

THE HIGH COURT OF MEGHALAYA

WA No.2/2012

In WP(C)No.415/2010

1. The State of Meghalaya represented by the Secretary, Public Works Department, (PWD), Govt. of Meghalaya, Shillong.
2. The Chief Engineer (Buildings) Public Works Department (PWD), Govt. of Meghalaya, Shillong. :::: Appellants

-Vs-

1. Shri. B.K. Dey Sawian,
Bungalow No.60, NBCC,
New Moti Bagh,
New Delhi-110023. :::: Respondent
2. The State of Meghalaya through the
Principal Secretary, Revenue & Disaster Management
Department, Govt. of Meghalaya, Shillong.
3. The Deputy Commissioner,
East Khasi Hills District, Shillong.
4. The Additional Director of Surveys,
Govt. of Meghalaya, Lower Lachumiere,
Shillong. :::: Proforma Respondents

BEFORE

THE HON'BLE MR JUSTICE T NANDAKUMAR SINGH

THE HON'BLE MR. JUSTICE S R SEN

For the Appellants : Mr. K Khan, Addl. Sr. GA

For the Respondents : Mr. HS Thangkhiew, Sr. Adv
Mr. N Mozika, Adv

Date of hearing : **18.07.2014**

Date of Judgment & Order : **30.07.2014**

JUDGMENT AND ORDER

(Justice T. Nandakumar Singh)

This writ appeal filed by the appellants/respondents 1 - 5 in the writ petition is directed against the judgment and order of the learned Single Judge dated 23.09.2011 passed in WP(C)No.(SH)415/2010 filed by the respondent No.1/writ petitioner wherein and where-under, the learned Single Judge inspite of clear indication that the facts of the respondent No.1/writ petitioner's case in the writ petition are clearly disputed by the respondent No.3 i.e. the Additional Director of Survey, Govt. of Meghalaya in his counter affidavit and also by the respondent No.4 i.e. the Secretary, Public Works Department (PWD), Govt. of Meghalaya and the respondent No.5 i.e. the Chief Engineer (Building), Public Works Department (PWD), Govt. of Meghalaya in their counter affidavits, allowed the writ petition by directing the respondent No.3 to demarcate plot No.18 recorded in the name of the respondent No.1/writ petitioner in accordance with the findings of the respondent No.2 in his letter dated 11.05.2010 (Annexure-P-23 to the writ petition) and thereafter, take necessary and appropriate action for restoring that portion of the plot found to be encroached upon by the PWD in favour of the respondent No.1/writ petitioner and also that necessary and consequential amendment shall be made by the respondent No.2 in the Renewed Lease Deed dated 08.05.2008 in respect of the plot in question after taking into account the encroached portion.

2. Heard Mr. K Khan, learned Addl. Sr.GA appearing for the appellants/respondents and Mr. HS Thangkhiew, learned senior counsel assisted by Mr. N Mozika, learned counsel for the respondentNo.1/writ petitioner.

3. After taking into consideration of the serious disputed questions of fact in the present writ petition, we, from the beginning, are unable to persuade ourselves to endorse the *prima facie* findings of the learned Single Judge in the impugned judgment and order dated 23.09.2011 that in the absence of denial by the State Govt., the respondent No.1/writ petitioner made out a *prima facie* case that the PWD department i.e. respondent No.5 had encroached a portion of plot No.18 of the respondent No.1/writ petitioner. Only on this score, the judgment and order of the learned Single Judge dated 23.09.2011 passed in WP(C)No.(SH)415/2010 is called for interference. It is the case of the respondent No.1/writ petitioner pleaded in the writ petition that he is the owner of plot of land which was acquired by him through family arrangement, and was mutated in his name vide order dated 05.07.1990 of the Extra Assistant Commissioner (Revenue), Shillong in Mutation Case No.19 of 1990. The respondent No.1/writ petitioner himself admitted in his writ petition that in the mutation order, it was remarked that the plot measures more or less 1 (one) acre in the European Ward covered by a 99 year lease. In such circumstances, it is not known to us, under what circumstances and under what materials, the respondent No.1/writ petitioner, who himself admitted that the area of his land i.e. plot No.18 measures more or less 1 (one) acre, asserted that area of his plot i.e. plot No.18 should be 1 (one) acre. It is also stated in the writ petition that while the respondent No.1/writ petitioner was away on deputation between 1988 and 1993, he had received reports from well-wishers that there were encroachments on the plot from the end of PWD quarters covered by plot No.19 adjoining the western boundary of the plot. In the writ petition, the respondent No.1/writ petitioner further claims that where the PWD quarters are currently located were shown as the “southern boundary” of plot No.18, while the more recent official records and survey maps show the same area as the “western boundary”.

