



THE HIGH COURT OF SIKKIM : GANGTOK
(Civil Appellate Jurisdiction)

DATED : 11.06.2013

CORAM

**HON'BLE THE CHIEF JUSTICE
MR. JUSTICE PIUS C. KURIAKOSE**

F.A.O. No. 3 of 2012

1. Smt. Pabitra Chhetri @ Pabitra Maya Chhetri
@ Pabitra Kumari Chettri @ Pabi Maya Chettri,
Wife of late Gopal Chettri,
Resident of 7th Mile, Samdur Busty,
P.O. and P.S. Ranipool,
East Sikkim.
2. Shri Amber Bahadur Chettri,
Son of late Gopal Chettri,
Resident of 7th Mile, Samdur Busty,
P.O. and P.S. Ranipool,
East Sikkim.
3. Shri Madan Kumar Chettri,
Son of late Gopal Chettri,
Resident of 7th Mile, Samdur Busty,
P.O. and P.S. Ranipool,
East Sikkim.

..... **Appellants.**

- versus -

1. Shri Shiva Bahadur Dahal,
Son of late Ratna Bahadur Dahal,
Resident of 7th Mile, Samdur Busty,
P.O. and P.S. Ranipool,
East Sikkim.



2. Shri Damber Chettri,
Son of late Gopal Chettri (Poudyal),
Resident of Aho Busty,
P.O. and P.S. Ranipool,
East Sikkim.
3. The Sub-Divisional Magistrate/Gangtok,
District Administrative Centre,
East Sikkim.
4. The District Collector/East,
District Administrative Centre,
East Sikkim.
5. The Secretary,
Land Revenue & Disaster Management
Department,
Government of Sikkim,
East Sikkim. **Respondents.**

For Appellants : M/s. N. Rai, Sr. Advocate with Jyoti Kharka and
Sushant Subba, Advocates.

For Respondent : M/s. S. S. Hamal and Tashi Wongdi Bhutia,
Advocates for respondent No.1.

M/s. J.B. Pradhan, Addl. Advocate General with
S. K. Chettri, Asstt. Govt. Advocate for the
State-respondents No.3, 4 and 5.

J U D G M E N T

Pius, CJ

This First Appeal from Order is preferred by Defendants No. 1, 3 and 4 in Title Suit No. 09/2012 on the files of the District Court, Special Division-II, East Sikkim at Gangtok challenging the final order passed by the learned District Judge in an application for temporary injunction filed by the first



respondent/plaintiff. The appellant No. 1, the first defendant is no more and all her legal heirs are already on the array of parties. The parties are hereinafter referred to for convenience as appellants/defendants and first respondent/plaintiff respectively.

2. The facts pertaining to the case have been narrated in detail by the learned District Judge in the impugned order and therefore I do not venture to narrate them in detail over again. In brief, the case of the respondent/plaintiff is that he is the son of late Ratna Bahadur Dahal and the first defendant, since deceased, is the second eldest daughter of late Ratna Bahadur Dahal and other three defendants are the three sons of the first defendant born to her in two different marriages. The plaintiff's father owned extensive properties at 7th mile, Samdur Block, East Sikkim including 0.8460 Hectares land in Plot No. 336 and plaintiff's father had gifted out 0.1330 Hectares from out of those properties to the first defendant in the year 1990. On the basis of the above gift deed, the defendant No. 1 in her turn gifted portions of her properties in favour of her sons, Defendants No. 3 and 4. According to the plaintiff the fourth defendant (appellant No. 3) claiming himself to be the owner of the land on the basis of the above registered



gift deed executed by his mother started constructing an RCC building illegally encroaching upon the land measuring 0.0060 Hectares forming part of Plot No. 336 belonging to the plaintiff. It is the above extent that 0.0060 Hectares of land claimed by the plaintiff to be his property allegedly trespassed upon by the 3rd defendant and whereupon he is putting up a RCC building that is described as the suit property (according to the learned District Judge in the impugned order). The plaintiff sought for temporary injunction restraining further constructions.

