, M.G. Road falls within European Ward which, in turn, lies within and forms a part of what is known as “Normal Shillong” and not a part of tribal areas. Section 1(2) of the Act provides that the Act extends to the tribal areas within the State of Meghalaya as specified in Part II of the Table appended to paragraph 20 of the Sixth Schedule to the Constitution. As the flats at Ferndale Compound are found to be located at European Ward, which is within the normal Shillong and not within the tribal areas, I hold that the provisions of the Meghalaya Transfer of Land (Regulation) Act, 1971 and the rules made thereunder are not applicable to this area. Therefore, there is no infirmity in the impugned decision of the State-respondents contained in the letter dated 9-12-2009 communicated by the respondent No. 4 allowing the transfer by the respondent No. 7 of the flat in question in favour of the respondent No.8.

11. Coming now to the contention of the learned counsel for the petitioner that as no law regulating transfer of flats has been enacted by the State-respondents, such transfer shall have to be governed by the provisions of Act and the Rules, more so, when flats are embedded/attached to earth coming within the sweep of the term “land” under Section 2(b) of the Act. The term “land” is defined by Section 2(b) to include immovable property of every description and any rights in or over such property. There can be no quarrel with the proposition of law that flats are embedded or attached to earth and are thus coming within the purview of the term “land” under Section 2(b). There is nothing in the above definition of “land” to suggest that the building or the flats without the land underneath it, are not lands as they are

embedded or attached to the land, or, at any rate, they are attached to what is embedded to earth/land. The land and the flats can be sold out separately. Therefore, the absence of any law regulating the transfer of flats and apartments cannot have the effect of shifting the location of these flats and apartments from the European Ward to tribal areas or Shillong Administered areas so as to attract the mischief of the provisions of the Meghalaya Transfer of Land (Regulation) Act, 1971. Therefore, this contention of the learned counsel for the petitioner has also no merit and fails.

12. The upshot of the foregoing discussion is that this writ petition, bereft of merits, is hereby dismissed. However, on the facts and in the circumstances of the case, the parties are directed to bear their respective costs. Interim order, if any, stands vacated.

JUDGE

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