4. On 04.04.1997, the respondent No.1/writ petitioner while on visit to the plot noticed that there were fresh encroachments by the PWD on the plot from the side of the PWD quarters as evident from the fencing put up around the encroached area. This was immediately brought to the notice of the respondent No.2 vide his letter dated 05.04.1997 with the request for the second time to depute his officers to demarcate the boundary of the plot. The respondent No.1/writ petitioner also admitted that he had sold out some portions of his land i.e. plot No.18 to one Shri.Pardunan Kr. Singha and that portion of land is plotted as plot No.18-A. It is further stated in the writ petition that the said plot i.e. plot No.18-A has an area of 6,700 sq.ft. The respondent No.1/writ petitioner had further stated that due to financial compulsions, he had caused a wall to be constructed around the undisputed 32,000 sq.ft. of the plot to prevent further encroachments by the PWD and sold the same to Karbi Anglong Autonomous District Council on or about December, 2006 and the said portion had again plotted as plot No.18-B. After selling out those portions, the respondent No.1/writ petitioner made a hypothetical calculation, by assuming his original plot of land should be 1 (one) acre, that the remaining portions of his land i.e. plot No.18 should be 0.846 acre and the PWD encroached upon his plot to the extent of 0.174 acre (7,588 sq.ft.).

5. Respondents No.4 & 5 had filed affidavit-in-opposition wherein, it is stated that the PWD quarters originally of Assam Type in nature had been in existence before Meghalaya attained Statehood. It is also stated that the area as claimed by the respondent No.1/writ petitioner measures more or less 1 (one) acre. Therefore, the respondent No.1/writ petitioner does not know the exact area of his plot of land i.e. plot No.18. After more than a decade of passing the mutation order dated 05.07.1990, the respondent No.1/writ petitioner started claiming that the exact area of his plot of land is 1 (one) acre. The wall of the western boundary of the respondent No.1/writ

petitioner's plot of land was constructed by the respondent No.1/writ petitioner himself and also several times during the joint inspections, the respondent No.1/writ petitioner himself claimed that the section of the walls marked A to B and B to C was constructed by him and also the respondent No.1/writ petitioner agreed to the joint survey and demarcation conducted by the Director of Land Records and Survey (DLRS). The PWD stated that based on the record furnished by the Director of Land Records and Survey and map showing plot No.18 and 19 at European Ward the exact area and boundary of the PWD plot of land had been determined and decided in the joint survey on several occasions and as such, there is absolutely no question of encroaching any part or portion of the land of the respondent No.1/writ petitioner i.e. plot No.18. The respondent No.1/writ petitioner himself has to ascertain in the field, what are the exact areas of plot No.18-A and 18-B respectively sold by him.

6. It is also reiterated in the affidavit-in-opposition filed by the respondents No.4 & 5 that the respondent No.1/writ petitioner does not have proper idea of the boundary of his own plot of land. Moreover, the wall of Pine Mount School (plot No.17) had been in existence before Meghalaya attained Statehood. In para 17 of the affidavit-in-opposition filed by the respondents No.4 & 5 stated that in the original map, the area of plot No.19 is 0.348 acre, whereas in the printed copy is 0.233 acre. This shows that PWD had originally acquired a land measuring 0.348 acre. The survey map furnished by the Director of Land Records and Survey (DLRS) vide map season September, 2009 of plot No.19 shows that PWD is also having short of land. The PWD does not interfere anything on the boundary wall of the respondent No.1/writ petitioner. It is also categorically stated that the boundary wall of the plot of land of the PWD was constructed within the

knowledge of the respondent No.1/writ petitioner. Paras 9, 10 & 13 of the impugned judgment and order dated 23.09.2011 read as follows:-