3. A perusal of the plaint which show that the suit property is described as two different items. The first item Schedule – ‘A’ extending to 2944 sft. on road reserve land and the second item described in Schedule – ‘B’ is a strip of land measuring 128’ x 30’ (3840 sft.) forming portion of original plot No. 336 located 50’ from the centre of National Highway 31-A with one existing Ekra house therein within four given boundaries. I feel that the learned District Judge in the impugned order became inclined to refer to 0.0060 Hectares of land allegedly forming part of plot No. 336 as suit property as it became clear from the documents produced that the bone of contention between the plaintiff and the third defendant was the above portion of 0.0060 Hectares only.



4. The injunction sought for was resisted by the appellants contending that they are not encroachers either on the plaintiff's property or on the National Highway road reserve and contending further that the RCC building is being constructed by the third appellant on his own property on the strength of plan duly approved by the relevant statutory authority on the basis of lawful enquiry conducted in that regard. It was contended that very valuable building materials such as cement and steel have been collected by the third appellant for completing the construction and if order of injunction is passed irreparable damages will be occasioned to the third appellant. It was also contended that all the three main considerations to govern the Courts while exercising the discretion in the matter of granting temporary injunction were in favour of the third appellant.

5. As many as 21 documents which were produced by the first respondent/plaintiff along with the suit were marked on the side of the plaintiff in support of the plaint and equal numbers of documents were produced on the side of the defendant/appellant also. The learned District Judge on evaluating the documents produced by the parties and hearing



the counsel of both the sides would confirm the order of ad-interim injunction which had been passed initially and it is that order which is challenged in this appeal by the present appellants on various grounds.

6. I have heard the submissions of Mr. N. Rai, learned senior counsel for the appellants and those of Mr. S.S. Hamal, learned counsel for the contesting first respondent. I have also heard Mr. J.B. Pradhan, learned Additional Advocate General, who appeared for the State and public officers. The submission of Mr. Pradhan was only that the right of the Government and the National Highway Authorities to initiate appropriate action for removal of encroachment in the event of the constructions being made by the third appellant found to be illegal should not be foreclosed.

7. Making elaborate submission on the basis of various grounds raised in the memorandum of appeal, Mr. N. Rai submitted that considerations of prima facie case, balance of convenience and irreparable injury which were the 3 paramount considerations to be taken into account for granting temporary injunction were not taken into account at all by the Court below and according to the learned senior counsel the impugned order



is *per se* vitiated. The learned senior counsel also submitted that the third appellant and the first respondent who are close relatives are adjacent neighbours also. It is under the very eyes of the first respondent/plaintiff that the 3rd appellant commenced and continued with the construction. The first respondent/plaintiff did not raise even a little finger against the construction till the roof slab of the 3rd floor was constructed. Learned senior counsel submitted that the first respondent/plaintiff would in fact visit the construction site every now and then and would give advice to the 3rd appellant regarding the ongoing construction. It was only on 30.06.2011 that the first respondent/plaintiff submitted the complaint to the Sub Divisional Magistrate alleging that the ongoing construction encroached into National Highway and also into a portion of the first respondent's private property. The SDM initially passed an order of stay/injunction restraining the construction. Later after enquiry the order of stay was vacated and the 3rd appellant continued with the construction. It was then that first respondent went to the civil court and filed the title suit and obtained interim order of injunction. The learned counsel highlighted that the fact that the third appellant has no physical possession of the site where



construction is now going on was obvious and almost admitted. The learned counsel further submitted that the fact that the construction had progressed to a considerable extent was also obvious. If this be the situation the aspect of prima facie case and balance of convenience had to be answered in favour of the defendants only. Value of the building materials and construction cost is sky-rocketing every day and continuance of injunction order is putting the third appellant to irreparable injury. The learned counsel submitted that if the suit is finally decreed in favour of the respondent plaintiff he can recover not only the land allegedly trespassed upon but also the building illegally constructed by the third appellant thereon.

8. Read my following order dated 10.06.2013 passed in the above FAO as part of this order.

"Heard Mr. N. Rai, learned senior counsel for the appellants in full. Heard Mr. S.S. Hamal, learned counsel for the contesting respondents/plaintiffs in part.

During the course of his submission, Mr. Rai, learned senior counsel for the appellant told me in response to a query posed by me that if after trial the Court comes to the conclusion that the constructions which are being made by the 4th defendant/ appellant No. 3, are upon the properties which are liable to be recovered by the plaintiffs/respondents, the 4th defendant/appellant No. 3 will be ready to surrender not only the land upon which the constructions are being made but also those constructions made by appellant No. 3 on such land.

The 4th defendant/ appellant No. 3 is before me. He was specifically asked by me in his mother tongue (Nepali) through the Court Officer (Mrs. Nina Kunwar, Addl. Registrar-cum-Sr. Reader) as to whether he will be ready and willing to surrender not only the land trespassed upon by him but also the construction put up by him on such land, in the event of the trial Court coming to a conclusion after the trial that he had encroached upon land



belonging to the plaintiffs and put up construction thereon, the 4th defendant answered that in such an event he will be ready and willing to surrender not only the land trespassed by him but also the construction put up by him on such land.

Post tomorrow (11.06.2013) for further hearing of learned counsel for the contesting respondents. "

9. Mr. Rai would fortify his submission by citing various decisions such as judgments of Hon'ble Supreme Court in ***Terene Traders vs. Rameshchandra Jamnadas & Co. and another : AIR 1987 SC 1492***; ***M. Kallappa Setty vs. M.V. Lakshminarayana Rao : AIR 1972 SC 2299***; Judgment of Rajasthan High Court in ***Associated Cement Companies Ltd. vs. The State of Rajasthan and another : AIR 1981 Rajasthan 133***; Judgment of Allahabad High Court in ***Hari Das Singh vs. Commissioner Agra Division, Agra and others : AIR 2000 Allahabad 279***; and also Judgment of Orissa High Court in ***Padmanava Choudhury vs. Debendra Kumar Mohanty : AIR 2011 Orissa 155***. Learned senior counsel requested that the order of injunction be vacated and the third appellant be directed to continue with the construction subject to final outcome of the suit.

10. Mr. Hamal, learned counsel for the contesting first respondent would resist all the submissions of Mr. Rai. At the very outset Mr. Hamal submitted that this is a case where the



learned District Judge had chosen to exercise his judicial discretion in favour of granting injunction against the third appellant. The exercise of such discretion is to be interfered with lightly by this Court sitting in appeal. Learned counsel submitted that it is not at all correct to say that the plaintiff is guilty of acquiescence and latches. Once it was noticed that the construction undertaken by the third appellant was encroaching into road reserve and also into first respondent's own property, the first respondent readily filed a complaint before the SDM. Drawing my attention to the order passed by the SDM, Mr. Hamal submitted that it was found by the learned SDM that the title document on the strength of which the third appellant was now carrying on construction suffered from vital mistake and the direction had been issued for getting those mistakes corrected. The third appellant cannot be permitted to continue with the construction now started. Such constructions do encroach not only upon the first respondent's property but also into National Highway. Prima facie case is clearly made out through the documents produced by the first respondent and particularly by the findings entered by the SDM, which are to the effect that the title document of the third appellant suffers from serious mistake and infirmities. Permitting the



third appellant to continue with the construction will be permitting him to perpetrate the illegality which he started and this may not be allowed. Mr. Hamal also submitted that nobody sustains any injury and much less irreparable injury by not being permitted to carry on an illegality.

11. I have given my anxious consideration to the rival submissions addressed at the bar. The lower court records are available and I have gone through the same. I have kept in mind the ratio emerging from the precedent cited by Mr. N. Rai and also other precedents governing the issue of grant of temporary injunction under Rules 1 and 2 of Order XXXIX CPC. Leaving apart the technical contentions raised on either side, the core issue is whether the order of injunction which is impugned before me is sustainable on the touchstone of consideration of prima facie case, balance of convenience and irreparable injury which are paramount in the matter of grant of temporary injunction.