“9. The writ petition is contested by the respondent No. 3 and the Public Works Department by filing their respective affidavits-in-opposition. At the outset, it is pleaded by the respondent No. 3 that the writ petition involves purely a civil dispute, which cannot be agitated under Article 226 of the Constitution and that the petitioner has an alternative remedy of approaching a civil court for determination of his right to the land in dispute. As per the request of the respondent No. 2 vide his letter dated 14-7-1994, the answering respondent identified the boundary of the plot on the basis of the map surveyed in 1963-64 and the survey report was furnished to the office of the Deputy Commissioner, Revenue vide the letter dated 2-12-1994. In the year 1997, another survey was conducted for the plot in question and plot No. 19 and the result of the survey was forwarded to the Addl. Deputy Commissioner, Revenue vide the letter dated 7-7-1997. The Addl. Deputy Commissioner, Revenue, East Khasi Hills District by his letter dated 19-7-1997 again requested the answering respondent to demarcate the lands as per the survey map season of 1963-64. The answering respondent again vide his letter dated 31-7-1997 informed the Addl. Deputy Commissioner, Revenue that an area of 3213 sq.ft. or 0.794 acre belonging to the petitioner had been demarcated on the ground as per the map of 1963-64 in the presence of the representative of the petitioner and the representative of the Addl. Deputy Commissioner, Revenue. The Addl. Deputy Commissioner, Revenue by his letter dated 2-8-1997 informed the answering respondent that as per the record of respondent 2, the area of the plot is 36,860 sq. ft., the area of plot No. 18A being 6,700 sq. ft., the area of plot No. 19 as 0.233 acre, whereas the area of plot No. 17 is 0.969 acre. In terms of the said letter, the plot of the petitioner is having an area of 0.672 acre or 29,272 sq. ft. and has been encroached either from plot No. 17 or plot No. 19. The Addl. Deputy Commissioner accordingly requested the answering respondent to conduct survey of and demarcate plot No. 18 measuring 36,860 sq. ft. on the ground keeping the area of the land intact to the extent possible. The Addl. Deputy Commissioner vide his letter dated 12-9-1997 requested the office of the respondent No. 3 to fix the date for demarcation of the land as per the boundary coloured in yellow of the survey map and the boundary between the plot and plot No. 19 was accordingly demarcated on 30-9-1997 as per the boundary in yellow map and the survey report submitted to the Addl. Deputy Commissioner on 18-10-1997. Again, in the year 2008 and also in the 2009, surveys were conducted and demarcation of the boundary between the plot and plot No. 19 were done and a report whereof submitted. When no concrete result came out from all these exercises, this writ petition is now filed by the petitioner.”

10. In the affidavit-in-opposition of the P.W.D. Meghalaya, it is asserted that the PWD quarters are originally of Assam type in nature and since they have been in existence before Meghalaya attained Statehood, the question of encroachment by the Department adjoining the western boundary of the petitioner's property marked as A to B

and B and C as per site plan of the PWD quarters does not arise. According to the answering respondent, on the basis of the survey and demarcation conducted by the respondent No. 3 pursuant to the letter dated 14-7-1994, it is self-evident that the wall of the western boundary (marked as A to B and B to C) was constructed by the petitioner and also several times during the joint inspection, he himself claimed that the said walls were constructed by him and that as per the map there is also an approach road leading towards his land and a portion of his land might have been included in the said approach road. It is denied that the PWD had tempered with a copy of the letter dated 5-4-1997 of the petitioner to DC and asserted that the Department relied on the record furnished by the Director of Land Records and Survey (DLRS), and he should have pointed out the boundary of his plot at the time of survey and demarcation. According to the answering respondent, the fact that the petitioner claimed that the encroachment was either from plot No. 17 or Plot No. 19 evidently shows that he himself does not have any proper idea of the boundary of his own plot: moreover, the wall of Pine Mount School (plot No. 17) had been in existence before Meghalaya attained Statehood. It is also stated that the land area as directed by the Addl. Deputy Commissioner in his letter dated 2-8-1997 cannot be kept intact as all the area of different plots is based on the survey conducted by the Director of Land Records and Survey (DLRS). It is also pleaded that as stated by the petitioner, as per the original map, the area of plot No. 19 is 0.348 acre whereas it is shown as 0.233 acre in the printed copy, which shows that PWD had originally acquired a land measuring 0.348 acre and that the Department is also short of land. It is categorically asserted by the answering respondent that the minutes of the joint inspection held on 30-4-2010 was only the report of the joint inspection and that the representatives of the DLRS refused to sign the minutes of the joint inspection and that the Department is not occupying any land contrary to the land records maintained by the Government contrary to the claim of the petitioner. Finally, it is contended that plot No. 19 belongs to PWD quarters and that the survey report submitted by the Director of Land Records and Survey (DLRS) is final and resurvey of the plot and plot No. 19 does not arise. The writ petition, it submitted, is without merits and is liable to be dismissed.

13. There is nothing on record to show that the aforesaid conclusions of the Deputy Commissioner, East Khasi Hills District are disputed by the State-respondents. I have earlier extensively reproduced the affidavit-in-opposition filed by the Revenue Department and I have read and re-read the same to ascertain the exact stance taken by them, but I am unable to do so: to say the least, the affidavit-in-opposition is conspicuous by its ambiguity. This left me with no alternative but to adjourn the hearing of the case and direct the P.W.D. authorities to file their affidavit-in-opposition, which they did subsequently. Even after this, the respondent authorities do not materially improve their case. On the contrary, the affidavit-in-opposition filed by the PWD appears to be a half-hearted attempt to defend their case but without substantiating their allegations with supporting documents. True, the observations made by the Deputy Commissioner on the basis of the minutes of the meeting held on 30-4-2010 are not final and are not binding upon the State Government. However, in the absence of their denial by the State Government,

these observations can be given weightage by way of prima facie evidence. Once a prima facie case is made out by the petitioner, the onus shifts to the respondent to rebut the prima facie case of the petitioner. In fact, I am again constrained to observe that no substantial dispute is raised by either the PWD or the Revenue Department on findings of the respondent No. 2 in the letter dated 11-5-2010 nor is the same repudiated or disowned by the remaining respondents. Having failed to rebut the prima facie case of the petitioner, I have no alternative but to hold that a case for demarcation of the plot in question in terms of the findings of the Deputy Commissioner, East Khasi Hills in his letter dated 11-5-2010 for restoration of the portion of the plot encroached upon by the PWD to the petitioner.”

7. From the record, it is clear that there is no so called affidavit-in-opposition filed by the Revenue Department, but the learned Single Judge in Para 13 of the impugned judgment and order dated 23.09.2011, stated that the learned Single Judge read and re-read the affidavit-in-opposition filed by the Revenue Department, which is actually non-existence. The Deputy Commissioner under his letter dated 11.05.2010, after making certain observations, simply requested the Govt. to direct the concerned department for the restoration of the shortfall in the area of the land of the respondent No.1/writ petitioner i.e. plot No.18. The Deputy Commissioner (Revenue) cannot direct the State Govt. to take decision in the manner decided by the Deputy Commissioner. It is the Govt., who has to take its own decision. Therefore, the Govt. after considering the said letter of the Deputy Commissioner (Revenue) dated 11.05.2010, had directed the Deputy Commissioner, East Khasi Hills District to re-examine the matter again under the letter of the Under Secretary to the Govt. of Meghalaya, Revenue & Disaster Management Department dated 25.08.2010, which reads as follows:-

“GOVERNMENT OF MEGHALAYA
REVENUE & DISASTER MANAGEMENT DEPARTMENT.

No.RDS.114/2008/100 Dated Shillong, the 25th August, 2010.

*From: Smti. S.R. Wallang,
Under Secretary to the Govt. of Meghalaya,
Revenue & Disaster Management Department.*

To,

*The Deputy Commissioner,
East Khasi Hills District,
Shillong.*

*Subject: Matter relating to Plot No.18 located at European Ward,
near Pine Mount School, Shillong.*

Reference: No.RDS.114/2008/99, Dated 16.8.2010

Sir,

I am directed to invite a reference to the letter cited above and to request you to re-examine the matter again as per decision taken in the review meeting of the NLRMP held on the 18.8.2010 in the Committee Room III, Addl. Secretariat, Building.

A report may be sent to this Department at the earliest possible.

Yours faithfully,

Sd/-

*Under Secretary to the Govt. of Meghalaya,
Revenue & Disaster Management Department."*

8. The learned Single Judge while passing the impugned judgment and order dated 23.09.2011 in WP(C)No.(SH)415/2010, had lost sight of the said letter/directions of the Govt. of Meghalaya dated 25.08.2010. The learned Single Judge by the impugned judgment and order dated 23.09.2011 issued the writ of mandamus directing the respondent No.3 to take necessary action in accordance with the findings in the said letter dated 11.05.2010 which had been considered along with the subsequent letter dated 16.08.2010 by the State Govt. and directed the Deputy Commissioner to re-examine the matter again. The Apex Court in a catena of cases held that the primary purpose of a writ of mandamus is to protect established rights and to impose a corresponding imperative duty existing in law. The writ of mandamus cannot be granted unless it is established that there is an existing legal right of the applicant and writ does not lie to create or to establish a legal right. In the present case, what is the established right of the respondent No.1/writ petitioner to claim that the area of plot of land should be 1 (one) acre and what is the concrete evidence that a portion of his land had been encroached by the PWD and this right claimed by the respondent No.1/writ petitioner is to be declared

by the civil court of competent jurisdiction in the given case inasmuch as, there are claims and counter claims and serious disputed questions of fact. Therefore, we are of the considered view that the respondent No.1/writ petitioner cannot make out a case in WP(C)No.(SH)415/2010 for issuing a writ of mandamus. The Apex Court in ***Rajasthan State Industrial Development and Investment Corporation & Anr. v. Diamond & Gem Development Corporation Limited & Anr.: (2013) 5 SCC 470*** held that:

“21. The grant or refusal of the writ is at the discretion of the court. The writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the respondent. Thus, the writ does not lie to create or to establish a legal right, but to enforce one that is already established. While dealing with a writ petition, the court must exercise discretion, taking into consideration a wide variety of circumstances, inter-alia, the facts of the case, the exigency that warrants such exercise of discretion, the consequences of grant or refusal of the writ, and the nature and extent of injury that is likely to ensue by such grant or refusal.”