12. The suit filed by the first respondent is a very comprehensive one seeking as many as 20 reliefs including reliefs No. (b) (c) and (d) which are as follows: -



- "(b) For a decree for restoration of khas possession of the suit land to the plaintiff located 50ft of road reserve area from the centre of NH-31"A";
- (c) For a decree declaring that the defendant no. 1, 3 and 4 shall quit and vacate the suit land in favour of plaintiff and shall remove and/or dismantle any RCC structure or structure built by them in the suit land at their own cost and peril;
- (d) For a decree declaring that the RCC building constructed by the defendant no. 4 falls within the portion of 50ft. road reserve area and in the portion of suit land which is both illegal and unauthorized and he shall remove and/or dismantle the same there from at their own cost and peril;"

In other words, if the first respondent succeeds in the suit he will be entitled to recover the possession of the entire extent of his land allegedly encroached upon by the third appellant and also will become entitled to have the illegal construction put up by the third appellant upon his land, be removed through process of court.

13. I am not now concerned with the merits of the rival contentions raised by the parties in the suit or with eligibility of the first respondent for the above 3 reliefs or other reliefs claimed in the suit. In the present appeal, I am only concerned with the question whether the ad-interim injunction which is now passed against the appellant ought to continue. I am inclined to answer the above question in favour of the appellant. As already indicated the first consideration is the consideration of prima facie case. May be it is on the first respondent's property also that the third respondent is now



carrying out the construction but it is clear from the documents placed on record that as on the date of commencement of the suit the third appellant was having khas possession – actual physical control over the site where he started the construction. That the statutory authority granted approval to the plan obviously after holding necessary local inspection, is a circumstance of considerable moment in this context. Even the first respondent had conceded in the complaint submitted to the SDM that much prior to filing of suit the third respondent had started the construction. The very circumstance that the first respondent has sought for recovery of possession and also for dismantling the illegal construction amounts to a concession from the first respondent that the construction had actually started when the *lis* commenced. It cannot be disputed that construction of an RCC building is a very costly and expensive venture and that building materials like cement and steel are likely to perish and deteriorate in value unless utilized promptly. In other words I am of the view that this is a case where the consideration of prima facie case and balance of convenience should have been answered in favour of the third appellant.



14. Coming to the question of irreparable injury, in my view, in view of the specific assurance given to this Court by the third appellant (who is being directed to swear to an affidavit regarding the above assurance) that in the event of decree of restoration of possession being granted to the first respondent, the first respondent can recover not only the entire land of first respondent found by the court to be trespassed upon by the third appellant but also all the constructions put up by the third appellant on such land as though such constructions were natural accretion to the first respondent's land, the first respondent cannot have any legitimate grievance that by vacating the injunction order and permitting the third appellant to continue with the construction he will sustain irreparable injury.

15. Result of the above discussion is that the impugned order is set aside. The order of injunction is vacated. The third appellant can continue with the construction on the basis of the approved plan which he holds now. This order vacating the injunction order will be subject to the following directions and observations:

- (i) The third appellant shall file an affidavit with seven days from today undertaking in clear terms that in case the trial court finds after trial that the construction made by him are upon the property to which the first respondent is entitled and the court also finds that the first respondent is entitled to recover possession of such land the first respondent can recover not only the land but also the construction put up by the 3rd appellant as though the same as natural accretion to the land.
- (ii) This order vacating the injunction granted by the Court below will not stand in the way of the Government (Central or State) and any other competent authority to take action for removal of encroachment, if any, of national highway.

16. I make it clear that this judgment will operate only when affidavit as directed above is filed by the third appellant.

(Pius C. Kuriakose)
Chief Justice
 11.06.2013

Approved for reporting : Yes / No

Internet : Yes / No

pm/jk