9. The jurisdiction of the Civil Court to try the civil suit has been discussed and illustrated by the Apex Court in a number of cases. Some of which are:

- 1) ***Rajasthan SRTC vs. Krishnakant : (1995)5 SCC 75 : 1995 SCC (L&S) 1207: (1995) 31 ATC 110;***
- 2) ***Dwarka Prasad Agarwal vs. Ramesh Chander Agarwal : (2003) 6 SCC 220;***
- 3) ***Dhulabhai vs. State of MP : (1968) 3 SCR 662: AIR 1969 SC 78;***
- 4) ***Sahebgouda vs. Ogeppa : (2003) 6 SCC 151;***
- 5) ***Dhruv Green Field Ltd. Vs. Hukam Singh: (2002) 6 SCC 416;***
- 6) ***Swamy Atmananda & Ors Vs. Sri Ramakrishna Tapovanam & Ors: (2005) 10 SCC 51.***

From the ratio laid down by the Apex Court in the above cases, it is clear that (i) the existence of jurisdiction in Civil Court to decide questions of civil nature being the general rule and exclusions being an exception, the burden of proof to show that jurisdiction is excluded in any particular case is on the party arising such a contention. The rule that the exclusion of

jurisdiction of a Civil Court is not to be readily inferred is based on the theory with Civil court is a court of general jurisdiction and people have a right unless expressly or impliedly debar to insist for free access to the court of general jurisdiction of the state; (ii) where the statutes give a finality to the orders of the special tribunal, the Civil Court's jurisdiction must be held to be excluded if there is an adequate remedy to do what the civil court would normally do in such a suit.

Disputed Questions of Fact:

10. The Apex Court in ***D.L.F. Housing Construction (P) Ltd., v. Delhi Municipal Corpn. & Ors.: (1976) 3 SCC 160*** held that:

“20. In our opinion, in a case where the basic facts are disputed, and complicated questions of law and fact depending on evidence are involved the writ court is not the proper forum for seeking relief. The right course of the High Court to follow was to dismiss the writ petition on this preliminary ground, without entering upon the merits of the case. In the absence of firm and adequate factual foundation, it was hazardous to embark upon a determination of the points involved. On this short ground while setting aside the findings of the High Court, we would dismiss both the writ petition and the appeal with costs. The appellants may if so advised, seek their remedy by a regular suit.”

The Apex Court in ***Daljit Singh Dalal (Dead) through LRS v. Union of India & Ors.: (1997) 4 SCC 62*** held that:

“8. There are thus several disputed questions of fact. We also fail to see any public interest involved in this petition. The disputes raised by the petitioner being factual disputes, cannot be examined in a writ petition under Article 32 of the Constitution. The petition is, therefore, dismissed with no order as to costs.”

The Apex Court in ***Vinay Shukla v. Union of India & Ors.:(2007) 2 SCC 464*** held that:

“4. Learned counsel has next submitted that the petitioner should be awarded damages for his illegal abduction and confinement by the authorities of the State. The allegations made by the petitioner are entirely factual in nature, which can be established only by recording oral evidence. It will be open to the petitioner to seek such legal remedy as is available to him in law for claiming damages on the ground of his alleged abduction and confinement. The writ petition is dismissed.”

The Apex Court in ***Kerela State Electricity Board & Anr. v. Kurien E. Kalathil & Ors: (2000) 6 SCC 293*** held that:

“10. We find that there is a merit in the first contention of Mr. Rawal. Learned Counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract? If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.”

11. Keeping in view of the ratio laid down by the Apex Court in the cases discussed above and also the serious disputed questions of fact between the parties, we are of the considered view that the present writ petition, where the right claims by the respondent No.1/writ petitioner come within the realm of private law, is not the proper forum for deciding the right claims by the respondent No.1/writ petitioner and the proper forum would be the civil suit in the civil court of competent jurisdiction. Accordingly, the

impugned judgment and order dated 23.09.2011 passed by the learned Single Judge is hereby set aside and in the result, the writ petition is dismissed with the above observations.

12. Writ appeal is allowed.

JUDGE
(Justice S.R. Sen)

JUDGE
(Justice T Nandakumar Singh)

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